MUNICIPAL ROLE IN THE DETERMINATION OF LAND USE

by

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The thesis inquires into some rationales, historical and theoretical, for a municipal role in the determination of land use. It is particularly concerned with developing an understanding of municipal action as part of a larger decision process. While the topic is nominally land use, the thesis is as much concerned with the structuring of decision processes as it is with the particular area of decision discussed.

The first part of the thesis deals with zoning as a modification of a previously more privitized land use decision process. The first chapter touches on the significance of zoning and questions the limits of land use control. Is desirable land use the only permissible end of municipal land use control powers, or are these powers available for implimenting distinct policy objectives? Subsequent chapters discuss the historical origins of the municipal role; a general conceptualization of the role of the state in supervising and providing a backdrop for a privitized decision process; and the theoretical arguments for the consitutionality of zoning, relating them to the framework of privitized decision discussed earlier.

The second part of the thesis develops a model of individual interaction which does not rely on a dichotomy between individual and state, and considers the usefulness of some goals offered by theorists for restructuring land use decision processes. The discussion is concerned primarily with establishing the limited usefulness of the economic criteria considered in light of the ill-defined nature of the distribution of the objects of human desires. The concluding section suggests that a cost internalization function may be discerned in parochial municipal land use control measures.

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DESCRIPTION OF TOPIC

This thesis will discuss some rationales for the municipal role in land use determination. This is of necessity a discussion of techniques and policy, action and motivation. Why were techniques created thought to be appropriate? What rationales supported the need for collective action? My inquiry has led me to question whether in phrasing the last question I have not made assumptions which may prove questionable. It presupposes a norm of individualistic action from which departures must be justified. While this notion retains for me much intuitive appeal, it is considered and rejected. What is meant by collective action in a society which proscribes the use of force by one member against others to the extent ours does?

My topic materialized as an attempt to develop an understanding of and attitude toward the land use control techniques of Ramapo, New York and Petaluma, California. Both are frank in announcing their intentions to further certain parochial interests of the residents of the municipalities. They have been attacked for the harsh and unfair impacts such plans will have on residents of neighboring municipalities and would be settlers as well as

particular landowners within the municipalities. However neither of these techniques is dealt with explicitly. Rather the discussion which has materialized is of a more general nature, dealing with issues which might be characterized as involved with a theory of government which attempts to provide an approach to considering such municipal land use control techniques.

This thesis is about the law, but it makes no attempt to state the substance of existing rules. Rather it is concerned with how the law structures the interactions of individuals in society. While I wish to focus on the municipal role in land use determination, my treatment stumbles back and forth across a line between dealing with the municipal role and its supporting rationales, and dealing with a theory of government with municipal control of land use a convenient example of an area of decision making.

The topic is land use and the inquiry why control at the municipal level, historically and theoretically? It is hoped that the discussion of these questions will form the basis for viewing the exercise of municipal land use controls not in terms of a dichotomy between governmental and private action, but with this distinction placed in a position of reduced importance. A society with the

intricate and pervasive interdependancies which characterize ours, cannot rely on a theory of government which entrusts to each level only those decisions which have no significant perceived impact on individuals who have not participated in the decision process, and escalates the consideration of each measure with broader impacts to a level of government which can supposedly administer with a view toward the totality of effects, without generating uniformity in the quest for equality of opportunity. If we are to maximize individual freedom and the range of available choice, we must develop an attitude toward political and private collective action which is not sensitized simply to effects on those not party to the decision process, but which links the level to which the activities of individuals may be coordinated to the values in the pursuit of which individuals attempt to coordinate their activities.

INTRODUCTION

The Context of the Municipal Role

Subject to the limitations of technology, or if one prefers, the tacit conditional consent of the other forces of nature, man controls the use of land. The process by which land use is determined is one of choice and coercion, involving directly and less directly varying numbers of individuals in varying capacities. The individuals involved change as they die, sell, fail to get reappointed or reelected or simply lose interest. Tastes of those involved change also. Processes of gathering information about the desires of those involved vary considerably, as does the process of molding from those desires a plan of action. Individuals and collective entities are constantly seeking to coordinate their activities and improve the mechanisms for coordination. The entire process is continuously evolving, with some changes effected more consciously than others.

In the early decades of this century a very conscious and significant change in this decision process spread through many comunities in the United States. Municipal governments, enabled by state legislatures began to plan and to zone. Speaking loosely, planning was an information gathering and analyzing process and zoning one of several

techniques for implementing the conclusions of the planning process. The zoning ordinance was a new[1] rather direct and coercive collective input into the process determining land use.[2] Its significance is considerable. While other techniques for implementing planning decisions may have been more important in the reshaping of America's large cities, none has been as influential as zoning in the shaping of the visage of suburbia.[3] In addition to the effects on the physical environment, it has had profound effects on the distribution of the American population throughout that environment.[4]

In the conflicts over the bounds of a municipality's zoning power which have reached the courts, the interests competing may appear to be those of landowners claiming the right to put their land to the most profitable use, those of other local residents who, through their planning department, have expressed a desire to preserve small town character or a level of residential amenity, and those of would-be residents who wish to assure their privilege to migrate and settle;[5] but always implicit is the conflict, involving what Professor Heymann calls social attributes.[6] Individuals are concerned not just about the resolution of a particular dispute -- whether the land owned by the Ambler Realty Co. will be developed for residential or industrial use -- but about restructurings of the decision process. Will subsequent competition between land owners'

expectations of financial gain and home owners' expectations of continued residential amenity be resolved in the chamber of the municipal legislature, the offices of the local realtors, or the courtroom? Each alternative involves different social attributes: different patterns of disappointing expectations, different allocations of effective decision making power, different incentives, and different effects on the formation of values.

The Nature of the Municipal Role

The Supreme Court decision in Village of Euclid v. Ambler Realty Co.[7] established that the delegation of the zoning power by state legislatures to municipalities was permitted. The municipal exercise of the zoning power ipso facto neither deprives landowners of due process of law, nor denies them equal protection of the law. The decision made zoning a safe harbor. Municipalities which anticipated land use conflicts accompanying growth in population have been able and encouraged to employ a technique which, although perhaps less than ideal in its allocation of decision making power among interested parties, provides a sure fire way of furnishing some measure of control over what is often referred to as a "chaotic" process of growth. The availability of such an acceptable alternative

of course discouraged experimentation with markedly different alternatives, whose legality would be open to challenge.[8] Zoning, in modified form, has become an almost universal tool of municipal government. While the development of today's coercive non-compensatory techniques for implementing municipal land use decisions has been a step by step metamorphasis of zoning, they differ from the paradigmatic zoning scheme upheld in the Euclid case in many respects. They are vastly more detailed and more flexible. The relationship of the restrictions to planning goals are often spelled out with logic more convincing today. Yet in overall character they are just beginning to break from the pattern typified by the Euclid scheme. Rather than the placing of each parcel of land in one or another category where various uses are proscribed uniformly, or in modern versions permitted on detailed conditions, it is standards which apply uniformly to all land within the municipality which play the major role in implementing the municipality's planning policy. The most well known use of this type of technique is to control the timing of development, a job for which 'static' zoning was poorly suited. Where the Euclid technique attempts to classify land into categories on a map which determine use, the newer techniques enunciate criteria on which permission to develop for a specified use is based. Pre-classification

of land, districting, the essence of zoning is dispensed with.

The Relationship of Policy to Technique

City planning since its inception has had a special concern for the physical environment. It is "the determination by public authority of the legal quality of land areas for the purpose of adapting their use to community needs."[9] Is it a discipline whose purpose is to improve the physical environment as something valued in its own right, or is it the manipulation of the physical environment only the major tool in a process aimed directly at furtherance of the general welfare? Must public action in determining the physical environment be desirable as fulfilling the tastes and desires of the community, or may it be justified as instrumental in modifying tastes and desires in the pursuit of a better society?

Little in the realm of human activity does not rather directly involve the use of land. Always implicit in the control of land use is the potential of controling, of interfering with, almost any aspect of human endeavor. In Kirsh Holding Company v. Borough of Manasquan,[10] the New Jersey Supreme Court struck down a zoning ordinance, the admitted purpose of which was to control or prohibit

obnoxious behavior by preventing group rentals of cottages by college students.

> "...(T)he evil arises because of the offensive personal behavior of many of these unrelated groups; group uses by other unrelated segments of the summer resort population present no problem. The practical difficulty of applying land use regulation to prevent the evil is found in the seeming inability to define the offending groups precisely enough so as not to include innocuous groups within the prohibition. ...
> "...Ordinarily obnoxious personal behavior can best be dealt with officially by vigorous and persistent enforcement of general police power ordinances and criminal statutes of the kind earlier referred to. Zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct in dwelling situations...."[11]

In Village of Belle Terre v. Boraas[12] the Supreme Court of the United States upheld the validity of a village ordinance limiting land use to one-family dwellings, where family was defined as traditional families and groups of not more than two unrelated persons.

> "... The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."[13]

The environment which Mr. Justice Douglas describes as one which a village may provide to its residents under the police power is not one which could be easily understood from a series of pictures of the village. The environment he describes is a social environment, having little to do with the objectively measurable physical

physical description of the village. The technique of controlling land use here transcends the control of the physical environment as an instrumental end in furthering the general welfare. Physical form has become an index for allowing selective control of behavior which has nothing to do with physical form, and for selective control of values. Whereas the Supreme Court of New Jersey found the ordinance arbitrary in its classification because it affected the rights of those whose conduct the statute was not aimed at controlling, i.e. well-behaved groups, the United States Supreme Court deemed the ordinance permissible in proscribing residence by persons whose values, manifested by their living situation, were sufficiently offensive to the community that prevented it from being their "sanctuary".

Once established as legitimate, techniques become available for purposes other than those for which they were originally intended. Although challenges may consider and delimit permissible purposes, the technique acquires a legitimacy of its own. As it becomes a fact of life, part of a people's everyday assumption about the structure of rights and the forms government action may take, the burden of presenting a persuasive rationale slowly shifts from those who support it, to those who

would eliminate it as a form of public action.

A technique, a concrete plan of action or restraint, embodies the ideologies of its designers. It is the synthesis of a consideration of values and the available means for accomplishing desired results. Behind the evolution of a technique like zoning lies a pattern of changed dominant policies and theories. The beliefs of Bassett, and Nolan, early advocates of city planning and zoning, led them to design techniques which had as "ends" qualities which are probably no longer understood or valued in the same way today. Tastes have changed and the theories relating these ends to the well-being of the individuals who make up society have ceased to be as persuasive.

Footnotes to Introduction

1. Zoning was not without precedents, but the comprehensiveness of these ordinances and their new and sudden popularity made them a new genre. Metzenbaum, in Law of Zoning, notes that in an act authorizing the erection of a powder house in Boston in 1706 the storing of gunpowder elsewhere in the community was banned; and that in 1692, the building of wooden buildings was banned in Boston as a fire prevention measure. J. Metzenbaum, Law of Zoning, Vol. 1, p. 5, 1-5 (2nd ed. 1955). However, note that neither measure attempted to regulate land use differentially within the jurisdiction. Both are examples of legislative exercise of the police power to define nuisances.

Zoning as we know it today, involving extensive differences in regulation from district to district within a jurisdiction, has less respectable origins: "Between 1870 and 1890 a good deal of San Francisco's laundry was done in several hundred Chinese establishments. ...

"With strong overtones of nativism, a line of germinal lawsuits went to the tribunals of California and into the Supreme Court of the United States. Known whimsically as the 'Laundry Cases', they often arose in San Francisco and typically involved the imprisonment of a Chinese laundry operator for violating local law regulating the location of shops and prohibiting night work. ...

"The buildings were usually frame structures. Upon that basis the City Council rested its use of the police power, asserting that laundry regulation was a form of fire prevention. 'The fact that the laundry buildings were becoming the clubs of the Chinese added to their objectional features in the popular mind, and stirred the legislative body to drastic action.'" S. Toll, Zoned America 27-29, (1969) quoting W.L. Pollard, "Outline of the Law of Zoning in the United States", Part II, Annals of the American Academy of Political and Social Science, CLV (May 1931) , at 18.

In Barbier v. Connoly 113 U.S. 27 (1885) and Soon Hing v. Crowley 113 U.S. 703 (1885) the United States Supreme Court upheld these regulations.

2. The plan itself, although officially adopted by the legislative body of a municipality is without legal effect and does not present a justiciable controversy in its effect on the value of a landowner's parcel. Cochran v. Planning Board of City of Summit 87 N.J. Super. 526, 210 A.2d 99 (1965).

3. See Toll, 193.

4. Woodroof, 1434.

5. See e.g. Hyson, A General Overview of the Conflicting Interests Involved in Development and Environmental Control, 19 Vill. L.R. (1974).

6. P. Heymann, The Problem of Coordination: Bargaining and Rules, 86 Harv. L.R. 797, 862 (1973).

7. 272 U.S. 365 (1926).

8. In Eubank v. City of Richmond 226 U.S. 137, 33 Sup. Ct. 76, 57 L. Ed. 156 (1912) the court struck down an ordinance allowing the owners of two-thirds of the property abutting any street to determine a minimum building line not less than five feet nor more than thirty feet from the street line. Noting that the court upheld an ordinance fifteen years later in Gorieb v. Fox, 274 U.S. 603, 47 Sup. Ct. 675, 71 L. Ed. 1228, 53 A.L.R. 1210 (1927) which required a setback as great as that of 60 percent of the existing houses on a block, Professor Berger concludes that it was "blockfront democracy" which troubled the court in Eubank. C. Berger, Land Ownership and Use 637 (1968). Such precedents do not invite innovative arrangements for making land use decisions. See McBain, Law-Making by Property Owners, XXXVI Political Science Quarterly 617 (1926) for a review of contemporary cases and reasoning with respect to the delegation of municipal legislative function.

9. Basset, What is City Planning? 1 City Planning 61, 130 (1925); quoted in Haar, Land Use Planning, 2nd ed. (1971) p. 52.

10. 59 N.J. 241, 281 A.2d 513 (1971).

11. Id. at 253-4.

12. 416 U.S. 98; 94 Sup. Ct. 1536 (1974).

13. Id. at 9; 1541.

ORIGINS OF THE MUNICIPAL ROLE IN THE DETERMINATION OF THE USE OF PRIVATE LAND

The origins of the municipal role in the determination of the use of privately owned land are entwined in the history of the rapid growth of large American cities around the turn of the twentieth century and the following two decades. The "city" was the focus of extensive criticism and concern. More precisely, concern was expressed over the corrupt government of cities, the poor quality of life led by the poor of the cities, the unpleasant aesthetic experience of touring the physical environment of the city -- which was obviously most poignant to those with more highly refined sensibilities --, and the dangers to American values and the American way of life accompanying the continued existence of slums as breeding grounds for social unrest and dissension.

"(The) period, from 1907 to 1927, ... has in some respects a natural unity, and represents the rapid rise and development of the present movement for city planning in the United States."[1] Introducing an assessment of the progress of the City Planning Movement, John Nolen, speaking to the 1927 National Conference on City Planning attempted to present in capsule form an impression of the conditions twenty years before. He continued:

> "... In 1904 Lincoln Steffens published his 'Shame of the Cities', with chapters on graft and corruption in St. Louis, Minneapolis, Pittsburgh, Philadelphia, Chicago and New York; and in 1906 his volume on 'The Struggle for Self-Government', dedicated to the Czar of Russia. About the same time appears 'The Battle with the Slum', by Jacob Riis, and other books and articles dealing with municipal reform. City government was at a low ebb, but an awakening was in sight, preparing the way for better local government and better planning."[2]

Among the diverse responses to these distinct but related concerns was that of some architects and landscape architects. Their approach was to treat the city as a single project, to be dealt with in much the same way as an architect designs a single building for a single client. Needs were to be studied, a plan formulated, and the city to be expanded, and as buildings wore out rebuilt, in accordance with this comprehensive plan.

That it was municipal government who was to be responsible for this process was initially probably less of a conclusion than an assumption. The essence of city planning was to plan each part in relation to the whole. Only the collective body politic was in a position to even consider such a notion.

The emphasis of the early city planners was on the employment of expert advice. The authority to implement the advice was necessary so that a small number of people could review data to be gathered and arrive at a unified

comprehensive plan. Frank Williams opened "The Law of City Planning and Zoning", written in 1922, with this definition of City Planning: "City or town planning is the guidance of the physical development of communities in the attainment of unity in their construction. Wherever in any locality a sufficient concentration of population has occured to create complexity, here will be found a network of interests, each seeking its expression in the physical life of that locality; and it is the task of city planning, either by prevention or by cure, to bring these interests into harmony, in the unity of that locality."[3]

Aubrey Tealdi, Professor of Landscape Design at the University of Michigan writes in the introduction to Williams' book:

> "In general it may be said that in the earlier planning reports the legal side of city planning was given little or no consideration. The result was a failure, either wholly or in part, to accomplish their purpose. This failure was easily traceable to the lack of legal foundation for carrying out the plans recommended in the reports.... The need of a sound legal basis for city planning in the United States soon became apparent. In fact it did not seem an exaggeration to say that the most important profession in connection with city planning was the law, and that the lawyer, at least for the time being, was the one most fundamentally concerned with its progress."[4]

Thus, the focus of city planning was on the reshaping of the urban physical environment. Securing an entity in the position to do this only became a consideration when

experience demonstrated that the obvious client, the municipal government, might not be fully able to act in this capacity.

The city considered as a whole was the object of the planners' attentions. At that time the geographic boundaries of municipal governments more adequately encompassed the parts of the urban system to which attention was addressed. To the extent that was not the case, the prevailing view seemed to be that political integration was the natural and inevitable solution. Writing in 1923, Professor Munro states:

> "...While, ... the great metropolitan community with its concentric rings of industry and trade may be politically a crazy-quilt of separate entities it is none the less a single economic unit. ...
> "...The social and economic homogeneity of the whole area results in the creation of problems of a metropolitan character with which the separate municipalities are quite incompetent to grapple. ...Out of all this is sure to arise, in due course, some movement for unification, complete or partial, such as will ensure the broad treatment of metropolitan problems by a centralized authority. Such movements usually have an uphill road to travel, for small communities are traditionally averse to being swallowed up in larger aggregations, but the propulsive forces are also strong and in most cases some sort of metropolitan unity is only a matter of time."[5]

Why planners continued to emphasize a municipal role in planning instead of appealing to state governments with more plenary powers is clear in light of the context of the planning movement, the governmental reform movements in progress at the same time. The planners' notions of new

responsibilities for municipal governments nicely complimented the municipal government reform movement's primary concern for "good" -- i.e. not corrupt -- government.

Part of the context of governmental reform was the Municipal Home Rule movement. According to Dillon's Rule[6] the grant of powers to municipalities by the sovereign state was very strictly construed. Consequently each time a municipality wished to deal with a new problem, a specific grant of authority from the state legislature was deemed necessary.[7]

> "It may be true that the first attempts to secure legislative intervention in the local affairs of our principal cities were made by good citizens in the supposed interest of reform and good government, and to counteract the schemes of corrupt officials. The notion that legislative control was the proper remedy was a serious mistake. The corrupt cliques and rings thus sought to be baffled were quick to perceive that in the bussiness of procuring special laws concerning local affairs, they could easily outmatch the fitful and clumsy labors of disinterested citizens."[8]

McBain explains the municipal home rule movement, which attempted to proscribe interference by state government in local matters, as a response to this abuse. McGoldrick focuses on corruption at the level of the state legislature:

> "State control over cities, especially the state control against which the home rule movement has been aimed, has been administered by the enactment of legislation. State administrative control is a much more recent development, offering an entirely different set of problems. Legislation, in legal contemplation, emanates from the entire

> legislative machinery and speaks the will of the sovereign state. The reality is rather different. In the case of a small city represented by a single legislator in each house, what passes for the will of the entire house is actually the will of the particular member. His party colleagues stand ready not only to accept his judgement as to all matters relating solely to his district but to enact it into law. ...
>
> "...Viewed in the light of actual legislative practice the home rule movement is part of the broader movement to liberate cities from organized corruption, and to restore control to the so-called, or self-called, good citizens. It is not concerned with a philosophy of local autonomy in contradistinction to state control. ..."[9]

Whether municipal autonomy was valued in its own right, or only as instrumental in reducing the corruption in government generally, the thrust of the home rule movement was to vest in municipalities sufficient general police power to handle such problems as might arise -- precisely the type of legal foundation on which power to plan could be built.

The sympathetic relationship between the early planners and the reformers who were centrally concerned with the improvement of municipal government itself had even more direct aspects. Especially in the early part of the governmental reform movement, where the chief villain was corruption, the development of bureaucracies with technical skills to some extent limited the exercise of the discretion of corrupt politicians. The fact that the experts, once given authority tended to expand their influence provided

for governmental action which, if not democratic in spirit, at least was not patently corrupt.[10]

That architects and landscape architects value the aesthetic experience of beholding well designed public buildings and spaces surprises no one. But as it matured, the focus of city planning shifted and was not even primarily concerned with aesthetics valued in their own right.

> "At first the movement in civic improvement was mainly confined to the idea of the City Beautiful so that the plans and reports dealt mostly with parks, civic centers and other specialized features that made their appeal through that idea, ... It was not until later that the less showy but fundamental questions such as transportation, water supply, sewerage systems, etc., were taken into consideration as essential parts of civic improvement."[11]

As the architect is concerned with firmness and commodity in addition to delight, the city planners were concerned with "(h)ow to relieve traffic congestion and increase safety in city streets, how to relieve congested working and living conditions, how to give city dwellers in office, factory and home more sunlight and better air, how to provide a more favorable city environment for the rising generation, how to reduce, by better city planning, some of the 'tragedy of waste', which is estimated to be about fifty per cent of the man power of the nation, and how to control and regulate the size of cities and

provide a wiser method for the distribution of population," in addition to "how to combine a new, modern, and appropriate beauty with American ideas of efficiency, ..."[12]

Though their method was the manipulation of the superstructure of the city, the early planners did not limit their concern to those qualities of physical form which are desirable in their own right. They were responding to almost all of the concerns that had been expressed about the city and its population. With what has been described as "weak concatenations" of causal chains and determining influences, the planners proposed to remedy perceived problems with the urban population through manipulation of the form of the city.[13]

"Among the efforts to environmentally improve the citizens of our cities was the movement to depopulate the slum districts. The cities were awakening to face the problem that good 'citizens are (their) best assets,' and were beginning to accept that the slums were

> prime creators of human wreckage. ... The city ... in condemning some, marking others for extensive alteration and repairs, forcing out many families because of overcrowding, (has) started a compulsory exodus where ... these imigrants must live in some extent, as American citizens should ... removed from the deadening, demoralizing influence of the district ... The struggle to lift the level of the citizens

and 'the breeding of blooded citizens' had begun."[14]

To the early planners, the public good which was to be served by zoning was divorced from the felt needs of both urban property owners and dwellers whose land and lives were to be regulated. The benefit was to redound to society at large as a result of environmental determinism, through the improvement of the citizen, not the fulfillment of his needs.

Since planning and rehabilitation of a city is a serious matter, "it is best that local prejudice not warp the judgment, nor familiarity dull the sense to opportunities for change. For these reasons, the best results are obtained from outside advice."[15] "Expert control and civic pride would both be the guides to public ideals and desires. ... City planning meant a city built by experts who visualize the complex life of a million people and who could harness their dreams into intelligent and wisely directed projects."[16]

The technique of zoning to control the use of private property was an import from Germany, whose cities --both governments and physical features-- were highly admired by prominent planners at the time. In An Introduction to City Planning, published in 1909, Benjamin Marsh maintained:

> "The most important part of City Planning, as far as the future health of the city is concerned, is the districting of the city into zones or districts in which buildings may be a certain number of stories or feet in height and cover a specified proportion of the site, that is, the determining of the cubage or volume of buildings."[17]

Here was a method for directing the future development of the city, for laying out a plan in the form of a map and enforcing it. It offered a method for controlling the density of population believed to be so dangerous to the health and moral constitution of the urban dweller. In the search for "attainment of unity in city construction"[18] here was a way to exercise a measure of control over privately held lands.

As planners sought to achieve their goals, the political realities of getting zoning adopted and upheld in the courts no doubt played their parts in the development of the rationales for zoning.

New York city was the first to enact a "comprehensive" zoning scheme. It was comprehensive both in that it regulated the permissible acticities which could take place on parcels, segregating residential from industrial and commercial uses, as well as the size and shape of buildings which could be constructed, and in that it placed every parcel of land in the city into one or another of the zones. Edward Bassett, appropriately termed "dean of zoning"[19] played a central role in bringing to New York City the benefits of comprehensive zoning, and continued to try to bring those benefits to the rest of the nation.[20] His explanation to the Chicago Real Estate Board of the success of New York City in bringing its private property owners under regulation where Philadelphia had failed sheds light on the influence of political necessity. It is summarized by Toll:

> " (In Philadelphia) zoning was rejected for lack of adequate preparation. Unlike New York, where 'the people handled all of the zoning for the city,' Philadelphia tried to legislate without taking the 'people' into its confidence. ... In contrast, the people of New York 'told the Commission what to do. After the Commission had been instructed by the people it was to a large extent the people's plan, and it went through flying.' But in the final analysis Bassett was candid enough to tell his Chicago audience just whom he meant by the people of Chicago. 'It is the practical people of this town that in the last resort are going to say what ... (height) limit will be.'"[21]

Explaining zoning in a brief handbook writen in 1922, Bassett begins by describing the "chaotic conditions in unzoned cities" illustrating that

"the lack of regulation stimulated each owner to build in the most hurtful manner." After several more examples he concludes: "Not only were private owners injured, but the city itself became less attractive to industrial enterprises, business men and home owners." Several pages later, discussing what zoning is and how it works, he states: "How does zoning protect in actual practice? In general it stabilizes buildings and values. Most of all it conserves for the future. ..."[22]

If the planners' values were paternalistic and their allegiance to class interests sometimes difficult to discern in the early stages of the movement when alliance with the housers emphasized concern for the poor qualities of life in the tenements, the function of zoning was less ambiguously stated by those who made it their business to promote it.[23]

Footnotes to Origins of the Municipal Role

1. Nolen, 3

2. Id.

3. Williams, 1

4. Williams, V-VI

5. Munro, 436-7

6. Dillon's rule, which came to referred to in this short form as a result of frequent citation to it as good authority, so confirming the rule, is: "It is the general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, -- not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existance of power is resolved by the courts against the corporation, and the power is denied." Dillon, Comentaries on the Law of Municipal Corporations, volume 1, section 237 (5th ed. 1911)

7. The original concern which lead to the close circumscription of municipal powers was probably fear of the potential inequity in majority rule in the event of the formation of a stable majority. This concern has deep roots in American political tradition. Both Jefferson and Madison feared that cities could not properly govern themselves. See "City Government in the State Courts," 78 Harvard Law Review 1596, at 1597 and 1601.

8. McBain, The Law and The Practice of Municipal Home Rule (1916), 8, cited in "Land-Use Control, Externalities, and the Municipal Affairs Doctrine: A Border Conflict," 8 Loyola Law Review 432.

9. McGoldrick, 2-3

10. Reed, 125

11. Tealdi, Introduction to Williams, V

12. Nolen, 20

13. Boyer, 44

14. Boyer, 94, quoting contemporary sources.

15. Boyer, 168, quoting Robinson, "The Replanning of Cities"

16. Boyer, 168

17. Benjamin Clarke Marsh, An Introduction to City Planning (New York: privately published, 1909),28, quoted in Toll, 124

18. Williams, 39

19. Metzenbaum, 52. See Chapter III-Part II of Metzenbaum generally for an exciting, play by play recount of the perilous birth of the savior of American cities, zoning.

20. Bassett wrote: "It was feared that, if Greater New York was the only city to make this intimate use of the police power, the courts might annul zoning because it was not widely adopted." Reasoning that the courts' acceptance of zoning as a legitimate exercise of the police power "depended to a large extent on the general use and application of that form of regulation," Bassett decided "we ought to spread zoning throughout the country." Toll, 194, citing materials by Bassett.

21. Toll, 196-7, quoting materials by Bassett.

22. Bassett, 321

23. And a business in every sense. Toll, at 195 quotes from Bassett's Autobiography: "During the next twenty years I visited every state and all the large cities of the country. This work, however, was not gratuitous. I established a uniform charge of $100 per day for time away from the office including travel time, plus expenses. ... On these trips I made talks before boards of trade, legislative bodies, both state and city, assisted in drawing zoning ordinances and state enabling acts for zoning, tried zoning cases, and argued test cases before appellate courts. From 1917 to 1927 I had about all of this work that I could do and still have some time to spare for my necessary office work."

THE DETERMINATION OF LAND USE PRIOR TO ZONING
Law as the Structure of A Decision Process

The intention of this section is to sketch in very general terms a view of areas of the law as the structure of a decision process; diffusely allocating authority in some areas to private individuals, centralizing authority in other cases in the courts, and in other circumstances in other creatures of government. What is diffuse and what is centralized is a function of perspective. From the global perspective of all land, decision making in the case of privately owned land is very diffuse, involving the interactions of numerous haphazardly related owners; and in the case of publicly owned lands, centralized, typically involving most directly the decisions of legislative or administrative bodies. From the perspective of the single parcel, private ownership seems the more centralized, involving typically one individual; and public ownership more diffuse involving again a legislative body.

The analysis presented here is equally applicable to the current structure of decision making, but the allocation of responsibility for land use decisions has changed. The use of private property to allocate decision making responsibility has been significantly de-emphasized through an increased reliance on detailed legislative and adminstrative land use regulation.

Prior to the advent of zoning, parcel specific land use decisions were entrusted to individuals under the supervision of the courts. Courts monitored the decision process through the application, upon the requests of individuals with private grievances, of the law of property and nuisance.

The use of a parcel of land was in any given instance determined by the unanimous agreement of the relatively small number of individuals who "owned" the land. Entitlement to participate in this decision is based on the law of property. In honoring the prior decisions of other individuals and making the power of the state, through appeal to the courts, available for the enforcment of these decisions, the law of property established effective decision making power. By offering a standardized set of interests consisting of rights, privileges, duties, powers, etc. with which individuals had some degree of familiarity, it facilitated the delegation by owners of decision making power without the necessity of forseeing, considering, and bargaining over every conceivable eventuality. When conflicts over land use arose between parties whose interests were established by agreements, they could often be resolved by the courts by reference to the agreements and to the doctrines of the law of property, which were often deemed "intentions" of the parties inferred from the use of standardized terms. The underlying theme of this area of the law was to lend the force of law to the intentions of entitled parties, and to allow them to decide how to use that which was their own.[1]

The privileges of private ownership, however, were not absolute. "The law of nuisance plies between two antithetical extremes: The principle that every person is entitled to use his property for any purpose that he sees fit, and the opposing principle that everyone is bound to use his property in such a manner as not to injure the property or rights of his neighbor. ... The necessities of a social state, especially in a great industrial community, compel the rule that no one has absolute freedom in the use of his property, because he must be restrained in his use by the existance of equal rights in his neighbor to the use of his property."[2]

Nuisance covers two theoretically distinct areas of liability. Nuisance itself is technically a type of injury. A public nuisance is an invasion of the rights of the public at large, an act "which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty's subjects."[3] Private nuisance is an unreasonable interference with the use and enjoyment of land, i.e. an interference with the rights that come from owning land.

Some aspects of the law of public nuisance have little to do with the determination of land use. Like the ordinance of Belle Terre, discussed earlier, they are primarily concerned with the regulation of permissible activity generally, regardless of parcel specific factors. Houses of prostitution exemplify this type of public nuisance. The injury to public rights is simply through the knowledge that the activity is being carried

on. An interference with a public right of way, on the other hand, typically involves injury to the public by virtue of a physical condition. The public rights in such a case have to do with the use of a particular parcel of land and are intimately related to the situation of that parcel as a way of getting from one place to another. This aspect of public nuisance law provides a means for monitoring the use of privately owned land depending upon its relationship to the use of nearby publicly owned lands. Although rules determining the availability of damages in such cases of public nuisance vary from those applicable in casesof private nuisance, the basis of liability is very similar to that involved in private nuisance. The public is the owner of land, the use of which is being unreasonably interfered with.

Private nuisance is concerned with interferences in the use and enjoyment of privately owned land. The right to be free from interference in making use of land in a manner permitted by virtue of "owning" land --a complimentary set of rights without which the privileges of ownership would be considerably less secure-- is implied to some extent in the title which is the basis of the privileges. Such interference is caused, one may presume, by some nearby activity, i.e. the use of neighboring land. Typical private nuisances are unreasonable amounts of dense smoke, vibrations in the earth, noise, or stench. The key requirement is unreasonableness.

Here again, an activity whose direct effect on the senses is not itself

obnoxious may be a private nuisance. Funeral parlors are a common example.

Especially since subjectively understood interferences not accompanied by palpably obvious affronts to the senses were protectable by the law of nuisance, a means is necessary to effect the balancing described in the lines from Anitonik v. Chamberlain quoted earlier. Just as the freedom to use one's property as one chooses is capable of leading to the destruction of the value of other property, the prevention of interference, analytically is capable of extension to proscribe any type of neighboring use. The law's indispensable standard of last resort, reasonableness, provides this means.

Under this regime private interactions governed by the law of property constitute the primary mechanism whereby society affirmatively plans future land use. The plans that are made are the plans of individuals within the limits of their entitlements, without significant collective or representative input into the various bits of the highly diffuse decision making that shaped the form of the city. To the extent that there was "unity in the construction of cities" it was largely a result of Adam Smith's invisible hand.

Nuisance law was available for the resolution of conflicts at the point at which land users had suffered, or were clearly about to suffer, actual injury. If he was sufficiently concerned, and unable to dissuade his neighbor from continuing either informally or by purchasing a property

right from him -- as a means of formalizing and perpetuating an agreed resolution -- an individual could bring his claim before the courts and have the question of each party's entitlement -- either to persist in his disturbing activity or to be free from the other's continued interference -- resolved.

The Collective Roles

In the preceding section it has been stressed that the most direct decisions with respect to the use of land were made by owners. This goes on in a context of collective decision making on issues of general applicability. Here the collective role is examined in more detail and categorized. The distinctions in roles, while analytically satisfying, do not represent consistently separate functions of different government entities or even different bodies of law. In any given act of a court or legislature one may discern the performance of several roles, the importance of each being a matter open to varying interpretations.

The state -- I am using the term generically, the distinctions between levels of government not being relevant here -- oversees the largely private process of determining which individuals will make land use decisions. There are three aspects to this function. In all of them, collective action influences, but does not directly decide how land is to be used.

1. The state lends its force to the understood rights of private landowners through a variety of judicially and legislatively perscribed remedies, ultimately relying on the power of the state to confiscate wealth and imprison individuals. This is perhaps the most basic and necessary role. Without it one can hypothesize that there would exist an anarchtic condition of decision making determined by force and manners. But even then it seems one could conceptualize such a condition in terms of smaller, less formalized "states" performing this role. Since the state denies, under almost all circumstances, the use of force to its citizens, it must perform this role.

It should be noted that although this role of enforcement may be distinguished analytically from the definition of substantive rights and privileges, when manners, moral compulsion, and social pressure prove inadequate guardians of entitlements, actual alternative courses of action are effectively delimited by the procedures available for the enforcement of theoretically distinct substantive rights. Also, it seems likely that in addition to being derived from understood entitlements, these enforcement procedures, through the indirect means of affecting the attitudes of individuals and becoming part of their subconscious assumptions, influence the formulation of substantive entitlement.

2. It is the role of the state to clarify in the courts for individuals

who feel unjustly treated the bounds of their entitlement. This includes both clarifying who may exercise the rights of ownership, and what the bounds of the rights of ownership in the particular case are. The former corresponds more or less to areas of contract and property law, the latter is shared with the law of nuisance, until recently classified most commonly as tort law[4], where the focus is on the wrongfulness of conduct, rather than the privileges of ownership.

Where the law is clear, and the parties require clarification only because they have not had prior experience, this information distribution function may be performed by lawyers, as well as by courts. The necessity of resolving conflicts requires that entitlement in the particular case be clarified even when the law was not previously resolved. The clarification function thus blends with a definitional function. This incremental process of defining rights for prospective purposes and general application through the resolution of actual conflicts is perhaps the most fundamental principle of the common law system. It represents a minimal redefinition of rights, attempting to reverse prior decisions only in the rarest of circumstances after a long incremental process of erosion. While the law clearly changes by this process, the emphasis is on the definition of new law and clarification of old only as required by existing ambiguity and irresolution.

3. In order to encourage individuals to make arrangements between themselves, and to discourage arrangements which unduely inhibit subsequent

rearrangement, the state redefines the ground rules of private property which affect the ease with which control over the use of land can be transfered. Since one of the purposes of the law of property is to give certainty to the expectations of individuals regarding their control over their wealth -- both as something valued in its own right and something instrumental in encouraging the arrangement of mutually advantageous agreements between individuals -- the redefining process tends not to involve very radical change.

In 1285 in England, De Donis Conditionalibus, 13 Edw. I, c. 1 (Statute of Westminister) clarified the importance of the intensions of the prior owner in determining the perogatives of the holder receiving his interest from him:

"Wherefore our king, perceiving how necessary and expedient it should be to provide remedy in the aforesaid cases, hath ordained, that the will of the giver according to the form in the deed of gift manifestly expressed shall be from henceforth observed, so that they to whom the land was given under such condition (i.e. to the donee and the heirs of his body) shall have no power to aliene the land so given, but that it shall remain unto the isse of them to whom it was given after their death, or shall revert unto the giver of his heirs if issue fail either by reason that there is no issue at all, or if any any issue be, it fail by death, the heir of such issue failing."[5]

For the next two centuries, if at any point the owner of a parcel of land, with proper language provided in the deed by which he transfered it, that any who should come to own it could only transfer it to his issue (creating a "fee tail") the land became inalienable, with the result that:

"Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under colour of long leases the issue might

have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: ... and treasons were encouraged; as estates tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm. But as the nobility were always fond of this statute, because it preserved their family estates from forfeitures, there was little hope of procuring repeal by the legislature."[6]

The redefinition of ground rules necessary to eliminate fee tail was accomplished by a series of judicial interpretations of De Donis, and ultimately by collusive litigation.[7]

Delimiting the control that may be reatined by those alienating the possession of land has been the continuing task of the revisors of property law. Weighing against the desire to let owners exercise complete "despotic dominion" is the importance of having this dominion exercised by people in a position to be convinced to let someone else, who is willing to pay, use the land. This aspect of the state's role is concerned not with directly deciding how land is to be used, but with making sure that living and identifiable people are in the position to decide.

The state also participates more directly in the determination of land use. Whereas in the roles described above, the policy directing state action might be seen as non-policy with respect to land use, leaving policy decisions to the private sector, in the following roles, state action must be guided by specific intentions about how land is to be used.

4. The most obvious and direct way in which the state determines land use is as landowner. It can and does participate in the marketplace in much the same manner as private individuals. It buys land for public buildings, parks, and roads, and exercise control over such land similar to that exercised by private land owners.

Its perogatives exceed those of other particpants in the market place in that while individuals can generally decide whether or not to sell to an offering buyer[8] they can not decide not to sell to the state when it insists on buying. Since the inability of the seller to refuse to sell deprives him of anything with which to bargain, the fixing of the selling cost -- "just compensation" -- becomes a matter of impartial appraisal through formal condemnation proceedings.

The state is limited in its exercise of the power of eminent domain by the requirement that it can only take property for "public use." Writing in 1925 and arguing for the constitutionality of excess condemnation -- "taking more property than is necessary for the precise, narrow purpose of the public improvement" -- Young describes the state of the law regarding the public use requirement, and quotes Lewis, Eminent Domain, 3rd. ed. section 257:

> "The different views which have been taken of the words 'public use' resolve themselves into two classes: one holding that there must be a use, or a right of use, on the part of the public or some limited protion of it; the other holding that they are equivalent to public benefit, utility or advantage." 9

Lewis favored the first view and Young, the second, which he argued was becoming increasingly acceptable. The United States Supreme Court decision in Berman v. Parker[10] in 1954 clarifies the correctness of Young's predictions. The court upheld the exercise of eminent domain in urban renewal projects, where the land was to be immediately resold for redevopment. Clarifying that the power of the legislature extended beyond the clearing of slums, and extended to planning the area as a whole so that it would not revert to slums, the court stated: "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to an end."

The restraint upon the use of the power of eminent domain -- which combined with a power to raise revenues through taxing is capable of bringing an unlimited amount of land under direct collective control, at least in theory -- now stems largely from popular distaste for taxes. Especially at the level of municipal government, where the relationship of public expenditure to the need to raise taxes is fairly direct, popular sentiment about the benefits of a proposed public improvement as compared to the costs to be borne by the taxpayer, limits government from buying projects that are not worth their price.

5. In particular, and limited situations, without interposing itself as purchaser and reseller, the state provides some landowners with a power

very similar to eminent domain. Although it is normally the right of each owner of an interest in land to refuse to sell it, courts and legislatures have provided remedies, either out of fairness to a landowner who is severely hampered in the use and enjoyment of his property, or, from a more global perspective, in the interest of fostering the allocation of land resources to particular uses, which effectively force sale. This role blends into the role described earlier, of attempting to assure, with no particular policy objective, the free transferability of land. Where the circumstances under which the remedy is available are very specific, it may be viewed as an instrument of specific collective policy.

In "From Rural Enclosure to Re-Enclosure of Urban Land," Professor Dunham discusses the history of the enclosure movement in England "whereby rights in common in waste and arable land were cut off in favor of ownership of separate parcels," "the mill acts in New England and their descendants in the West with regard to roads, irrigation canals and the like," and several other developments in the law. He explains these developments as necessary to overcome strategic bargaining on the part of private land owners. "It is believed that the essence of each of these cases is that the land may be so situated towards other land as to create a mutual dependence and a natural community and that, therefore, there is a real risk of hold-out preventing the use of other land because of a refusal to sell."[11]

6. The state also has the power to exercise some degree of control, usually in the form of restraints, over the use of privately owned land without acquiring and paying for a property interest. Under the police power the state may undertake measures in the interest of promoting public health, safety, morals, and general welfare. Distingusihing between mere regulation and the taking of property, Williams in Law of City Planning and Zoning explains:

> "Regulation, if it is to have any effect at all, must necessarily deprive the persons affected by it of personal and proprietary rights which, but for the making of it they would lawfully enjoy. The United States Constitution forbids the taking of property without compensation. Does it therefore follow that the police power is superior to that Constitution? Not at all. Legislation under the police power is invalid, which is contrary not only to the fifth and fourteenth amendments of the Constitution, but to the commerce clause, the clause forbidding the impairment of contracts or any other constitutional provisions, or to state constitutions. But constitutions are to be interpreted not only logically but in the light of history and the common use of words. Governments always have regulated and always must to some extent regulate without compensation the relations of one individual to others. It is not to be supposed that the makers of our Constitution intended to forbid such legislation."[12]

Thus it appears that there are some privileges which may be associated with ownership of land which, looking back on the state of affairs existing prior to a new valid regulation, may be seen as a sort of second rate entitlements, allowed to the owner of land by default on the part of the state to exercise its power.

The situations in which state action framed in regulatory language is most susceptible to challenge as a taking of property without just compensation are those where there is a great discrepancy between the effect

of the restriction on individuals affected generally and the complaining individual, or where the complaintant is one of a very few individuals affected. Where the impact of an ordinance is widespread and more or less uniform , one may infer from its political acceptance that there are benefits which redound to those affected, and in a sense compensate them for their loss. Professor Michelman separates the question of compensating affected individuals from that of the efficiency of state action -- whether the gains to those benefited outweigh the losses to those detrimentally affected -- and concludes that regulation should be compensable where it would be inefficient not to compensate, i.e. the administrative costs of processing claims is less than the "disillusionment" costs of not doing so.[13]

In Berman v. Parker, discussed above, the Supreme Court, in considering the powers of Congress with respect to the implimentation of urban renewal plans in the District of Columbia, noted that Congress exercises over the district the police power. The court's discussion seems to focus more on the purposes which government exercising the police power may further, rather than the bounds of the power. In this usage "police power" seems coterminus with the power to govern. The term has also been used to refer to the miscellaneous collection of government action -- regulations, subsidies, licensing -- which do not involve the use of other specific powers, such as taxation or eminent domain. Freund seems to use the

term in this sense. Here he explains "the police power as a means of furthering the public welfare:"

" In so far as the prosperity of the community rests upon the efforts which each individual makes for himslef, and in so far as without security of rights, free, fair and peaceful individual activity is impossible, justice is one of the chief elements of public welfare. Criminal justice moreover directly protects public or collective interests in important respects. Custom and sense of propiety demand of the individual that he subordinate and adapt the exercise of his rights to manifest social interests and requirements, and the disregard of this obligation appears as a wrong. Thus must of the self-evident limitations upon liberty and property in the interest of peace, safety, health, order and morals are punishable at common law as nuisances. ...

"But no community confines its care of the public welfare to the enforcement of the principles of the common law. The state places its corporate and proprietary resources at the disposal of the public by the establishment of improvements and services of different kinds; and it exercises its compulsory powers for the prevention and anticipation of wrong by narrowing common law rights through conventional restraints and positive regulations which are not confined to the prohibition of wrongful acts. It is this latter kind of state control which constitutes the essence of the police power. ..." (emphasis in original) [14]

Under the police power, some degree of collective decision making, directly concerned with the use of land can be made. It is upon the police power that the extensive controls which make up the present municipal role are based.

Footnotes to The Determination of Land Use Prior to Zoning

1. In "Dialogue on Private Property," 9 Rutgers Law Review 357 (1954) at 372, Felix Cohen states: "(T)he existence of private property represents in some ways a middle ground between the absence of government and the complete determination of human activities by government. I suppose that is really what Morris Cohen is driving at when he talks about private property as a delegation of sovereign power in certain limited areas. In those areas the government doesn't make a final decision, but agrees to back up whatever decision the so-called owner makes."

2. Antonik v. Chamberlain, 81 Ohio App. 465, 78 N E 2d 752 (1947), quoted in Prosser and Wade, Cases and Materials on Torts.

3. Prosser and Wade, Cases and Materials on Torts, 5th ed. 1971, pg. 653, quoting Stephen, General View of the Criminal Law of England (1890) 105. Public nuisances were originally petty crimes. Since 1536, an individual who has suffered special damage may sue the actor in tort.

4. Dunham, From Rural Enclosure to Re-Enclosure of Urban Land, 35 N.Y.U. Law Review 1238 (1960)

5. Quoted in Berger, Land Ownership and Use (1968) 120

6. 2 Blackstone, Commentaries on the Laws of England 116 (1765), quoted in Berger, op. cit.

7. De Donis came to be deemed satisfied if other lands of equal value were bequeathed to the heirs, and eventually by a court judgment of equal value, whether or not collectible. See Berger, op. cit., for the collusive litigation scheme. He notes that the common recovery scheme, as it was called, was so profitable for soliciters, courts, and government officials, that De Donis was not repealed legislatively until 1834.

8. See number 5 infra.

9. Young, City Planning and Restrictions on the Use of Property, 9 Minn. L. R. 518 (1925) 536.

10. 348 U.S. 26 (1954)

11. Dunham, op. cit. 1245

12. Williams, 18-19

13. See generally Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law, 80 Harv. L. R. 1165 (1967)

14. Freund, The Police Power (1904) section 8

THE POWER TO ZONE:
Legal Rationale and Shift in Land Use Decision Process

To examine how zoning was described in arguing for its validity, I will review an article by Alfred Bettman, a Cincinnati lawyer who was active in the city planning movement.[1] In addition to the fact that the arguments are well stated, Bettman's possible role in the Euclid decision[2] makes the use of his article appropriate.

After introducing zoning as districting with uniform regulation within districts, and varying regulation from district to district, and explaining that it is the police power upon which the validity of zoning rests, Bettman discusses some analogies, since "a new type or mode of property regulation is not likely to sustain itself in the courts, unless it can be shown to bear some analogy to recognized and sanctioned traditional methods of regulation."

The first is the relationship of zoning to the law of nuisances, the analogy heavily relied upon in the Euclid decision. Noting that nuisance usually applies to those developments whose offensiveness is patently obvious, he addresses the precepts and philosophy which he feels underlie the case law. The philosophy is "nothing more or less than the old adage that a man shall not so use his property as to injure another; and the precept, that a man may not send noise or odor or other disturbing substance or vibration into or onto his neighbor's property."[3] Asserting that

the law of nuisance operates by way of prevention as well as suppression, he suggests that zoning shares many of the same purposes. It aims to segregate "the noises odors and turmoils necessarily incident to the operation of industry from those sections in which the homes of people are or may be appropriately located."[4]

Bettman chose conveniently the underlying principles which zoning has in common with the common law of nuisance. Recalling the discussion of nuisance in the preceding section, it should be clear that there are rather importance differences in both the procedures of the system and the underlying philosophy. The interference which could be enjoined in a suit based on nuisance had to be "unreasonable" and substantial, and the conflict be between the parties ripe. This limited the applicability of nuisance because courts were concerned not to allow the rights of landowners to be unduly burdened by a sensitive or spiteful neighbor. Land was a subject of special concern to the common law. Each parcel was recognized to be unique, and there was special concern that an individual's range of discretion in determining the use of his unique parcel be protected.

The presumption was that the owner of land was entitled to use it as he saw fit. Nuisance was a way of policing uses of land which grossly interfered with the actual use of neighboring parcels. If nuisance was available for preventitive purposes, it was only in the most generally and obviously offensive cases, called nuisance per se. Basic to the philosophy of nuisance was that each case was decided on the actual facts of an

actual conflict. The fact that nuisance was a body of law administered by the courts made it a fallback for the resolution of conflicting land uses which owners could not resolve between themselves. It was a check upon the decision of the individual landowner, policing unfairness in using property to the detriment of another, not an attempt to supercede the decisions of landowners. The focus of nuisance was the protection of some benchmark of entitlement of the individual landowner, not the coordination of development for the benefit of the community, somehow distributed to the population at large.

The law of highway construction is Bettman's second analogy. He suggests that the "owner of a sky-scraper might, within the bounds of reason, be held to contribute more than his fair share of street obstruction, in the stream of pedestrians and vehicles which he draws to or pours out from from his property. ... Limitations of height or of other forms of buildings intensity have an obvious relationship to freedom of movement on the highway and to traffic control."[5] The argument is that the legislative body has determined that a level of freedom of movement in the street is desirable and the method they have chosen to further this legitimate public goal is reasonably related to it. They are the representative body of the populus and are entrusted with the duty of looking after affairs which cannot be addressed adequately with less coordinated an approach. The emphasis is on the provision of a necessary service to be available to the

public generally, a type of service which cannot be provided by a lesser level of coordination among interested parties. The service is so widely beneficial that substantially all the citizens of the municipality are interested.

Another of Bettman's analogies is "the recognized power to enforce cooperation upon members of a group similarly situated, for the direct benefit of all of the group, with indirect benefit to the general public. ... In the case of a zone plan, each piece of property pays, in the form of reasonable regulation of its use, for the protection which the plan gives to all property lying within the boundaries of the plan."[6] The policy here seems to be the coordination of action on the part of property owners for there own benefit. The analogy in the case which Bettman cites is taxation. Implicit is the argument that the general benefits of government compensate for taxes. The theory was that zoning's imposed orderliness would create value that would inure to property owners generally, unrelated to the suppression of adjacent discordant uses.

While the analogy to nuisance, manifesting a concern for the presumed appropriation of value or utility by the development of a different use by a neighbor was perhaps the keystone of the zoning argument, Bettman was careful to distinguish zoning from nuisance explicitly and argued that it was the inadequacy of nuisance that necessitated zoning to deal with the problems of municipal growth. His argument is simply that the definition of what is and what is not a nuisance was inadequately specified by the case

law. "A conscientious lawyer would hardly hazard a guess as to whether his client's proposed industry will or will not be called a nuisance. There is something manifestly unfair in requiring the owner of an industry to select and pay for his site, design his plant and even build, before he can obtain any degree of assurance that he will be permitted to operate."[7] His criticism is a fair one, but while arguing that a change in the law was necessary, it does not support the conclusion that comprehensive planning was mandated. The hypothetical goes somewhat far in that there are alternatives open to such an entrepreneur which don't require such excessive exposure. He can either buy a sufficient amount of surrounding land and use it for purposes compatible with his potentially nuisance industry, or he can make arrangements with the owners of the adjacent parcels, specifying by contract, or the conveyance of a property interest, his right to operate his plant.[8] While the uncertainty as to whether he could operate his plant without the consent of neighboring owners may somewhat complicate such negotiations, it operates on both parties. The neighboring landowner who one might assume would demand exorbitant amounts, must be wary that if he demands too much, the entrepreneur by developing, and running the risk of a nuisance suit, may shift to the neighbor the exposure of having forsaken a lesser amount. Once the adjacent use is developed, the neighbor must run the risk of further exposing himself by investing in a nuisance suit.

In theory the zoning system has the benefit of reducing this uncertainty,

but it can only do this by deciding th issue of who will be entitled to do what ahead of time. This is clearly desirable in that less turns on the decision when it is made well in advance of any investment in the development of the properties, but at the same time, to the extent that this is true, the decision maker is deprived of the benefits of a complete factual pattern on which to base his decision. He must more or less arbitrarily allocate to some owners the opportunity to build commercial development and deny the opportunity to others nearby, just across the district line. While zoning in advance of development -- assuming that the zoning is not frequently changed, as became a serious a serious problem[9] -- would have the advantage of reducing conflicting land uses, it gains this only at the cost of deciding how land will be used will in advance of when urban development has proceded to the point where land is about to be developed, i.e. before there is the best information about what type of uses the land will be demanded to house. To shift the mechanism for conveying this demand information from market forces to political expression in the form of zoning plans would require more of a shift in the land use decision structure than was envisioned. This is something planning was never really designed to do.

Recognizing that zoning must involve many instances of regulation which appear rather arbitrary from the standpoint of reducing land use conflicts, e.g. excluding the noiseless and odorless plant as well as the nuisance

type, Bettman stressed that zoning rested on the police power, which extended beyond the suppression of of nuisance-like interferences, and extended to affirmatively promoting the general welfare:

> "The zone-plan's restriction of nuisance industries to designated districts is not a suppression of nuisances, but it is part of a general constructive plan whereby the territory of the city is allotted to different uses, in such a way as to prevent or reduce the various types of wastes and disorders of unplanned development, and to promote the conveniences, economies, efficiencies, and amenities of the community which develops according to a design."[10]

Precisely what these conveniences, economies, efficiencies, and amenities were, other than the reduction of nuisance like interference, he does not describe in detail. Since the court's review of legislative exercise of the police power is limited to ascertaining that the exercise is reasonably related to some public purpose, perhaps this is appropriate. It does seem clear that the regulation of land use could have an effect on such matters, but Brettman does not suggest that it is necessary for the court to examine a zoning ordinance to see whether it does. He argues that the reasonableness of the regulation is to be inferred from the fact that the regulation is comprehensive, both geographically and with respect to matters regulated. The regulation of use in addition to height and bulk, it is argued, is "more thorough, more scientific, and therefore, more reasonable than any of these types of regulation applied alone." Similarly, geographic comprehensiveness is to insure that the zoning represents "the whole community's plan, motivated by the desire for the promotion of the best

possible districting of the whole territory for the benefit of all."[11] In that one of the concerns of a court, as mentioned earlier, is the abuse of legislative powers for personal benefit of a stable majority, the districting of the entire community tends to insure at least that all participants in the legislative process are interested parties, and therefore that the decision is likely to be the result of a bargaining process with all geographic interests represented.

The reasonablenss of the zoning scheme is to be assessed from the perspective of the entire city. The question is not whether the exclusion of a particular use from a given lot is reasonable, but whether the ordinance creates a reasonable districting of the whole city. Conceding that the boundary lines may effect dissimilar treatment to otherwise very similar parcels, Bettman stresses that " a certain degree of arbitrariness is inherent in all law-made boundaries. ... As zoning is regulation by districts and not by individual pieces of property, the proper test of equality is the general intelligence and fairness of the classification as a whole, not an impossible and prohibitive identity of treatment of individual lots of land."[12]

Where such cases of seemingly avoidable arbitrariness arise, they are to be handled by the Board of Zoning Appeals and Adjustments. This is an administrative board designed to serve as a "safety valve" to eliminate excessively harsh or arbitrary treatment. The separation of detailed case by case treatment -- necessary from the standpoint of fairness -- from the

legislative determination -- where case by case consideration would be burdensome and suspect as an invitation to patronage and corruption -- leaves the legislative body to make more general, long term decisions. The legislative role is a sort of re-definition of nuisance by broad districts, with the Board of Adjustment relieving landowners from the burdens of the restrictions in particular circumstances where fairness dictates, e.g. where the regulations effectively deny the landowner any profitable use of his land. In this respect zoning represents a reverse of the nuisance based supervision of land use determination by private landowners. To protect a landowner's neighbors, the use of his land is clearly circumsribed unless fairness dictates that the restrictions be removed. Under nuisance, restrictions were imposed on a case by case basis, only as fairness dictated.

The analogy points out another difference. Zoning does not merely shift entitlement between the parties and allow them to bargain as they could before. The concern of the zoning scheme extends beyond the mitigation in advance of land use conflict and aims to foster rationality in the organization of the physical plan of the entire city. Therefore it is only the Board of Adjustment that can grant waivers of the restrictions, rather than the most directly interested parties, the neighboring landowners. The zoning scheme removes from the sphere of private perogative a range of decisionmaking and vests that power in the local legislature and administrative body.

It was the intention of the advocates of zoning that the legislatively enactly plan remain essentially stable -- it could hardly provide security and stability to property values and use if it did not. Board of Adjustment waivers were to be rare, only in cases of exceptional hardship. It seems clear that permanence and generality in collective decision making have not characterized the legislative and administrative zoning practice. Aside from the problem of corrupt zoning officials selling relief from restrictions for their personal advantage, judging from the statistics on early variance practice[13], the administrative officials viewed their role as less constrained than that described by zoning's theoriticians. It seems likely that administrative boards granted variances for lack of reasons not to.

The need for flexibility has been a constant driving force in the evolution of current municipal zoning schemes. The information available for making decisions of the general type required of zoning ordinances has never been adequate to make the number of cases requiring detailed special attention insignificant. Devices like special use permits, floating zones, and special use districts -- as well as frequent rezoning -- have marked the evolution of the pre-determined, once and for all scheme envisioned by zoning's theoreticians into a very particularized monitoring of development. New York City has enacted, in response to specific development projects, special legislation which enable its planning offices to bargain freely with developers, trading additional bulk for public amenities or desired

uses. In the words of Dan Tarlock, "zoning ha been transformed from a technique to remedy a limited class of market defects to a potential system of administrative allocation of land development opportunities."[14] While the intentions of zoning, whether or not realistically, extended beyond the discordant adjacent land use market defect Tarlock refers to, his conclusion about the role performed by zoning seems quite correct.

Footnotes to The Power to Zone

1. Bettman, Constitutionality of Zoning, 37 Harv. L.R. 834 (1923)

2. Evidently Bettman submitted an amicus curae brief between the argument of the case, and it's rehearing, after which, so the story goes, one of the justices changed his mind and the decision in the case was changed. Toll suspects that the swaying of the court was the doing of Bettman. See Toll, 236-7. For a different explanation, see the chapter in Metzenbaum, cited earlier. Metzenbaum represented the Village of Euclid and argued the case before the court.

3. Bettman, op. cit. 836-7

4. Id.

5. Id. at 838

6. Id. at 839

7. Id. at 841

8. See generally Demsetz, The Exchange and Enforcement of Property Rights, 7 Journal of Law and Economics 11 (1964)

9. Perhaps only a problem for courts who were attached to the theory of zoning rather than motivated by particular values about what was good for the community.

10. Bettman, op. cit. 842

11. Id. at 844-5

12. Id. at 850-1

13. See John Reps, Discretionary Powers of the Board of Zoning Appeals, 20 Law and Contemporary Problems 280 (1955).

14. Tarlock, Notes for a Revised Theory of Zoning, in Wunderlich and Gibson (eds.) Perspectives of Property, Institute for Research on Land and Water Resources, The Pennsylvanian State University (1972) at 17. Tarlock"s article is also included in Scott, Management and Control of Growth, Urban Land Institute (1975).

GOALS IN DESIGNING A LAND USE DECISION PROCESS

This chapter is devoted to formulating a model of human interaction which attempts to respond to the problem which has been the motivation of this thesis: developing criteria for arriving at an understanding of, and attitude toward parochial land use control, i.e. municipal land use measures which further interests of municipal residents to the detriment of individuals outside of the municipal decision process. Unlike the modelling presented earlier, in the section on pre-zoning decision process, here the distinction between state and individual action is not of central concern and is disparaged in favor of a more functionally oriented analysis. Municipalities have both state-like and non-state-like attributes. They are governmental entities, but to a very large extent subject to control by state governments. Because the essence of the inquiry is the extent to which municipalities should be functionally sovereign, it seems necessary -- in hindsight, in any case -- to take this functional approach.

I shall argue that the perception of extra-territorial effects of municipal actions is only the beginning of an analysis of the desirability of allowing municipalities the prerogative exercised, and in itself does not argue that the prerogative is undesirable. In order to discrim-

inate between desirable and undesirable municipal privileges, it becomes necessary to scrutinize both the motivation of the action and the pattern of effects that municipal action of the type involved will have.

The model which I offer is derived from an economic model, involving individual decision making as choice among perceived alternatives based on the highest utility. Because the model arose out of an investigation of other economic models, I shall present it in that manner. I shall not try to detail its assumptions, and limits, but present it with the warning that it probably involves subtle assumptions about motivation and cognitive processes, the implications of which I myself am not fully aware.

The following discussion takes the form of a critique of a model presented by Professor Ellickson. While I reject the formal framework which he creates because I find it unsatisfying in that it leaves no room for the inquiry which is the central concern of the article, I concur in his arguments about the type of concerns which are involved. However, I see them as relevant to an issue not explicitly raised in his model. A difference that I think flows from treating these concerns in this context is a shift in emphasis, highlighting the subjective and alterable character of desirable courses of action, and

suggesting that involved in the ripening of restructuring decisions is not simply a canvassing of existing taste, but the formulation of attitude on the part of parties who see themselves as disinterested or subject to conflicting interests, and the modification of expectations.

Efficiency and Optimality

In an article advocating abandonment of primary reliance on zoning and increased use of consentual arrangements between neighboring land owners, improved nuisance rules, and fines, Professor Ellickson defines the problem of land use conflict as one of resource allocation. He begins by noting that

> "Economists assert that if the market remains free of imperfections, market transactions will optimally allocate scarce resources. They do not maintain that the distribution of these optimally-allocated resources among specific individuals will necessarily be just. ...According to this economic model, optimally efficient patterns of city development would evolve naturally if urban land development markets were to operate free of imperfections; city planning or public land use controls would only make matters worse from an efficiency standpoint."[1]

Ellickson then identifies as the major imperfection in urban land markets "'externalities' or 'spillovers' -- that is, impacts on nonconsenting outsiders."[2] Relying again on welfare economists, he advocates that "harmful

externalities be 'internalized' to eliminate excessive amounts of nuisance activity. Internalization is said to be accomplished through devices that force a nuisance-maker to bear the true costs of his activity."[3]

Although this material is offered on a provisional basis, and is to be examined in detail in the rest of this section, it is worthy of note here that this explanation of internalization is somewhat misleading -- or this definition somewhat at odds with that used by economists. To be "internal" a cost need not be borne by an individual in the sense of paid for out of his pocket. Internal refers to inclusion in the individual's economic decisions with respect to how much of an activity, causing such a cost to someone, to engage in. For this purpose, it is sufficient if a cost is a clearly identified opportunity cost, e.g., the loss of an opportunity to be paid for not developing a parcel in such a way as to block a view from a neighboring house.[4]

Ellickson continues:

> "Internalization of harmful spillovers in land development often requires some departure from what this article calls a laissez-faire distribution of property rights, an imaginary legal world where each land owner can choose to pursue any activity within the boundaries of his parcel without fear of liability to his neighbors or government sanction."[5]

He goes on to describe briefly a "spectrum of internalization systems" in order of "increasing degree of collecti-

vization of decision", ranging from manners through definition and enforcement of nuisance rules, the imposition of taxes on specified activities, and the proscription of specified activities, to the prescription of activity. His order seems to follow not necessarily increased collectivization of decision, -- for in even the minimal "laissez-faire" property rights world that he postulates, if unofficial use of force is proscribed, and individuals effectively[6] denied the right to interfere with others' exercise of their rights, a fully collective rights distributional decision has been made -- but to the particularity or specificity of collective decision, whether it distributes effectively narrow or wide ranges of options to the individuals in society. Correlative with the breadth of opportunities which fall within an individual's prerogative, is the breadth of impacts which may be perceived as harmful, that he must suffer. This view of what Ellickson proposes as internalization systems as alternative distributions of rights hopefully will become clearer after the discussion of externalities, considered later in this section.[7]

In order to choose among the limitless array of alternatives that could be constructed out of the parts chosen from this spectrum, Ellickson offers as goals of

the system to be constructed, efficiency and equity. He explains efficiency as the minimization of nuisance costs -- the harmful effects of neighboring activity, prevention costs -- the efforts by either the nuisance maker or sufferer incurred in reducing the effect of the nuisance, and administrative costs -- including both the private and public costs of writing agreements and law, policing arrangements, negotiating, etc. He has explicitly limited his scope to harmful "externalities" and so deals with the minimization of costs rather than the maximization of benefits. While framed in different terms, his goal of efficiency seems to be the same efficiency goal used by economists.[8] The definition given in that context is useful to keep in mind, since it more explicitly ties the notion of efficiency to the mechanism which defines optimal resource allocation. A measure which reallocates resources -- shifts around the use and enjoyment of goods benefitting some individuals and perhaps harming others -- is defined as efficient if the benefits to those made better off, measured in monetary terms, exceed the harm to those made worse off. The concept of efficiency is closely related to Pareto optimality. A reallocation of resources is called a Pareto improvement if as a result of the allocation, at least one individual is better off and no

one is worse off. One may infer that this is the case when two individuals voluntarily trade services, items of wealth, or rights, broadly conceived of as anything which they can trade. They arrive at a price or bargain such that each prefers what he will receive to what he gives up, otherwise he would not trade. Note that there are circumstances where the form of this description seems to fit, but we balk at calling an individual's participation voluntary, and do not view the result as particularly appealing. When a robber points a gun and orders his victim to deliver his money or lose his life, we described the victim's compliance with the terms of the bargain -- abstention from killing for money -- as coerced, not voluntary. If such a bargain is not viewed as acceptable -- even desirable -- it is because it is outside of the model world of Pareto improvements. The thief is attempting to sell something he is not entitled to, the right to take the victim's life. He is violating the distributional assumption of the model. In a world where entitlement was distributed in another way, this bargain might indeed represent the sort of "ethical maximizing" that Pareto optimality evokes. If the nature of our world was such that people were incapable of trading anything they were not entitled to, all interactions would involve Pareto improvements. The problem of divergence

between substantive entitlement and effective distribution is a recurrent one to which we shall return. It is rare in the economist's model that they are not assumed to be the same.

Where members of society desire something held or enjoyed by others, a change in the deployment of resources which transfers the goods to them is deemed a Pareto improvement only if the holders are fully compensated for the relinquishment. Where they voluntarily trade, that they are fully compensated is inferred from their voluntarism. The same transfer without any monetary payments which may have been part of a negotiated bargain is deemed efficient. Indeed any transfer which forms part of any negotiated bargain -- remember that we infer from each party's voluntarism that he values what he receives more than what he gives up -- fulfills the efficiency criteria. Efficiency, then, is a less demanding criterion than the Pareto criterion. To satisfy it, it is not necessary to identify all the recipients of both the costs and benefits in order to be sure that there is no net loss to any individual, as must be done to satisfy the Pareto criterion.

Taking wealth from some members of society and giving it to others simply because they would be willing to pay, without requiring actual payment, no doubt does not sit

comfortably on one's moral consciousness. It seems to be a widely held ethical assumption in our society that such a policy should not be generally pursued. Compensation for collectively imposed allocations is urged to the limits of feasibility. [9]

It warrants clarification that a uniform and strictly applied compensation requirement -- were such a policy technically possible -- though having an intuitive appeal, is hardly a neutral ethical ideal. Exclusive use of the Pareto criteria to decide what allocations may take place would ascribe to the existing distribution of wealth among individuals in society, in all its detail, an ethical rightness which there seems no reason to so ascribe. The distribution we find is the result of collective and private actions in the past which have both re-distributed and partially perpetuated the then existing distribution in accordance with values and ethical beliefs not necessarily embraced today.

The Nature of "Goods" and "Wealth"; What is Being Allocated and Distributed

The resources, goods, or rights we are referring to should be understood in a very broad sense. They are the elements in an open ended collection including all the

objects of human desires. The fact that ours is a four dimensional world can create confusion in understanding the character of shifts in the deployment of both tangible goods and other perceived phenomena which are the source of human well-being.

When an individual rents a house, it is understood that in return for the payment of an agreed sum, he will receive not the materials and land to do with as he pleases, but the use of this tangible stuff over a specified period with rather important requirements about what he must return at the end of the period. He has acquired a complex set of relationships to other individuals with respect to the house. To the lessor he may owe the obligation not to carry on any but specified activities within the house. To visitors he may owe an obligation to keep the cellar door firmly secured so that they do not injure themselves. Precisely what, in hindsight, we may see that he has acquired, depends to a very considerable extent on the nature of future events. It depends on whether the house burns down and on whether real estate values in the neighborhood go up. In short, the things that we speak of as being allocated are a collection of risks, contingent obligations, and dependent privileges. The nature of this spectrum of possibilities may be determined by agreement

between the acquirer and prior owners, and by other more general rules defining entitlement -- law. The role of "manners" is considered later.

When the deployment of tangible goods changes, one may conceptualize the change in any of several ways. Without calling into question distributional assumptions, one may view a change as either allocation or the materialization of an event upon which prerogatives, obligations, or enjoyment were dependent. While it is tempting to distinguish between a materialization and allocation on the basis of intentional action on the part of an individual, such a distinction can be slippery. The decision of a third party might be a condition of the agreement, and so seem more satisfactorily conceptualized as a materialization. A might enjoy the view over B's undeveloped fields, which he is "entitled" to enjoy until B decides to develop a house there. With respect to A's loss of the view he enjoyed -- certainly a good within our broad definition -- B's action seems more easily understandable as a materialization than an allocation. Perhaps because it only involved his unilateral action. Although B has never exercised his prerogative to build a house, and that had allowed A to enjoy a pastoral view, the prerogative was not newly acquired. When we consider that it

is within the existing entitlement of parties to trade entitlements to some extent, the distinction between materialization of events on which the current deployment of resources was contingent and allocation fades entirely.

The distinction between redistribution -- transcending the bounds of entitlement -- and allocation remains intact for the moment, largely because we have not yet considered how entitlement is defined. If entitlement is well-defined, expressing definitely whether or not any conceivable action is by entitlement, then the distinction between entitlement and allocation/materialization is a firm one. Perhaps this is made clearer by conceiving of all allocation as materialization. From this perspective, existing distribution is left unchanged. This is to say that all risks are distributed initially, and all future events are simply the materialization of the existing risks.

What Costs Count

In both paradigms of decision making which satisfy the Pareto criterion, voting with a unanimity requirement and negotiated trading between individuals within larger groups, the valuation of the effect on each participant -- what he gives up and what he receives -- is by the participant. It has been persuasively urged that this is the only

reliable source of information on how the various individuals value what they have or want,[10] and that the employment of the market mechanism to make society's resource allocation decisions is desirable in order to generate this otherwise unavailable information.

Note however that in making decisions intended to be accompanied by full compensation -- acting only in the interest of optimizing allocation -- an administrative or representative governmental agency -- some arm of government other than a collection of the affected parties -- attempts to gather different information than that used by individuals arranging their own affairs by mutual agreement. With respect to these differences in information one might deem bargaining between parties less collectivized decision making than governmentally ordained allocation.

Consider for example a group of white residents of a small apartment building considering jointly leasing a vacant apartment from a private landlord to convert it into a meeting and recreation room. In evaluating such a scheme, one of the residents might welcome the conversion **not** because he is interested in the use of the communal facilities, but because he is concerned that the apartment not be rented to black tenants. In arriving at arrangements in private bargaining, all factors which people are con-

cerned with are part of the utilitarian calculus, without regard to the degree such factors are deemed legitimate by the rest of society. In facing a similar decision, a regulatory body with power to convert the use of the room and raise the rents would not value the utility associated with the risk of a black tenant moving in. In general economists do not count what are called "interdependence effects", the effects on individuals utility of changes in another's state of affairs, the welfare effect from jealousy, envy, spite, sympathy or vicarious pleasure.[11] These are additional examples of non recognized sources of utility.

Is it because of the extreme difficulty of policing action motivated by illegitimate concerns, especially where legitimate preferences may explain activity also, that we do not more rigorously attempt to prevent satisfaction of these desires by private action; or is the illegitimacy of some of these sources of utility less than absolute, so that at some level of privacy, action based on such considerations, if not encouraged, is condoned?

In Shelly v. Kraemer[12] the United States Supreme Court held that State courts were barred by the Fourteenth Amendment's guarantee that no state deprive its citizens of equal protection of the laws, from granting injunctions

enforcing racially restrictive covenants, agreements between landowners in the form of property interests in each others' land to the effect that none would sell to non-whites. The court stated

> "that the restrictive agreements standing alone cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of these agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the state and the provisions of the Amendment have not been violated.
>
> But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. "

The court concluded that the action of state courts and judicial officers was state action, and violative of the Amendment.

> "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coersive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights."

The distinction drawn by the court between voluntary compliance with the restrictions and enforceability through the process of the courts effectively reduces the level to which parties voluntarily coming together to satisfy their mutual desires to be free from the risk of having a black neighbor, can coordinate their activities. It does so without holding that their satisfaction from

achieving in some measure their end is totally non-cognizable; without holding that any action taken in furtherance of that interest is impermissible. It is still possible for such parties to employ devices which do not involve reliance on judicial intervention to protect the arrangements made. For instance it would seem that neighbors could still come together at the time of the sale of a house and outbid black would-be residents.

Societal concern with the particular source of utility in this example, racial prejudice, has been enormous. The very characterization of the fact that utility is dependent upon race as "prejudice" rather than "taste" indicates that the troublesome nature of the source of utility is perceived. Today it is evident that a consensus of society views the reduction in this prejudice as a highly desirable change in tastes, to be affirmatively cultivated, perhaps even a necessary change to avoid crisis. In response to both the imminent threat to order and the need to insure that the source of this threat is eroded, rules going far past the 1948 Shelly v. Kraemer decision have made utility based on race entirely non-cognizable in a number of areas, i.e. decision based on this factor impermissable.

What is it about this source of utility that makes

it particularly troublesome? It is a response on the part of prejudiced parties not to any discontinuable activity of individuals, but to inherent attributes which do not respond to the law of supply and demand. A black person cannot be induced to abstain from being black in the literal sense. That he can do so in a cultural sense is perhaps one reason why discrimination based on cultural attributes might be accorded a higher level of acceptability or legitimacy, and so permissibly be the motivation of more highly coordinated activity. A generalized preference for more or less individuals of another race, because of very basic, widely espoused principles of entitlement, does not affect the production of the "good" which is capable of satisfying the demand so made. In the case of racial prejudice, the response of society in making "taste" with respect to race a totally non-cognizable source of well-being, and impermissable basis of decision might be viewed as an alternative response to the problem of scarcity and the desire to maximize human well-being. Instead of altering the production of goods in response to taste, an effort is being made to consciously alter taste to conform more satisfactorily with an inalterable -- because of more basic tastes not subject to question -- supply of goods.

But the special problems of race, its immutable character with respect to individuals, its irradicable nature with respect to society, and the highly systematic response to it of white society, are not present with respect to most of the matters upon which utility is based in land use decisions. The approach which I have suggested is present in Shelly v. Kraemer would seem suitable to such matters, when it is perceived that voluntary arrangements in furtherance of legitimate goals results in impingement on the enjoyment by others of other legitimate sources of utility.

Another difference between the information used in certrally determining allocation decisions, and that used by parties in dealings among themselves, may arise from uncertainty or varying estimation of entitlement. Here the concern of private parties for what they may not be entitled to is not itself illegitimate, but is not part of the regulator's calculations because he is better informed about the entitlement of each party.

Consider the conflict in Spur Industries, Inc. v. Del E. Webb Development Co.[13] A developer built a large number of residential lots close to a cattle feed lot in a previously primarily agricultural area. Some lots were sold to buyers, many of whom did not realize how pervasive

and offensive was the smell of the nearby feedlot. The developer and feedlot operator, as is not surprising, were unable to reach agreement whereby the feedlot operator would cease to interfere with the enjoyment of residential use of the lots, which were then selling very slowly. The court's decision granted an injunction against the continued operation of the feedlot and ordered that the developer pay the feedlot operator damages caused by his development of residential use nearby, i.e. the damages as a result of having to move his business.

In the negotiations which might have gone on before and in the course of the trial, the feedlot operator probably assumed he was entitled to continue his operation and so was unwilling to accept from the developer anything less than the full value of moving -- including such personal values as liking the locality for its proximity to friends (a legitimate source of utility), and perhaps even resentment toward the developer and new residents for spoiling the countryside (an illegitimate source of utility?). The developer may have assumed that the feedlot operator was not entitled to make the use of his land for residential purposes intolerable, and so was unwilling to pay the value to him of being rid of the smell.

The court's resolution is like a forced sale of the

right to continue operation of the feedlot. This is an instance of the fifth type of collective role described earlier, where the law seemingly goes beyond the definition of entitlement, and forces a sale. But perhaps it is better to conceptualize this as a different, contingent entitlement. Compare the result here to the contract law doctrine that courts will not enforce "penalties" -- as opposed to liquidated damage provisions -- for breach of contract. The policy of the law of contract in this respect is not to deter parties from breaching contracts in all circumstances, but to require breaching parties to compensate the other parties to their agreements. Thus there will be no incentive to breach contracts except where the remedy -- which we rather theoretically assume puts the other party in as good a position as he would have been in and so does him no damage -- is worth less to the breaching party than performance. Contracts broken under these circumstances represent Pareto improvements with the "benefit from trade" going to the breaching party.

The feedlot operator must be compensated for his losses in being forced to move, but he may not bargain with the developer and attempt to induce him to pay what it is worth in increased land value to induce the operator to abstain from operating the feedlot. Note that an injunction

conditioned on the payment of damages would suffice to accomplish this purpose. The case is complicated by the suffering of the prior purchasers of lots, who were not parties to the action. This might provide an explanation of why the court's decree seems to order both the granting of the injunction and the payment of damages, instead of merely making the issuance of the injunction conditional on the payment of damages. Possibly the developer is forced to purchase the feedlot operator's move at a price which results in a net loss to him and a windfall to existing residents. This has some appeal if one assumes that the developer sold the lots to the existing residents for a price greater than what they would have been willing to pay if fully informed about the disamenity of the feedlot.

The problem of mistaken assumption about entitlement can of course involve mistake in the other direction, i.e. one or more parties to an arrangement may assume that they are entitled to less than they in fact are -- one might wish to say would be, abandoning the assumption of predetermined entitlement. In such a case bargaining between the parties is likely to be easy. Had the feedlot operator assumed that he was not entitled to be compensated for having to close down his operation, while the developer

believed that he was not entitled to force the feedlot operator to move, it seems clear that both could have come away happy from a negotiated settlement where the developer paid the feedlot operator some amount ranging from zero to the full loss entailed in moving the feedlot.

Externalities

With this understanding of the criteria by which resource allocation is judged, and the suggestion that entitled distribution is a pre-requisite to discussion of resource allocation, let us take up the subject of external effects. The inquiry here is twofold: what is an external effect, and in what sense do external effects interfere with "optimal" resource allocation? Externalities are of interest because we are told -- over simplifying the economic argument -- that if we internalize them, we will improve resource allocation, which seems to be a desirable thing to do. The second question will involve recalling what is involved in internalizing, briefly discussed at the beginning of this chapter.

Ellickson's definition of "spillovers" or "externalities" -- "impacts on nonconsenting outsiders"[14] -- while conveying much of what is meant, is broader than that used by some economists. Consider for example the

act of outbidding the other bidders at an auction. Had each of the others not been out bid, he would have entered into a voluntary transaction, which we can infer from his voluntarism would have increased his well-being. Being outbid, he has suffered a harmful impact from an outsider -- i.e., without agreement to suffer it -- in losing an opportunity to improve his well-being. But here it is well understood that it is within the set of entitled prerogatives of each participant in the auction to outbid the others. This is the essential purpose of the auction. Being outbid is the materialization of a risk borne by each of the participants. It would not be possible to give each participant the right to bid against the others without subjecting each to the risk that he will be outbid. The existence of a right on the part of a single bidder to be the successful bidder, without in fact outbidding, would be inconsistent with the nature of the rights we generally understand the auctioneer to have. He is the sole party who, by not putting the item up for auction, has the right not to be outbid.

Rights of first refusal, which allow a party to buy from a seller at the highest bid made by a third party, and options are types of rights not to be outbid which exist in contexts other than auctions. They involve

splitting up of the rights of ownership between the option holder and the "owner" of the item. But no such rights could exist in more than one person, without some relationship between the rights, subordinating one to the other. A and B could not both have options to purchase an item from C without in some way making one contingent on the other. Consider what would result if we provisionally gave a bidder at an auction the right not to be outbid. He would probably bid very low since he would know that he could not be outbid. He would then be in a position to resell to another would-be bidder at a higher price. If the holder of this right not to be outbid were artificially prevented from selling to a higher bidder, there would indeed seem to be problems in resource allocation. A Pareto improvement would be available in the form of the transaction, and would be blocked by prevention of the sale.

Note that in the case of an auction the impact on outsiders is conveyed through the price of the article being auctioned. Mishan gives as an example of an adverse effect on outsiders, the switching of a number of consumers from tea to coffee. Initially the market price of coffee will rise, and that of tea will fall. Drinkers of coffee will be worse off having to pay more, and

drinkers of tea will be better off, paying less. Although the change in taste of past tea consumers has unintended effects on others, this is not the type of impact on outsiders which involves non-optimal resource allocation, because, as Mishan observes, "each general equilibrium position meets the requirements of a Pareto optimum, viz. one in which it is not possible to make one or more persons better off without making at least one person worse off."[15]

The impacts on nonconsenting outsiders which the economist maintains may represent non-optimal allocation of resources, do not operate through changes in the price structure of goods and services which other buy. Such impacts are entirely consistent with optimal resource allocation as defined as taking advantage of all benefits from trade (Pareto improvements). The existence of the impacts that follow from change in taste, technological changes, or changes in factor endowments, the shifting of the market to a new equilibrium position, is simply a reminder of the ubiquitous scarcity of resources which is at the root of the need for allocation. That not all desires can be satiated is the premise of economics.

The impacts on outsiders with which we might be concerned then, are those which operate directly and not

through the mechanism of price structure, and those which are not illegal and so are within the economic model.[16] An example of an external effect of this sort might be the reduction in pleasure that a homeowner suffers from his neighbor's practice of making fiberglass boats in his backyard, a process which gives off pungent fumes and at other times large quantities of dust.

When an impact is suffered by a nonconsenting outsider through a change in the price structure, it is because both the causer and the sufferer of the effect are competing for the use of a resource. In the auction example , the competition for the resources is obvious. In the coffee and tea example, the pricing mechanism works much more indirectly, but what is involved is essentially similar to an ongoing course of auctioning coffee and tea. When the price of tea goes down, benefitting remaining tea drinkers, it is because a number of traditionally successful bidders for tea have withdrawn, rather than bid successfully as was their prior practice.

The impacts which do not operate through the price structure may also be viewed as instances of competition for scarce resources. In the case of the homeowner who is bothered by his neighbor's fiberglass boat building hobby, there is competition for the use of the air which blows across the homeowner's land. He wishes to "consume"

it in the sense that he wishes to enjoy it free of noxious smell and dust. His neighbor wishes to use it for the disposal of the smell and dust, not readily disposable in another manner. Likewise in the case of Sturges v. Bridgman[17] -- which has become a favorite fact pattern for the exposition of externality theory -- where a doctor objected that vibrations from the neighboring confectioner's machines prevented the use of his newly constructed consulting room, we can think of the earth as a resource which the doctor wished to have free from other uses so that he could have quiet and freedom from vibrations in his consulting room, and which the confectioner wished to use for the disposal of his vibrations. We noted that where impacts on outsiders were effected through a change in prices, they did not cause concern over the optimality of resource allocation. Viewing these land use conflicts as competition between would-be users for a scarce resource, one might question why such conflicts are not resolvable through the pricing of the resource. It appears that if it could be arranged that the resources whose scarcity is the cause of the conflict -- seen as an external effect -- could be priced, their existance would not give rise to concern over the optimality of resource allocation. Coase demonstrates this initially

without conceptualizing the conflict between adjacent landowners as one for a resource, the nature of which is deduced from the conflict. He argues that harmful effects are reciprocal in nature; that in preventing the confectioner from "harming" the doctor, we are harming the confectioner. Going through the necessary permutations of initial assignments of rights, and values of being allowed to hurt or being hurt, Coase demonstrates that if bargaining is costless and each party behaves rationally, in a world of certainty, the party to whom freedom from harm is worth less will agree to allow the other to harm him. Toward the end of his article he concludes:

> "If factors of production are thought of as rights, it becomes easier to understand that the right to do something which has a harmful effect (such as the creation of smoke, noise, smells, etc.) is also a factor of production."[18]

Why are these resources not priced, and what can we conclude from the fact that they are not? The attributes of the resources, and the pattern of entitlement to them is at the heart of the problem. Since the nature of the resources involved, i.e. rights, is that they can be made conditional and dependent on any factor which one can devise, what one views as the resource, and so its nature, is to a large extent dependent upon the parameters which determine entitlement.

Consider the resource demanded by both the doctor and the confectioner. Neither can look to other suppliers when they find that the other is also desirous of consuming what they have to share. Because each has made an illiquid investment in the form of their apartments, which is technologically linked to the ground in that particular locale, only the right to control the condition of the ground under and nearby their respective buildings is capable of fulfilling their needs. Were they tenting, the resource each would need might be the right to control the condition of some ground on which they could locate, and not necesarily the ground on which they were then located. Dislike for the activity of moving as well as technological factors contributes to the illiquidity of their investments in the locations they now occupy. Due to factors which make the location distinguishable from others, being there may have value to both the doctor and the confectioner. Thus to the extent that location is not fungible each might have developed an attachment to the peculiar attributes of that location.

The technological difficulty of objectively measuring the quantity of vibrations to be emitted makes formal contracting on such matters difficult. For an owner of a parcel who is concluding an agreement which will bind subsequent owners, or users, -- to the extent he

is concerned about deriving value from his land by renting it to others -- the difficulty of defining with precision the nature of the restriction will increase the difficulty of ascertaining its effect on the market value of the land.

In the case of the confectioner and doctor, the resource valued is adequately described as the condition of the ground, or the right to vibrate. The doctor probably is not particularly concerned about his neighbor's motivation for vibrating. Where the resource's value stems from the desire of the would-be owner to employ it as a factor of production, this is likely to be the case. However, where the would-be user wishes to consume the resource, i.e. derive utility directly from owning or using it, it is possible that his utility will be dependent upon the motivation of the actor, and not solely upon the objectively measurable phenomenon.

One must also look at the pattern of entitlement to the resource. Perhaps the most significant impediment to the marketing of such a resource is the considerably uncertainty each landowner would have as to what he and the others have to sell or need to buy, the problem of ill-defined entitlement, discussed earlier. In the negotiations where the doctor is trying to buy a limitation to a maximum noise level, each will need to estimate what

level of noise would be a nuisance and so not permitted even without an agreement restricting noise. If they are negotiating in the face of an existing conflict, the relevant deprivation that the confectioner must price is the difference between what the doctor wants and what is a nuisance, rather than the vibration he is causing now. Optimistic estimation on the part of either party will make reaching agreement impossible, since each will then believe the other is making unreasonable demands. In such circumstances, litigation to determine the rights of the parties will be a necessary prerequisite to the eventual resolution of whether the doctor will be able to induce or compel the confectioner to discontinue his vibrating.

The pattern of entitlement itself, the number and circumstances of the people having an entitled interest, even where the entitlement itself is clear, may cause considerable impediments to bargaining. Should the confectioner have wished to assure, prior to moving into his apartment that he would be free to vibrate, beyond what he was permitted by virtue of his entitlement to occupy the land, he would have had to contact not just one, but all of his neighbors. Each would be in a monopoly position, and could be quite obstinate in refusing to sell such a right for any but an exorbitant cost, unrelated to

what the right was worth to them unsold. This impediment to trade arising out of strategic bargaining maneuvers is referred to as the problem of "hold outs".

The above discussion suggests that there may be very significant costs involved in transactions to allocate a resource like that which both the confectioner and the doctor are interested in using. The creation of a market for a good is itself an activity which is not costless. In order for individuals in the marketplace to bargain it must appear likely to each of them that the benefits to be obtained from trade will exceed the costs of bargaining. It seems likely that there are many instances where an omniscient observer of human affairs would perceive that there exist potential benefits from trades; i.e. potential Pareto improvements, which are not carried out, because the costs involved in carrying out these trades including the cost of finding out about them exceed the benefits to be gained from them.[19] An alternate way of viewing this phenomenon is to note that there are many more potentially mutually beneficial trades than could possibly be fully investigated, and therefore only those which seem most profitable will be investigated.

The "externalities" which represent imperfections and distort or prevent optimal resource allocation, are those

where the cost of bargaining outweighs gains from trade. Obviously there are informational problems in conducting such analysis. Let us assume that the entitlement of each party is well understood, and that the confectioner's vibrations are not a nuisance, i.e. he is entitled to continue to operate his machines. When we observe the doctor simply tolerating this situation, we may infer that in his estimation, the gains he could realize from a negotiated resolution whereby the status quo was changed, do not exceed the cost of negotiating. What we have little information on is whether or not gains from trade exist at all, apart from the costs involved in negotiating. It is plausible that the cost to the confectioner of reducing his output of vibrations exceeds what the doctor would be willing to pay. Under such circumstances, where no Pareto improvement is possible, the allocation of resources is optimal. If the result of the doctor not being able to use his consulting room is unsatisfying, it is either because one is dissatisfied with the distribution -- that the noise was not a nuisance -- or one is moved by ubiquitous scarcity; here is the poignant form of the lack of adequate information that allowed the parties to become exposed to the risk that they would each need a resource which only one could have.

Consider the case where a Pareto improvement would be possible but for the costs of bargaining. Such externalities distort "optimal" resource allocation only in a rather special -- and perhaps misleading -- sense of the term optimal. Costs of bargaining are not less "real" costs than others. Thus potential Pareto improvements unrealized because the costs of trade outweigh the benefits theoretically available, are perfectly consistent with optimal resource allocation which recognized all real costs. It is only in the sense of optimal which ignores these costs of bargaining that externalities distort optimal resource allocation.[20]

Internalization of "harmful impacts on nonconsenting outsiders" may always be accomplished through bargaining whereby parties agree to re-define their mutual prerogatives. Recall the discussion of internalization at the beginning of this chapter. The initiation of negotiations between the parties interested in the resource makes the cost internal to the actor's economic decision whether or not to engage in the activity. It is where the anticipated costs of bargaining outweigh the perceived benefits from trade that external effects remain "external", but this does not prove they distort optimal resource allocation.

Let us return to Ellickson's spectrum of internaliza-

tion systems and examine them in light of this view of externalities: instances of the non-existance of a market in a scarce good. It is particularly where the significance of the impact -- the disutility from not having the good -- and the very large transactions costs which would be involved in effecting an agreed trade, support an inference that significant gains from trade might be available but for these transactions costs, that externalities give rise to concern. When we collectively change the definition of entitlement -- transfer without compensation -- we may be able to effect an efficient transfer, but this will only be satisfying to the extent that the prior distribution was without conviction.

When a charge is associated with an act, e.g. a fee for building beyond a specified ratio of bulk to land area, the harmful effects which are associated with excessive density will be reduced, as a result of the disincentive. But while the tax effectively requires the would-be bulk developer to purchase the rights infringed by his extra bulk, and so creates a market in the goods, entitlement with respect to the right to build bulk is reversed. Whereas before, each landowner was permitted to build, -- it was part of the package of rights associated with owning land -- the tax effectively appropriates the right to build for the city, and requires the land owner to buy it

back. An incentive scheme which gave the developer who abstained from building excessive bulk would leave the structure of entitlement more intact. Such a scheme, linking the incentive to the coercive revenue raising mechanism of the state, would effectively require citizens to buy the right to build bulk from those developers who abstained. Involved in the tax on building and bonus for abstention, are forced sale and forced purchase respectively. Because it was the bargaining costs involved in negotiating with excessive numbers of people that were responsible for making the good an "externality" this is almost mandated by any entitlement redefinition that is aimed at creating a market in the good. In either case, the market exists between the agent of the public and the developer.

The use of the efficiency criteria, rather than the Pareto criteria, to override "entitled" allocative processes where the costs of bargaining or otherwise compensating outweigh benefits from trade, denies the entitlement premise upon which it is based. When the intent is only to perfect allocation, the efficiency criterion is inconsistent. It redistributes so that the allocation of resources before and after the transfers involved are not comparable under the Pareto criteria. Each may be optimal, but they are based on different premises. As

a criterion for modifying distribution, the efficiency criterion alone is clearly inadequate. Recall the earlier discussion at the beginning of this chapter.

Perhaps the most important contribution that could be made to reduce bargaining cost without modifying entitlement would be the clarification of entitlement. The consideration of the impediments to bargaining caused by uncertainty as to entitlement suggests that the design of procedures which narrow the gap between what individuals may effectively do, for lack of sufficiently inexpensive remedies available to those whose entitlement is thereby infringed, and must suffer, for the same reasons, and what these rights are "supposed" to be, might be an important contribution to reducing costs of bargaining, and so improving resource allocation. Whether the desirability of narrowing this gap between effective distribution and substantive entitlement for the reasons mentioned here outweigh the other considerations involved in the definition of entitlement is not clear, however.

Equity

Ellickson notes that his goal of equity is somewhat of a complication. He proposes to use a standard of fairness which Professor Michelman derives from Rawl's

second principle in A Theory of Justice. Michelman suggests that a measure is fair, even when it imposes on an individual uncompensated short term losses, where such an individual should be able to see that, viewed as part of a continuing program of collectively imposed reallocations, he will benefit in the long run; i.e. he will benefit more from the rest of the program than he will lose from this measure.

In effect, this formula re-attaches to the concept of efficiency the compensation requirement of the Pareto criterion. Rather than requiring that each small loss must be compensated, it must appear likely that the individual suffering a current loss will be compensated at a later time by some measure which will impose uncompensated losses on someone else. It is as though the sufferer is given a hypothetical choice of calling off the government action which imposes the loss on him, but only at the cost of calling off all subsequent (and prior? from which he has already received a benefit?) government action which will impose similar losses on others and benefit him. If he would elect to bear the loss now rather than forsake the benefits later, then the loss is fair, or in Michelman's context, it is just not to compensate the loser for a taking of property.

This notion of equity is useful under a conception of

collective action as intervention in the ongoing voluntary bargaining allocation process, where distributional considerations are not involved, i.e. where existing distribution is not to be disturbed. But it leaves the question of definition entitlement unanswered. Where entitlement is well and satisfactorily defined, the attachment of the probably-will-be-or-has-been-compensated requirement to collectively imposed allocations which are necessitated by impediments to bargaining, is satisfying, but query whether what is involved in such cases isn't more satisfactorily conceptualized as the definition or clarification of entitlement, rather than an allocation with nebulous compensation. Perhaps "compensation" is best reserved to refer to that which is received in return for what is given up voluntarily. Recall the discussion of Spur Industries, Inc. v. Del E. Webb Development Co., and forced sale of right to operate feed lot.

The Definition of Entitlement

The thoughts presented in this section form the link between the motivation of the thesis -- the desire to form an attitude toward the phenomenon of parochial land use control -- and the rather abstract modelling of the previous sections.

The word entitlement was chosen to describe one of the parts of the model because of its connotations of subjective moral judgement. While the equity criteria discussed above seemed to rely on "value-free" judgements, when the model is modified to emphasize the importance of the distribution assumption, the role of moral and value-laden judgement becomes clearer. Implicit in this statement is the recognition of a positive state, i.e. that property exists by virtue of the continuous reaffirmation of previous judgements; that distribution is not passive and re-distribution active, but that both are active.

The analysis thus far has involved a distinction, which, though particularly useful in some contexts, e.g. theft and other non-entitled real action, has its limitations. To what extent does the distinction between entitled distribution and effective distribution fade when it comes to matters like aesthetic nuisance, or other land use control conflicts which involve definition of rights which can command no overwhelming consensus of deeply felt support? If we maintain the assumption that the definition of entitlement pre-exists the type of conflict which arose in Spur Industries, Inc. v. Del E. Webb Development Co. and Sturges v. Bridgman, it seems clear that procedures which can provide the parties with this information early

on, at low cost, will improve decision making by them, and reduce the formation of conflicting expectations. But is it meaningful to speak of entitlement in such a case as if it were pre-existing? It seems that it is the process of resolving conflict, whereby the parties are finally informed of their entitlements, that also defines them for the first time. Viewed from this perspective, the distinction between substantive entitlement and effective distribution becomes one between subjective, individually perceived "right" and objective reality -- what in fact happens, what one can "get away with".

Ultimately the definition of entitlement is effected implicitly through the totality of social actions. Entitlement, in the sense of subjective entitlement, can only be a personal, individually perceived phenomenon, of varying consensus. It is likely to vary from individual to individual. Although each will probably deem it of importance that others feel an action or right is entitled or not, his decision is personal. If one accepts this assertion of self-determination, which seems workable at the level of concrete policy formulation I am primarily interested in, it follows that complete a priori definition of entitlement is impossible. While certainty of entitlement is a major objective in institutionalizing

the entitlement defining process, other fairness related notions are involved. What is possible, and does exist, are widely held estimations of high probability of certain individual and institutional responses. It is upon these generally held estimations that we are accustomed to rely.

The definition of entitlement, then, is an ongoing process which involves the formation of individual moral judgements on the part of members of society and the progressive reification of these judgements into substantive rules of entitlement, and procedural institutions for the effectuation of these rights. Entitlement, to my mind, takes the form of entitlement to certain substantive rights and entitlement to have disputes with respect to these substantive rights resolved through particular mechanisms.

Recall Ellickson's suggestion that manners are an available system of internalizing internal effects. It seems clear that one of the reasons people abstain from many potential interferences with others is what we might loosely call manners. To some extent what is involved is the recognition that this abstention from interference will engender similar responses from others, and that measured in terms of future abstention on the part of others from nuisance activity which would bother the actor, abstention now pays off. But this logic would seem to

contribute more to an explanation of the formation of manners generally, rather than to explain specific decisions about whether or not to impose upon others. Arguably it is the absence of a current decision which leads one to characterize the abstention as based on manners. Manners, a habit of mind which may be based on indoctrination in the above argument, are themselves responsible for impacts on the abstainer. I suggest that manners inhere both in habit which makes people not even consider classes of activities which would offend others -- which would mean that tastes are sufficiently complimentary that no competition for scarce resources arises -- and in vicarious utility losses which arise simply from knowing that one has caused or is about to cause discomfort to others. This loss of utility, regret or guilt, is entirely separate and distinct from the loss of the nuisance sufferer. It is a sympathetic interdependency effect which tends to reinforce existing formal rules of entitlement and, I submit, is part of the reification mechanism by which rules of entitlement are formalized. Manners play a large part in determining effective distribution, especially with respect to minor every day annoyances, but they are an aspect of taste, and not a mechanism for internalization.

Given this view of the process which determines entitlement, one can point to a number of considerations which a thoughtful individual might consider in arriving at a conclusion, either personally, or in the capacity of participant in one of the institutions which formalize rules of entitlement. Felix Cohen concludes his discussion of the origins of property rules as follows:

> C. Could we sum up this situation, then, by saying that this particular rule of property law that the owner of the mare owns the offspring has appealed to many different societies across hundreds of generations because this rule contributes to the economy by attaching a reward to planned production; is simply, certain, and economical to administer; fits in with existing human and animal habits and forces; and appeals to the sense of fairness of human beings in many places and generations?
>
> F. I think that summarizes the relevant factors.
>
> C. And would you expect that similar social considerations might lead to the development of other rules of property law, and that where these various considerations of productivity, certainty, enforceability, and fairness point in divergent directions instead of converging on a single solution, we might find more controversial problems of private ownership?[21]

When one is considering structure of a decision process, similar considerations are present. In considering how much discretion should be vested in officials acting in the public interest, one must weigh the reduction in bargaining costs that come from concentrated authority against the poorer valuation information that accompanies

the concentration of power in one individual to affect the welfare of many.

In determining when entitlement definition decisions will be formalized, one must weigh against the desirability of certainty, and the prevention of illiquid investments in wrong speculation -- as might have been the case in Sturges v. Bridgman -- the desirability of making entitlement contingent on specific factors which defy advance classification.

More than this cursory suggestion of what is involved in a consideration of decision restructuring alternatives is beyond the scope of what can be handled here. In the following section I consider the desirability of entitlement to coordinate land use through the mechanism of municipal government in cases where there is a significant perceived impact on individuals outside of the municipality. The Ellickson article is concerned with alternative decision processes concerning matters not perceived as significantly affecting persons beyond municipal borders, and I will not attempt to summarize the thoughtful analysis presented there.

Parochialism as Internalization

The problem of municipal parochialism is analytically somewhat similar to the problem of "externalities" between

adjacent landowners. It is now municipalities which in comprehensively regulating their own land affect the use and enjoyment of land outside their borders and the options of non-residents to settle within municipal borders. It appears that there is no smoothly functioning inter-municipal market in land use regulation. Perhaps even the suggestion that such a market is desirable is counter-intuitive, but in a sense it exists in the form of higher levels of political organization. I will suggest that a marketing function may also be discerned in the interactions between municipalities and would-be land users. In the following pages I will suggest that a municipal role in comprehensively regulating land use may perform the function of providing a market for environmental amenity. Ellickson would call this a cost internalization function. By allowing municipalities to exercise a sufficient level of centralized land use control, the strategic bargaining problems, costs of dealing with large numbers of decision making parties, and problems of uncertainty with respect to entitlement, may be sufficiently reduced that the benefits from trading in the good of environmental amenity may outweigh the costs.

Monitoring municipal action in the interest of protecting municipal citizens presents distinctly different problems from monitoring in order to protect the

interests of people outside the municipality. With respect to municipal residents, the question, assuming that municipal action is efficient -- i.e. counting costs to municipal residents only -- is, are the benefits reasonably well distributed? Is the Michelman standard of fairness fulfilled? To the extent one is dissatisfied with the criterion of efficiency as a ground for municipal action the question of the extent to which municipalities can determine entitlement is raised instead.

With respect to individuals outside of the municipality the question raised is the extent to which action by the municipality infringes on the entitlements of those outside the municipal borders. As the Shelly v. Kraemer indicates, coordination of individuals which does not exceed the bounds of the entitlement of each acting individually and does not unduly infringe the rights of the participants, may give rise to concern about the interests of outsiders. In light of the understanding of entitlement developed earlier, it seems clear that there exists some measure of entitled discretion at the level of coordination of municipality. Recalling the Belle-Terre and Kisch Holding Company cases discussed in the introduction, it should be clear that no blanket, formalistic solution is available.

In Duffcon Concrete Products v. Borough of Creskill[22] the court upheld the municipality's exclusion of a concrete plant. This municipal action affected significantly the relative well-being of many of the people within the bounds of Cresskill. The landowner who would have sold his parcel to the concrete plant was no doubt worse off. The adjacent landowners were probably better off, certainly if they were residential users. Residents of the municipality far from the plant might have been worse off. Had the plant located there, tax revenues from the plant might have decreased the tax demands on their property or increased the level of municipal services without raising taxes. The problems of fairness and legitimacy in the making of decisions with so many conflicting interests has been touched on earlier and is not considered here. I shall assume that from the perspective of these participants, the municipal role in making such decisions is acceptable. The reasoning of the Michelman fairness test seems readily applicable.

Cresskill having rejected the concrete plant, one is tempted to conclude that the plant is "forced" onto some neighboring municipality. But if so, perhaps it is with notice that the plant may be excluded if the municipality so desires. The municipality accepting the concrete plant

might do so because it is able to extract sufficient compensation for the loss of environmental amenity, by way of increased taxes, free concrete, or special landscaping, to make the location of the plant there desirable. If this is the case, the price of concrete will reflect these demands, and through the marketing of concrete, concrete products, and the services of the users of concrete products, this cost will be transferred to those people for whom concrete is produced.

If the plant is excluded everywhere, it is because the users of concrete will seek substitutes rather than pay the increased costs resulting from the necessity of compensating the municipal host for the environmental disamenities of the plant. Involved in allowing this municipal power to exclude, broadly conceived as a power to bargain and sell the right to locate, is a long-run transfer of well-being from users of concrete to the small number of individuals who, due to illiquid investments in the land around potential concrete plant sites, are likely to suffer if not compensated in the form of benefits made available indirectly through the municipality's exaction of a price for locating. In reducing the chance of a loss to landowners who could have a plant move in near them and not be able to recover, -- a risk uncertain as to who

shall bear it but certain that some shall -- a rather certain, very small, and highly spread out increase in costs is imposed on users of concrete. This shift in entitlement accomplishes something analogous to insurance against the risk of land devaluation from environmental impacts so marketed.

Such a distribution of entitlement would make it more likely that plants would locate such that the loss in surrounding land value is minimized. Whereas the difficulties of multi-party bargaining might have prevented the potentially adjacent landowners from bribing the plant not to locate there, both because of the complexity of dealing with a large number of surrounding landowners, and the possibility of dealing with numerous concrete plant developers, or owners of available sites, the existence of bargaining power in the municipality as representative of landowner interests insures that someone, albeit with inferior valuation information, is in a position to bargain with respect to the right to locate. In this way a market for the environmental "externalities" of concrete plants is created, and the "externality" -- the scarcity of the non-profitably-marketable resource environmental amenity -- is "internalized". This is brought about through a shift in the entitlement defining process, as well as

the substance of landowners rights. An area of use entitlement is now determined by municipal legislative bodies, instead of through case by case nuisance adjudication which, one expects, would have occasionally vested entitlement to use land for concrete plant purposes without compensating neighbors, in the owners of land. Competition between municipalities, who for high enough prices will accept the plant, rather than individual speculation on the highly uncertain, highly particularized decision making in nuisance litigation, will determine the location and level of production of such large scale environmentally detrimental facilities.

Where the coordination among municipal residents involves the exclusion of a business use, it poses its most serious problems in the centralized regulation of internal affairs. This is largely because the values penalized, concrete plant development and concrete use, involve no concentrated impingement on the range of opportunities open to any particular individuals or class. The transfer of well-being involved in a municipal right to exclude concrete plants, transfers costs essentially to society at large. In the case of other excluded uses, smaller amounts of the costs imposed by the exclusion can be passed on to society. One must look to the nature of the

use excluded. Where it is conveniently classified as a production function, and does not as an activity serve as the source of utility, the spreading of costs is likely to be present. To the extent that the use excluded is itself a source of utility, the transfer of well-being is from the excluded users to the municipal residents. Consider the exclusion of low income people from exclusive residential suburbs. While it is true that the existence of such a power to exclude would result in minimization of the costs to suburban residents of living next to poor people, the transfer of well-being involved, is from the excluded classes themselves, since the function penalized is not a production function and so provides no means of passing on the cost to consumers of the goods produced. It seems likely that such cases of exclusion must be analyzed individually based on the illiquidity of the sufferers of the impact and the consensus with respect to the values involved.

What becomes apparent in this discussion is that the coordination of internal land use by one municipality may force surrounding municipalities to take similar action if they are not to suffer a systematic increase in the occurance of events which have disagreeable, though differently priced, impacts. The people in the munici-

palities surrounding Cresskill can no longer rely on previously existing impediments to bargaining between landowners which might have led to an acceptably random distribution of heavy industry through the region. If neither of these alternatives -- systematic increase in disagreeable development or vesting in a representative body a large amount of discretionary power which will enable them to significantly affect the distribution of wealth -- is acceptable, several alternative schemes are available to police such municipal coordination. A higher level regulatory scheme can be devised to allocate to each municipality its "fair share" of regional development, low income housing, industrial development, etc. In order to escape increased centralized coordination of municipal affairs, coordination can be escalated to a higher level of government. Note that under such a scheme there would be no need to regulate municipalities not adopting a scheme of internal coordination. An alternative approach would selectively proscribe coordination techniques of self-regulating municipalities. This is analogous to inter-community nuisance. It requires reliance on an adjudicatory body's ability to probe the motive of political action, instead of on checks in the political process itself. Bosselman suggests that the Ramapo plan, which linked new development to an eighteen

year capital budget for infrastructure improvements may have been an instance of such a carefully disguised motive.[23]

The concerns which I earlier suggested were distinct may now be seen as related. In each case the question raised is whether individuals may retain their autonomy without suffering a systematic increase in a certain type of risk -- coordinating at a higher level to proscribe local coordination -- or whether they must choose between coordinating at the local level and bearing increased risk.

Footnotes to Goals in Designing a Land Use Decision Process

1. Ellickson, Alternative to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls, 40 U. Chicago L.R. 681 (1973)

"Allocation," "distribution," and "efficiency" are terms of art with technical meanings to the economist that are not clear to the uninitiated from an excerpt such as this. They are commonly used in discussing a model of economic behavior involving interactions among individuals over discreet periods of time. At the beginning of each period, each individual has a certain amount of wealth. One refers to the deployment of wealth at the beginning of the model as the distribution. In the course of the interactions that ensue as the model progresses, wealth is produced, consumed, and shifted around. The shifting around is referred to as allocation.

When one speaks of distribution as an action or activity rather than as the state one finds at the beginning of the model, one also refers to changing the initial deployment of wealth, but for different purposes than the shifting involved in allocation. It should be clear that both distribution and allocation involve changing the deployment of goods, services, rights, etc. among participants in the economy.

In the usual model, the distribution (state) is the deployment of wealth one finds at the beginning of a period of the model, and allocation is the shifting that goes on over the period. The distribution one finds at the beginning of the next period is simply the deployment one finds when the music stops.

2. Ellickson, 684. The subject of externalities and the limits of this definition are considered in a subsequent section.

3. Ellickson, 684

4. See Mishan, Cost Benefit Analysis 109 - 113

5. Ellickson, 684

6. It is perhaps the efficacity and ready availability of procedures to prevent the violation of rights, more than anything else, which determines the level of collectivization of decision making.

7. I do not mean to suggest that Ellickson would quarrel with this analysis. The differences I emphasize are more related to choice of modeling alternatives than analytic correctness.

8. This is clear from his footnote 26.

9. See e.g. Michelman.

There are also theoretical reasons for retaining a compensation practice. The individual valuations which are the data for the computations performed in application of the efficiency criteria are based on the continued existance of a specific distribution of wealth. That is, valuation by individuals is dependant upon their wealth. That a starving man is willing to pay less for a new suit of clothes than a rich man is clear. See Mishan, Pareto Optimality and the Law and his chapter on the effect of legal liability in Cost Benefit Analysis for an explanation of the effect this difference in valuation may have in yielding apparantly paradoxical results. Where these "welfare effects" are sufficiently large, it is possible that the reversal of an efficient (uncompensated) transfer will also be efficient.

10. Demsetz, Some Aspects of Property Rights

11. Mishan, Cost Benefit Analysis 108

12. 334 U.S. 1 (1948)

13. 492 P.2d 700

14. Ellickson, 684

15. Mishan, Cost Benefit Analysis 104

16. See the earlier discussion of robbery in the context of the Pareto criterion.

17. 11 Ch. D 852 (1879)

18. Coase, The Problem of Social Cost, 44

19. Implicit in this suggestion is the assumption that valuation exists apart from the values arrived at in the bargaining process. It seems clear that in many situations a party would have been willing to pay more, or accept less, and thus that this assumption bears a relationship to the subjective valuation function to some extent. But it seems equally clear that a party does not value an item before he conceives of it, and that his taste for it may develop to a considerable extent during the course of negotiations. It seems obvious that people may be talked into wanting something that they had no particular desire for previously. See also Heymann, 874 et seq on the non-instumental

values of bargaining.

The suggestion that individuals do not initiate negotiations unless the expected returns exceed the expected costs would seem still to apply. It must be recognized, however, that part of the costs involved in negotiations may be investments in altering the other parties' tastes, and some of the benefits derived, the utility of negotiating itself.

20. See generally Demsetz, The Exchange and Enforcement of Property Rights.

Mishan reacts critically to conclusions similar to these: "By such reasoning, some economists found themselves perilously close to the ultra-conservative conclusion that, in respect of spillovers at least, what is, is best. For the rest, one could do no more than to await the advent of innovations, technical or institutional, which could reduce the costs of preventative devices or the costs of negotiating and administration." Mishan, Cost Benefit Analysis, 123. I find this reaction perplexing. Economists do not conclude that what is is best in any ethical sense, but only that it is "optimal" as that term is narrowly defined in terms of the Pareto criterion. Perhaps it is an implicit assumption that in the real world distribution is as well defined as it is assumed to be in economic modeling which leads Mishan to be critical of the modeling deductions.

21. Cohen, Dialogue on Private Property 368-9

22. 1 N.J. 509

23. Bosselman, Can the Town of Ramapo Pass a Law to Bind the Whole World?, 1 Florida State U. L.R. 234 (1973)

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