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Property Rights: The Neglected Theme of 20th-Century American Planning

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Property Rights

The Neglected Theme of 20th-Century American Planning

Harvey M. Jacobs and Kurt Paulsen

Problem: Planning affects individual property rights, which have a special cultural significance in the United States, and it has often protected the interests of affluent and influential groups in the past. Thus, it is not surprising that many Americans perceive planning negatively.

Purpose: We provide a perspective on the role of property rights in the history of American planning, arguing for confronting these issues as part of finding a better way forward.

Methods: We reviewed primary and secondary historical sources and analyzed key legal cases and legislation.

Results and conclusions: Planners should honestly acknowledge the role planning has played in protecting elite property rights and should consider taking three steps toward a more positive future. First, they should tell their own story, rather than leaving this to opponents of planning. Second, they should highlight both the rights and the duties of private property owners and of the larger community. Third, planners should not shy away from stating the impacts their proposals would have on property rights.

Takeaway for practice: In order to accurately claim that planning manages property in the public interest, planners must understand and explain how planning proposals benefit and harm property owners.

Keywords: property rights, land use, planning history

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One of the most distinctive features of American planning is the role private property rights have played in shaping public land use planning. Scholars writing about the history of planning in the United States in the 20th century have recognized: the political power of development interests, debates over urban and regional form, the role of transportation, and, less often, planning as a method for managing social and racial conflicts (see, e.g., Hall, 2002; Peterson, 2003; Scott, 1969). Yet, we argue that this list neglects another important theme; planning has been used to secure and protect the property right interests of the affluent and influential classes and races. Critics view planning as one means by which the expansive regulatory power of government infringes on private property rights (Ely, 1992; Epstein, 2008). Instead, we argue that such a simplistic critique ignores the distribution of power and interests involved in public land use planning. Throughout the history of planning in the United States, the question has not been whether private property or government intervention will prevail, but rather whose property rights and interests are to be given more protection.

The thread of property rights runs throughout the history of planning in the United States. Many scholars agree that American planning has often promoted the property right interests of those with greater wealth and influence over those socioeconomically less well situated. As early evidence of this, we discuss New York City's 1916 zoning plan and the legal arguments and

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University of Wisconsin–Madison and teaches courses in comprehensive land use planning, housing, and planning history. The authors dedicate this article to the memory of their friend and colleague Don Krueckeberg.

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decision in the *Euclid* case. Property rights issues reemerged after World War II in the debate about urban renewal and interstate highways. We argue that planning was promoted to protect middle and upper class property right interests, often against those of the working classes, racial minorities, or immigrants. This continued with the rise of the modern environmental movement, during which planning led efforts to protect farmland, provide open space, manage urban sprawl, and promote smart growth. While each of these policies has environmental, spatial, and infrastructure justifications, they also help to protect the property right interests of those already living in affluent suburban communities (Fischel, 2004; Schmidt, 2008).

At the beginning of the 21st century, property rights are clearly central to the future of planning in two respects. First, the property rights movement has mounted a systematic attack on public planning, arguing in part that planning seeks to impose elite values on all groups, and therefore is out of step with core American values. Second, restrictive covenant-based homeowner's associations have become one of the fastest growing segments of the housing market (Lang & Nelson, 2007; McKenzie, 1994). Households are flocking to neighborhoods with property rights management schemes more detailed, restrictive, and rigorously enforced than public regulators could imagine possible. Both these developments raise fundamental, though dissimilar, property rights challenges for planning.

However, our intent is not just to relate this history. Planning is fundamentally about the allocation, distribution, and alteration of property rights. To discover how to meet the challenges from both the left and the right simultaneously and without hypocrisy, planners must acknowledge planning's historic role in protecting certain property rights. The planning community must also find a way to articulate the benefits of the current system of comprehensive land use and environmental plans and regulations if we are to continue to claim that this is how best to manage private property in the public interest.

Planning's Early Years

At the turn of the 20th century, American cities were great machines of growth, industry, and development, but also of congestion, corruption, pollution, and land speculation (Mumford, 1961). Following Progressive Era urban and social reforms, American planning sought to bring order to processes of urban development and to reshape existing cities in line with rational and comprehensive visions of beauty, order, economy, and justice (Fishman, 2000; Peterson, 2003). Planning history has traditionally

presented these planning interventions as managing private property for the greater public good, arguing for example, that the public interest was better served by order than by uncoordinated speculation and development (Krueckeberg, 1983). However, this story can alternatively be told with planning as a villain, protecting the property interests of privileged social and racial groups.

In the early 20th century, planning reforms that purported to improve the conditions of working classes and immigrants also established the upper classes and professionals as custodians of public interest and public virtue. This tension within planning also plagued allied reform movements, such as the Progressives, the City Beautiful movement, and housing reformers. The core property-related challenges in cities were how to address the concentration of overcrowded, low-quality worker and immigrant housing in tenements, and how to control the location of noxious industrial uses, particularly as these intruded into exclusive residential districts. Cities and states had been active in using a variety of police power regulations (building codes, height limits, tenement laws, industrial districts, and so on) to address these issues, but in an ad hoc, reactive, and localized manner (Kolnick, 2008). Both were problems of uncoordinated real estate speculation and development which private covenants and nuisance regulation were inadequate to control. Only comprehensive solutions would suffice.

But the question was not whether, but whose, property rights would be protected. This question split the social-progressive housing reformers and the proponents of planning as a scientific and professional field (Kantor, 1994). Both factions were for increased regulation of urban development; one to smooth the way for development and investment by rationalizing and ordering urban processes, and the other to improve the housing and working conditions of the lower classes. While both factions looked to European (particularly English and German) cities as models of what American cities could achieve through planning (Scott, 1969; Talen, 2005), they saw different lessons.

Benjamin Marsh, an early planning advocate among the social reformers in New York admired German cities for their four-fold system of land use planning and control: zoning (also called districting), land value taxation, municipal ownership of undeveloped land, and municipal planned suburban development of new towns. He and others who shared his goals hoped that public control over private land development would reduce overcrowding and speculation, thought to be the core urban problems. They also advocated land taxes designed to capture the "unearned increment" from speculators and developers as a way to

bring justice for the working classes (Kantor, 1994). Marsh criticized other planners as beholden to “real estate and corporate interests, without regard to the welfare of its citizens” (Peterson, 2003, p. 241)

When Frederick Law Olmsted Jr. and John Nolen won control over the National Conference on City Planning from Marsh and the anti-congestion reformers and housing advocates (see Peterson, this issue), the planning profession was set on a path toward technical expertise influenced by engineers, architects, and landscape architects, and away from public ownership and public regulation of private lands (Kantor, 1994; Peterson, 2003). Olmsted argued for only limited public regulation of private property because, “[America] relies for its progress primarily upon individual initiative under the stimulus furnished by the institution of private property” (Olmsted, 1916, p. 14).

One of the greatest ironies of American planning history is that social progressives and housing advocates were the initial enthusiasts for using zoning as the main mechanism for controlling urban development. When a districting system like Germany’s was initially proposed, it was often criticized by business interests, for example, as overly foreign or socialistic (Kantor, 1994; Peterson, 2003). Yet, planners soon began to realize that expanded police power regulation could provide the orderliness and control of urban development that real estate interests desired without requiring public ownership of land or a heavy land tax. By avoiding discussion of “the land question” (Kantor, 1994) (taxation of the unearned increment, public land ownership, and public development of urban land), the planning profession was able to secure public support from the upper middle class and commercial property interests (Peterson, 2003; Weiss, 1987).

The planning movement and its allies enthusiastically endorsed zoning. Los Angeles was the first to use citywide zoning to control locations of industrial facilities. Pushed by the Realty Board and the Chamber of Commerce, the 1908 Los Angeles ordinance was designed primarily to protect owners and developers of residential property (Weiss, 1987). In 1916, New York City adopted the first comprehensive zoning plan to include use and bulk restrictions covering the whole city. The zoning plan was promoted by commercial real estate interests to protect lower Manhattan office buildings and Fifth Avenue retail businesses, as well as by planners interested in protecting single-family home development in the outer boroughs (Fischler, 1998; Revell, 1999). Both developers interested in protecting residential areas from factories and housing reformers interested in limiting the spread of tenement housing saw zoning as a way to stabilize property values and rationalize urban development. The *New York Times* editorialized in favor of

the zoning plan, saying it would stabilize property values and was important to preserving the welfare of the city: “On the whole the plan is confidently believed by the ablest real estate experts to result in the near future in a stability of values” (“New plan for building heights and restricted areas will stabilize values, home and business conditions,” 1916). The *Times* editorial praising the zoning plan noted that it would protect all property owners from the invasion of manufacturing facilities, against which private restrictions (covenants) were proving useless and subject to protracted litigation.

New York’s comprehensive zoning plan, while less than a comprehensive plan, was prepared, endorsed, and promulgated by planners who shared with real estate interests the goals of rationalizing the urban landscape, stabilizing property values, and reducing congestion. As Peterson (2003) notes, the planning movement sought legitimation and acceptance from existing power structures, and aimed to reassure elite society that the planning ideal would improve cities without threatening existing institutional arrangements. Following New York’s example, planners and homeowners quickly enacted comprehensive zoning plans in hundreds of municipalities across the country (Krueckeberg, 1983; Revell, 1999). Soon thereafter, the purpose of zoning shifted from protecting commercial property interests to protecting single-family, detached, owner-occupied houses from all other land uses (Babcock, 1966; Fischel, 2004; Revell, 1999).

Residential districts made up exclusively of detached houses were an American planning ideal even before the time of Llewellyn Park, NJ, or Riverside, IL (Stilgoe, 1988). Now zoning had the ability to create and protect such ideal residential districts. However, during the early 1920s when zoning was spreading, the majority of Americans did not own their own houses (U.S. Census Bureau, 1926). Although planners may have hoped that zoning protection would create more investment in housing units, residential-only zoning was not intended to extend the benefits of property ownership to the working classes, immigrants, or racial minorities. Rather, protecting detached private residences meant preserving the property interests of those with greater means.

Some property owners charged that the expansion of municipal planning and zoning regulation in the 1920s interfered with private property rights without due process or equal protection (Kayden, 1989). Indeed, the protection of property rights figured prominently on both sides of the *Euclid* case (*Euclid v. Ambler*, 1926). Proponents argued that zoning protected property rights by excluding incompatible and nuisance uses (Revell, 1999), and that it would secure the public benefit of increased property values

through its comprehensive, rather than ad hoc or haphazard, approach to urban development.

The historically interesting question is why Justice Sutherland, not known as a friend of economic regulation, supported zoning as a valid exercise of the police power. Alfred Bettman, a leading planning advocate, filed an amicus brief on behalf of the National Conference on City Planning urging the court to uphold *Euclid's* ordinance. By all accounts, Bettman's brief convinced Sutherland (Claeys, 2004). Bettman argued that restrictions on industry and apartment houses were necessary to protect single-family districts, which would promote order and morality. Echoing the class, racial, and anti-immigrant bias of the time, Bettman argued that single-family housing produced better citizens than multifamily housing.

Zoning . . . promot[es] those beneficial effects upon health and morals which come from living in orderly and decent surroundings. . . . The man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, . . . [is motivated] by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. . . . Parents prefer to bring up children in such environment, not for any snobbish or aesthetic reasons, but because it promotes the health, mental, moral and physical, of the children. (Bettman, 1926, pp. 791, 794)

Ambler Realty intended to use its land for industrial development, not apartments, but was prevented by the zoning ordinance. In *Euclid*, Sutherland's decision went further than the question of industrial districts, opining on the nature of exclusive residential zoning. Buttressed by Bettman's brief, Sutherland quoted approvingly from a Louisiana Supreme Court decision that "the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district" (*Euclid v. Ambler Realty Co.*, 1926, p. 395). *Euclid* thus established that the police power could be used not only to separate incompatible uses as nuisances, but also to protect detached residences from all other land uses. Sutherland's opinion endorsed the dominant planning orthodoxy at the time that promoting single-family detached housing was important to securing the general welfare (Revell, 1999).

Euclid provided judicial support for two goals of the early planning movement: orderly real estate development to facilitate investment and preservation of the dominant social order (Fischler, 1998). Keeping apartment houses away from single-family residences maintained and perpetuated the spatial segregation by class and race which continues to characterize contemporary cities. Failure to plan for a mixture of housing types within neighborhoods worked against socioeconomic, racial, and ethnic integration.

Planning at Mid-Century

As historian Robert Fishman (2000) notes, the main institutional legacy of American planning in the 1920s was zoning. There was no fundamental reordering of the property rights relationship during the New Deal, although the federal role in economic development, economic regulation, infrastructure, and public housing expanded significantly during this period (Mohl, 1993). The Resettlement Administration's brief experiment with constructing greenbelt towns inspired by Ebenezer Howard's Garden City ideal was quickly thwarted by financial and property interests who objected to the federal government's ownership of the land (Hayden, 2003; Talen, 2005). Although Howard's original ideal involved cooperative ownership of land or limited-dividend housing developments, greenbelt towns looked like conventional suburban developments but were owned by the federal government (Talen, 2005). The political response to new towns suggested that the federal government could finance projects, homeownership, and infrastructure, but should not challenge the fundamental structure of private property. Furthermore, rather than investing significantly in public housing, federal housing policy instead focused on underwriting mortgages through the Federal Housing Administration (Fishman, 2000). The national policy underwrote and protected the property rights and housing values of homeowners, while providing only minimal quality public housing for the poor.

In the postwar optimism of the mid-century, planning addressed the needs for large scale infrastructure expansion and housing development in the suburbs as well as the crises of the physical and economic deterioration of central cities. One way to read the 1949 and 1954 Federal Housing Acts, which established and funded urban renewal, and the 1956 Federal Aid Highway Act, is that planners finally had the power and resources to implement the comprehensive planning ideal through influence on both urban development and transportation. Others see this period as one in which planners destroyed vibrant urban communities, facilitated suburban sprawl, and caused protests, freeway

revolts, racial animosity, and an anti-planning backlash that persists to today (Fishman, 2007; Mohl, 2004). Ironically, planners today seem far more comfortable interpreting the role of planning through the anti-authoritarian, anti-expert, anti-modern and pro-community, pro-poor, pro-environment criticism of planning that emerged from responses to urban renewal and interstate highways (J. Jacobs, 1961).

Planners had advocated slum clearance and urban redevelopment at least since the City Beautiful movement. Especially after the real estate crises of the late 1920s, planners came to share the beliefs of real estate interests that reinvigorating and stabilizing downtown property markets through modern “re-planning” would stem urban fiscal and population losses (Weiss, 1980). Postwar urban renewal and highway development thus represented a case of large scale public planning intervention to serve elite property interests, often at the expense of working class and African-American neighborhoods. Planners now had the power of eminent domain in addition to zoning to clear away competing and archaic land uses in order to implement comprehensive development plans. The coalition of planners and downtown development interests which pushed for urban renewal also saw in urban expressways a means to save urban centers from disinvestment (Fishman, 2000; Legates & Stout, 2000). Many planners counted it a victory for planning when, in *Berman v. Parker* (1954), the Supreme Court ruled that eminent domain to effectuate a comprehensive redevelopment plan constituted a valid public use, even when it involved condemnation of non-blighted properties in a blighted area.

Planning Renewed

By the beginning of the 1970s, planning faced a paradox. It remained vibrant, as the federal Department of Housing and Urban Development (HUD) was funding Section 701 plans that provided employment for many planners producing local and regional comprehensive plans (Feiss, 1985). However, there were also more questions about the utility of planning, and its appropriate social role. By this time the consequences of urban renewal were clear enough to lead many to question whether it had been wise policy (Teaford, 2000). These questions, widespread objections to planned freeways, and reaction to urban riots of the 1960s all contributed to a revolution in planning thought and practice (Davidoff, 1965; Moynihan, 1969; Peattie, 1968). Although it had never been easy, arguments developed during this period made it even harder to claim that comprehensive plans represented the interest of the public as a whole (Goodman, 1971).

However, during this same period, two developments related to property rights also revitalized and refocused planning: the quiet revolution in land use and the birth of the modern environmental movement. Prominent land use scholars had been arguing for some time that land use planning was failing because it was being implemented by local governments using zoning as the primary mechanism (Babcock, 1966; Reys, 1964). Bosselman and Callies (1971) offered examples of more centralized planning at the state level in Hawaii, Vermont, Wisconsin, and elsewhere to support their claim that a quiet revolution was taking place and that it was proving effective.

While the quiet revolution was primarily about the scale at which land use planning was implemented, it was also about property rights. As Bosselman and Callies (1971) themselves note in the closing chapter of their landmark report, “[I]f one were to pinpoint any single predominant cause of the quiet revolution it is a subtle but significant change in our very concept of the term ‘land,’ a concept that underlies our whole philosophy of land use regulation” (p. 314). In raising the question of which level of government was most likely to plan in the interest of the broad public, Bosselman and Callies called attention to how difficult it was for local decision makers to constrain the property options of their neighbors and friends. Increasing the scale at which these decisions were made promised more rational public planning that was less subject to manipulation by local property interests. “‘Land’ means something quite different to us now than it meant to our grandfather’s generation . . . [W]e are drawing away from the 19th century idea that land’s only function is to enable its owner to make money” (p. 314). They went on to note the then emerging idea that land should be seen as a community resource rather than a purely private commodity.

To a large extent, this perspective dovetailed with that of the emerging environmental movement. In what is perhaps the most cited paper in the field of environmental studies, Garret Hardin, a population biologist, popularized the phrase “the tragedy of the commons” (Hardin, 1968). Hardin’s phrase partially justifies the quiet revolution and much subsequent environmental activity by state and federal governments, as it refers to situations in which individual property owners, individual users of a resource, single local governments, or single states act rationally to maximize the value of their own property rights bundles, but the cumulative effect is socially irrational or suboptimal. Some planners may be surprised to know that Hardin’s solution is one commonly advocated by economists: to make property rights better defined and more secure. “The tragedy of the commons . . . is averted by private property” (p. 1245). He goes so far as to argue, for example, that

America's public lands (parks, forests, etc.) would be better managed if they were held as private property (p. 1244).

Hardin's (1968) article brought property rights fully into the public conversation about environmental management and planning. The problem Hardin identified was that when property rights are defined so that individuals can keep the benefits of a resource for themselves, but share any costs or disbenefits with the larger society, they will not use the resource in a socially optimal way. This idea affected substantive policy on air and water quality, wildlife habitat, farmlands, wetlands, and urban sprawl. Case law at this time used a similar idea to challenge suburban exclusionary zoning; that local governments excluding affordable housing and specific racial groups were pursuing their own interests to the detriment of the larger region (see, e.g., Fischel, 2004; Williams, 1971).

There were two types of solutions offered. First, expand the quiet revolution; increase the scale of public decision making to internalize both benefits and costs, and more socially optimal decisions will result. Second, fundamentally rethink what individual property rights mean. Scholars in the early 1970s began exploring radical ideas about ownership of the natural world, some emanating from court cases (e.g., Wisconsin's *Just v. Marinette County*, 1972), and others extending new ideas about environmental and natural systems (Large, 1973; Stone, 1974). New environmental protection and management programs for farmlands, wetlands, and species habitat illustrated these new approaches.

Many of these programs for land use and landscape management drew upon the skills and perspectives of planners able to think comprehensively about people and resources in a regional context. According to observers and critics on both the left and right, these programs were implemented to address the interests of the growing middle class (Heiman, 1988; McCloughry, 1976). Heiman, a scholar on the left, maintained that during the 1970s and 1980s the middle class defined quality of life in part as the ability to actively and passively consume various aspects of the natural environment.

For planners these developments were fortuitous. Taken together, the quiet revolution and the environmental movement provided theoretical and practical renewal for a planning practice that was under increasing criticism for actively contributing to the decline of cities, promoting racial homogeneity, and being captive to development and sprawl interests. Reinvented in this vein, planning was able to reconnect its tradition of comprehensive, long-range, rational, regional planning with the property rights interests of the middle class, its most durable and important clientele.

Pushing Back and Stepping Aside

What renewed planning in the 1970s, however, has become the basis for the challenge to planning since 1990. As chronicled by others, the quiet revolution in land use control changed over time, and according to some, transformed into the smart growth movement (Daniels, 2001; Popper, 1988; Weitz, 1999). The environmental movement, including environmental planning, has also grown and evolved. Both smart growth and environmental planning seek to address the failure of individually rational behavior to yield socially optimal results, in both cases relying heavily on the public sector. However, by the late 1980s, political conservatives developed a systematic critique charging that planning posed fundamental threats to individual property rights and local control, and threatened Americans' core liberties (McCloughry, 1975, 1976). Conservatives argued that protecting private property was a bedrock function of the U.S. Constitution (Ely, 1992; Epstein, 1985, 2008), and no matter what social functions planning served, restricting property rights was not legitimate.

This critique led to what was originally self-labeled the "wise use" movement to roll back land use and environmental planning (Gottlieb, 1989). This movement encompassed a diverse membership, including in-holders in state and federal lands, motor-based recreationists who used public lands, corporate resource extraction industries, and ideologically committed private citizens who believed in small government and strong property rights. Its proponents' own understandings of their goals, strategies, and representation evolved over time (see, e.g., the discussion in Brick & Cawley, 1996 and Yandle, 1995; and the critical observation in H. M. Jacobs, 1998a). Today, this substantive critique of planning is more focused on the regulatory takings doctrine emerging from *Pennsylvania Coal v. Mahon* (1922), in which the court noted "[T]he 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" (p. 415). From the perspective of the private property rights movement, most public land use and environmental management programs go too far and require either compensation to the landowner or revocation of the regulation.

Since the late 1980s, members of this movement have been seeking to formalize these understandings by passing federal and state laws designed to blunt the impact of planning activities (Emerson & Wise, 1997; Folsom, 1993; H. M. Jacobs, 1998b, 1999; Pollot, 1989). But though approximately two dozen laws were adopted at the state level, they do not appear to have had much substantive impact on planning practice (H. M. Jacobs, 1999, 2003).

Thus, by the end of the 1990s, the private property rights movement shifted to using ballot initiatives, focusing first on Measure 7 in Oregon in 2000 (Abbott, Adler, & Howe, 2003). Measure 7 aimed to overturn the state of Oregon's comprehensive land use planning program that was then nearly 30 years old. Measure 7 passed, but was overturned by the courts on an appeal brought by the environmental and planning communities. In 2004, property rights advocates returned with Measure 37, which had the same purpose as Measure 7 while also addressing the state constitutional concerns of the courts. Measure 37 was approved by over 60% of Oregon voters (H. M. Jacobs, 2008). The argument in favor of Measure 37 had been that Oregon planning and regulation were too strict, too unfair, and reflected elite values and perspectives on landscapes and land use.

The Supreme Court's decision in *Kelo v. New London* (2005) appeared to be a blow to the private property rights movement. However, it actually allowed the movement to argue that there is no effective constitutional check on government's power for planning purposes, and that without preemptive action, citizens' rights were in danger (H. M. Jacobs, 2008). To date, nearly 40 states have adopted legislation blunting the impact of *Kelo*. Building on the negative public reaction to perceived planning excesses, the private property rights movement supported so-called *Kelo* and *Kelo-plus* initiatives in 2006 in a set of western states that included Arizona, California, Idaho, and Washington (H. Jacobs, 2007). With the exception of Arizona, these failed to gain voter approval, but they kept these concerns in the public eye.

While planning was under attack in this way during the 1980s and 1990s, it became evident that many homeowners and real estate developers were voluntarily restricting property rights more stringently than would be possible under public zoning (Lang & Nelson, 2007; McKenzie, 1994). The growth of master-planned communities with restrictive covenants and the rise of homeowner associations resembled trends in times before zoning existed (Fogelson, 2005; Korngold, 2001; McKenzie, 1994). Such developments are some of the fastest growing segments of real estate, yet have received little attention in planning theory and history (Nelson, 2003). Ironically, it was the belief that private covenants were ineffective that created the original support for zoning. Now, developers and homeowners are using restrictive covenants to supplement public zoning, presumably because zoning offers inadequate protection of property values for those who can afford to live in these new communities.

Local governments began to encourage or even require homeowner associations beginning in the 1970s as a response to fiscal crises, since privatized services funded by

property assessments would reduce their obligations to fund them publicly, and restrictions would protect property values (Dyckman, 2008; McKenzie, 1994). Associations are popular with developers and homeowners because the restrictions are permanent, unlike zoning, which may change if local politics change. However, we argue that the popularity of homeowners' associations can also be explained by federal court challenges to zoning and growth management under civil rights claims, and by state court challenges under exclusionary zoning claims in the 1960s and 1970s. Judicial scrutiny based on civil rights claims threatened the ability of local planning and zoning to protect existing residents' property values. Restrictive covenants allow those who can afford it to supplement community zoning restrictions with more restrictive requirements specific to their neighborhoods.

Both the post-*Kelo* response and the resurrection of restrictive covenants seem to indicate that large segments of the population believe public planning does not adequately protect property rights, though for different reasons. The public reaction to *Kelo* suggests that planning is too closely allied with local political leaders who do the bidding of development interests to adequately protect individual property rights. At the same time, the rise of homeowners associations suggests that people are not entirely confident in planning's ability to protect the single-family home from the threat of neighborhood heterogeneity.

Conclusion

As the 21st century begins, there is widespread disagreement over the meaning of property rights in the United States. At its best, planning balances individual property rights with the community's interest in how that property is used. But it is not often celebrated for this. Disagreements over redevelopment, urban sprawl, smart growth, transportation infrastructure, the appropriate use of comprehensive plans, zoning, tax increment financing, and eminent domain appear daily in the print and electronic media throughout the country. Planning allocates and reallocates property rights, and these decisions have real distributional consequences. As a result, planning is almost always contentious.

The history of planning in the United States has a thread of property rights running through it. Though planners may aim to reshape and redefine private property rights in order to achieve the greater good, this noble ambition has too often been used self-servingly. There is some truth in the critics' claim that planning protects the property interests of the middle and upper classes, cloaking

actions that further specific class, racial and property interests in the language of the public interest. When planners fail to understand this history, they often misunderstand the nature of the conflict that emerges over planning proposals.

Planners are often surprised at the lack of trust in public planning and that they and the planning function are attacked from both the political right and left by development and community groups, as well as by political leaders. In responding, they often fall back on the technical and professional language of bureaucracy rather than engaging this broader public conversation. Planning cannot escape its relationship to property rights. Many conflicts arise precisely because there is no consensus on the appropriate and fair use of property. Individuals rarely consider the interests of the community at large, the regional environment, and future generations when they make decisions about property management and land use change. Someone must represent the interests of present, future, and natural communities in the use of land as well as the interests of those traditionally excluded from decision making, and planning cannot abandon its central obligation to do so. Indeed, planning is unique among the professions in claiming to be a steward of the overall public interest.

We are calling for planners to understand their history and its implications honestly. This will provide practitioners with a clearer and less naïve basis for practice. The public reaction to planning in the aftermath of Measure 37 in Oregon, *Kelo*, and subsequent state initiatives, represent real citizen concerns that public planning does not fairly represent their interests and values. We believe these challenges can be partially addressed by undertaking the following three related projects.

First, planners should tell their own story about how planning relates to property. The contemporary public rhetoric that has emerged from the property rights movement is strongly one sided in how it portrays American history, what America's founders thought about property, and the appropriate relationship between public authority and private property. Although the property rights movement's view of history is distorted, its rhetoric seems to have captured the public mood, and its simplified story is culturally and politically compelling. It highlights the costs, but not the benefits, of public planning. Planners should not avoid this public conversation, nor allow planning's critics to capture the high ground. In their interactions with citizens and elected officials, planners should continually reinforce the understanding that planning, regulation, and related activities (such as the taking of land for economic development purposes) are as old and American as America itself, though never without controversy.

Second, planners should use different language to discuss property, especially private property. Some Americans see private property as a bulwark protecting individual rights from government incursion. This cultural ideal of ownership has often been invoked to suggest a nearly absolute power of individuals to use their property without corresponding obligations to others, save the common-law restriction against harming neighbors. The 1970s environmental movement renewed an equally valid and old concept that balances the rights of property with the rights of the larger community within which individual rights are given their meaning. There have been many calls to rethink what property means, what ownership means, and how to balance private and public rights and duties in property. Planners must develop a way of talking about property which highlights both rights and duties of both private owners and the community. Although this will not be easy, we cannot ignore the opportunity to ennoble public discourse.

Third and finally, we suggest that the planning community take up the challenge posed by the first generation of state property rights laws to prepare something like a property rights impact statement as part of the planning process. The initial idea, modeled on environmental impact assessments, was to assess the degree to which proposed plans and regulations would take private rights if adopted. The property rights movement clearly intended these to emphasize the negative effect of public action on private property rights, requiring government to fund research to thwart its own proposals for action.

We argue for a broader concept, requiring impact statements that highlight both the costs and the benefits, and the short and long term consequences of both action and inaction on the proposed plans or policies. Such an exercise has the potential to clarify public discussion in the best tradition of applied planning research. How will planning proposals modify or create property rights? How will the effects of these modifications be distributed? Who will gain and who will lose? How will future generations and the environment be affected? The answers to these questions will not be obvious, nor will there always be consensus about whether the proposed plans and policies are fair. But if such questions are not asked and answered, planners themselves remain unaware of real consequences of what they propose, and their proposals may seed social conflict rather than consensus.

Planning in the 20th century has had a consistent property rights theme which our standard histories have often neglected. The organized reactions to Measure 37 and *Kelo* were evidence that many Americans do not see planning's positive contribution but see primarily negative results from planning. We should not ignore property

rights in the 21st century, but should embrace this theme to help shape public discussion and provide a renewed basis for the claim that planning helps communities manage private property in the public interest.

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