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Feature Article

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Planning is Un-American!

Or, what to say when you are accused of being a communist

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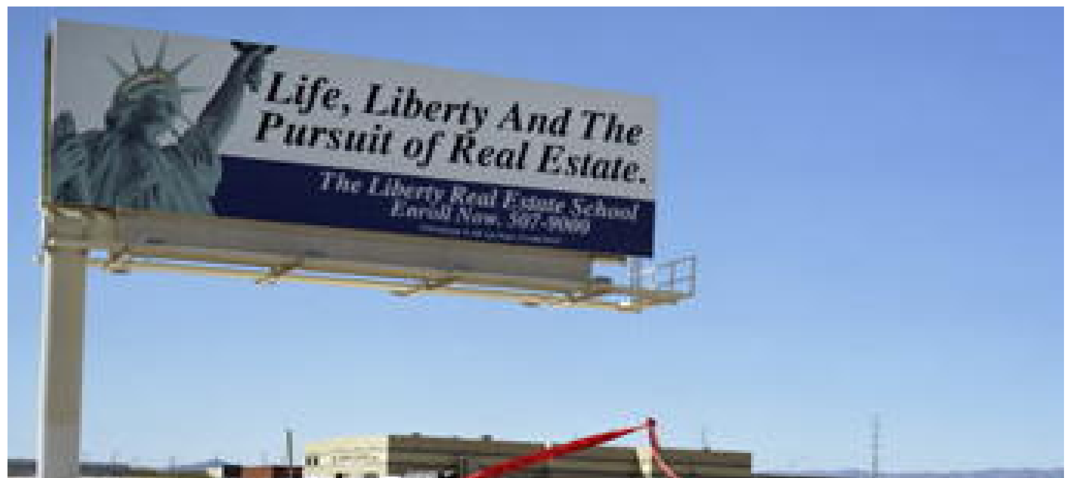

Most planners, and especially most small town and rural planners, have at one time or another faced the accusation that "planning is communist" or "planning is fascist" (or, more commonly, both comments rolled together). I regularly faced these and similar barbs when I worked in rural Vermont during the 1970s, and have continued to parry them over the years in New York State, Washington State, and Wisconsin.

Usually these accusations come about when planners are responsible for proposing a land use or environmental regulation – such as zoning, farmland protection or smart growth – or recommending denial of a land use permit. A common perception is that zoning and similar regulations restrict the options individuals have for doing what they please with their property. "Damn it; it's my land and I'll do what I want!" is the way I am often presented with the issue. Why? "Because I'm an American, and the right to do what I want with my land is what it means to be an American! My rights are guaranteed in the Constitution!" When these sentiments are expressed – often at great volume – you can literally see the exclamation points.

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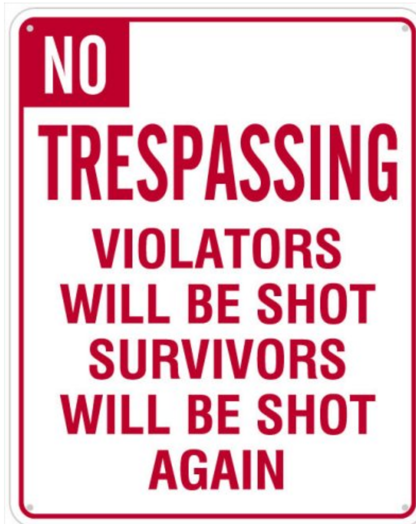
How true are these perceptions? What are planners to say when confronted like this? While one can expect strongly ideological commentators and citizen-activists to resist an alternative perspective, not everyone will. There are many people in the middle to whom planners can speak, via newspaper columns, through radio interviews, on blogs and at public meetings. It is in the interest of communicating to this middle group that I offer the following thoughts, observations and comments.

Most broadly, my argument is that planning, and especially land use regulation, is as old, and thus as American, as any other aspect of American life.



While zoning and environmental regulation are largely modern, 20th century inventions, they both have clear links to actions taken by colonial cities and states. And the history of the meaning of the "takings clause" of the Bill of Rights actually favor planning and planners' proposals, rather than those of private property advocates. Let me explain.

Several legal scholars make the point that land use regulation – often what many would consider onerous land use regulation – was commonplace in colonial times. (See for example the works cited by John Hart and William Treanor, as well as the outstanding monograph by John Ely.)

Treanor points out that colonial Virginia regulated tobacco-related planting practices to require crop rotation and prevent over planting. Colonial Boston, New York City and Charleston all regulated the location of businesses such as bakeries and slaughterhouses, often to the point of excluding them from their city limits.

Similarly, Hart provides extensive examples of aesthetic regulation in the city building process in Washington, D.C., New York City, North Carolina, Connecticut and Georgia (for urban form and property value purposes). Laws permitted the public or individuals acting on behalf of the public to flood another's property in order to promote economic development (the so-called mill acts which allowed the establishment of water wheels for grain grinding purposes). Also groups of landowners could force another landowner to drain a wetland and contribute to drainage projects, often against and over the wetland owner's objections (New Jersey and Connecticut passed these laws).

Rather than being a relatively new and un-American idea, land use regulation is a very old, very American idea. One way to understand what it means to be American is to understand that Americans have always actively managed the land use relationships we have with each other. Land use regulation is an integral part of American history, American culture and American law.

Why is this true? For a simple reason, actually. While it is reasonable to understand Americans as prizing individualism and self-initiative, we have always lived with a paradox. I trust myself to be a good and responsible land manager. I just don't trust you.

Land use regulation is our response to our lack of trust in our neighbors. To assure public order and security of property values I agree to restrictions on my property and my right to use it as I please because the same restrictions keep you from using your property as you please. Ultimately I benefit more from the guarantees I get from the restrictions to your property than the costs (economic and social) I bear from the restrictions to my property.

And then there is the matter of the takings clause. As every planner learns, attempts at land use and environmental regulation are subject to accusations of "you're taking my property, and the Constitution doesn't allow that." But is this true? The takings clause, the final twelve words of the Fifth Amendment of the Bill of Rights says: " . . . nor shall private property be taken for public use, without just compensation." Landowners argue

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that certain types of regulatory actions – especially those that substantially reduce the economic value of their land – are precisely those for which they are entitled to compensation. Alternately, if the public is not willing to compensate then the landowner expects the regulation to be repealed.

That landowners can even use this line of argument is itself a twentieth century development. From the time of its adoption in 1791 until the 1920s the takings clause was only about one thing – the physical expropriation of land by government. It was not written to deal with the issue of regulation, and was not understood as having any relationship to the right and responsibility of government to regulate. Up until the early part of the twentieth century the U.S. Supreme Court found virtually no limit to the government's right to regulate. In the 1915 case of Hadacheck v. Sebastian the court noted (in relation to local regulation):

> It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining . . . There must be progress, and if in its march private interests are in the way they must yield to the good of the community (Hadacheck v. Sebastian 239 US 394 (1915): 410).

What changed? The opinion of the court. In 1922 the Court introduced an idea which had never existed before – regulatory takings. In the case of Pennsylvania Coal v. Mahon the Court found that: "The general rule . . . is, that while property may be regulated to a certain extent, if regulation *goes too far* it will be recognized as a taking" (260 US 393 (1922): 415; emphasis added).

In other words, a regulation could be equivalent to a physical taking under the Fifth Amendment. If it was a taking, then compensation was required. But what the Court did not say was exactly where the line was that distinguished regulation that "goes too far" from regulation that does not.

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Are irate landowners correct to argue about the limits of government regulation? Yes and no. Yes in theory, no in practice. In theory there is a limit to government regulation, and on occasion the courts identify a regulation that, in fact, "goes too far." But in practice few actions of most contemporary governments cross this unspecified line. For all practical purposes, most of what most governments do is in the realm of Hadacheck – legitimate, reasonable, and necessary, given the complex balancing act of the greater public interest and individual burden.

Is planning un-American? No. It is as American as apple pie, motherhood, or the single-family house in the suburbs. Is land use and environmental regulation communist? No. It has roots in actions by American cities and colonies that predate even the formation of the United States itself. These actions have continued since the colonial period up until the present day.

Planning and planners can be subject to severe criticisms, often by those with compelling rhetoric. If planning is to succeed we must take control of the public conversation about it. We need not shy from this challenge. We have history, tradition and law on our side.

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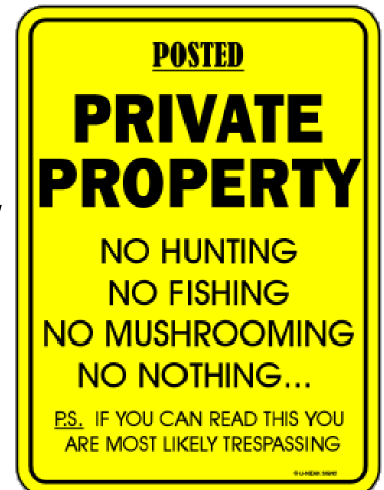

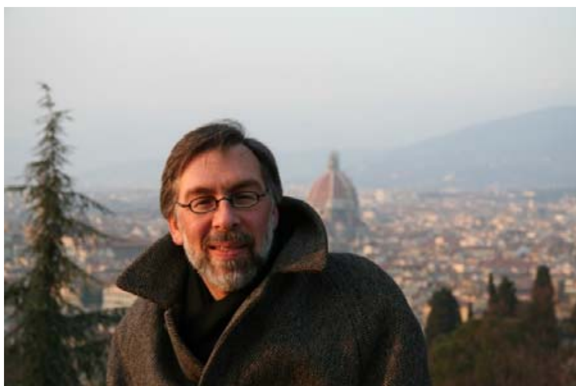

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The author has been writing about these issues for many years; see the publications noted on his website: http://urpl.wisc.edu/people/jacobs/; in particular see his 1999 article in the Journal of the American Planning Association, and his co-authored 2009 article also in the Journal, as well as his brief essay in the May 2009 issue of Planning, all cited above.