

Instruments of Land Policy

Dealing with Scarcity of Land

Edited by

Jean-David Gerber,
Thomas Hartmann, and
Andreas Hengstermann

 **Routledge**
Taylor & Francis Group
LONDON AND NEW YORK

(2018)

A U.S. perspective on obligations to build: planning professionals would be shocked

Harvey M. Jacobs

American applicability?

Most American landowners, land developers, and planning professionals would be shocked to read about the Swiss land policy tool of building obligation. In the limited space available to me for this commentary I will do two things – explain why Americans in general would be shocked, and reflect on how such a land policy approach fits into an ongoing dialogue about the core concept of what private property actually means.

Essentially nothing like the concept of building obligation exists in the U.S. What there is instead is a basically bi-modal basis for land use. Where land is privately owned, the landowner holds the land use decision. He can decide to under-use it or to use it to the limit allowed by zoning and other land policy tools. Zoning and related land policy tools provide a frame for land use, but they do not force a landowner to take advantage of the maximum limits available. Alternately, government can acquire the land (by free market sale or by expropriation) to facilitate more intensive land use.

Why is this the situation? American law and culture draw upon a notion of private property in which property functions as a bundle of rights. Regularly these rights include air rights, use rights, and the right to sell or lease (among others). A part of the use right is the right not to use and the right for the owner to select the timing for land use change. While other components of the bundle of rights have been modified over time (such as the air right), the use right – except as it has been shaped by zoning – has not been modified. So in the American context, government can incentivize and persuade towards land use change, especially land intensification, but it cannot actually control the timing or outcome of this change process.

What is interesting, though, is that the issue at the core of the building obligation as land policy has been an active component of American land policy debate for over a century, though almost always at the fringes of the debate. In the late 1800s, Henry George proposed a form of land taxation intended to force land intensification. His focus was on concentrated land holdings in cities; what he wanted was to provide for broader access to land for the working class. His work was very popular in the U.S. and

throughout the British colonies, and found root, in modified form, in a few American cities and in places such as New Zealand. George himself ran for the mayor of New York City in 1886 on a land reform platform; he lost (though whether legitimately or not is contested). So-called Georgist taxation continues to have adherents globally.

But for Americans, there is a skepticism about the appropriateness of government involving itself in land intensification decisions. This skepticism is rooted in the experience with urban renewal in the decades of the 1950s–1970s and continuing into the present. Urban renewal appeared to demonstrate that government ideas for land use were not always accurate or correct, and that governmental actions in this regard were often at the expense of politically weaker communities and communities of color.

This debate was renewed in the early 2000s with the internationally renowned U.S. Supreme Court case of *Kelo v. New London, Connecticut*. In this instance, the city of New London sought to acquire 115 privately owned properties for land consolidation and subsequent redevelopment by a private developer. The well-known, though not officially acknowledged, intent of this process was to provide the property to Pfizer Pharmaceutical for development as a research facility. As an economic development strategy the city was foreseeing jobs, increased land tax revenues, and thus increased funds for local services. One hundred owners agreed to sell, while 15 resisted. The city proposed to expropriate the properties of these 15 owners. Susette Kelo became the spokesperson for the group of 15. Arguments against the proposed action were multiple. Ultimately the U.S. Supreme Court sided with the city, allowing the expropriation to proceed. But the controversy over the acquisition became so intense that in the end Pfizer declined to participate in the project. Today the project site sits vacant. To its opponents, the vacant site and the displacement of former residents is a testimonial to ill-informed government decision-making for land intensification.

Property rights in evolution

The core issue embedded in the land policy tool of building obligation is how the right to build is (or should be) shared between the private owner and the public. What is most interesting to me is understanding the Swiss policy approach in the context of a global discussion about property.

Private property, even in the U.S., has always been a social and legal institution undergoing change. That change has most often been prompted by changes in technology or social values. So, for example, in the early twentieth century, after the invention and commercialization of the airplane, private owners lost their air right ‘to the heavens above’ so as to accommodate the design and implementation of air highways. Owners maintained an air right, but now it is truncated, and not to the heavens above. In the latter part of the twentieth century commercial property owners lost their right to exclude customers, which they had done previously on racial, ethnic and religious grounds. Following the civil rights protests of the period, this right

was removed from the commercial private property owners’ bundle (though it remains in the bundle of noncommercial private owners). In each case there was resistance to the change, but ultimately it prevailed.

Similarly, the allowable scope of public regulation of privately owned land through policy tools such as zoning has expanded over the century. So certain spatial planning goals such as protection of agricultural land in the peri-urban area or the conservation of unique ecological lands are now possible in ways that would have been unimaginable to policy designers of earlier eras. These changes also elicited (and can still elicit) pointed resistance but have, overall, been grudgingly accepted. But the widespread implementation of these approaches is more limited than one might expect because of Americans’ general skepticism about governmental action and their general adherence to an idea of strong private property.

Globally, including within the U.S., a debate has been reinvigorated about the very construct of property in a private property system. The form of private property dominant globally emerged out of eighteenth-century political-economic discourse and social change embodied in the American and French revolutions. The world of the eighteenth century was primarily rural, in decided contrast to today’s world. How appropriate is an eighteenth-century model of property for an urban world with changing global climate conditions? How appropriate is this model for addressing new ideas about land use and land scarcity? To many scholars and activists the answer is: not very appropriate. Just as ideas about air rights and the right to exclude changed with changing technology and social values in the twentieth century, so too could ideas about the shared right to build. Property rights scholars and activists highlight how changing technology (e.g. drones) and changing social values (e.g. same-sex marriage) continue to reshape the property bundle.

The idea embedded in the Swiss policy of building obligation is one that acknowledges both the present structure of property and the ability to use that structure to change it in the realization of new ends. It is creative, and it has potential to address an important land issue.

Will the Swiss policy of building obligation find any potential for implementation in the U.S.? Not soon, but maybe in the future. In theory, in law and policy there is nothing that would prevent such an approach. But social-cultural values and institutional arrangements need to change first. While that may seem like a large precondition, it should be kept in mind how far land policy has come in a century. If change in that period is judged to be significant, it can be believed that further and future change is also possible.

The global community of land policy researchers and practitioners need to continue to hear about this innovation. While its success in Switzerland will not guarantee adaptive-replication, its failure to achieve expected results could warn off those who might try to address urban land scarcity similarly. Property rights systems and land policy structures are multifaceted and highly adaptable. The Swiss approach to building obligation demonstrates this and encourages us.