The Voluntaryist

Whole Number 80 *"If one takes care of the means, the end will take care of itself."* **June 1996**

"Beyond the Wit of Man to Foresee": Voluntaryism and Land Use Controls

By Carl Watner

Introduction

The impetus for the research behind this article was a Spartanburg, S.C. HERALD-JOURNAL editorial of June 25, 1995 (p. A15) headlined "Zoning isn't a loss of rights: zoning is a protection rather than an elimination of property rights." In "double-think" language right out of *1984*, the writer justified zoning controls because "zoning prevents surprises." According to the editorial, without zoning there is nothing to prevent the value of one's property from being diminished when a neighboring property is suddenly developed as a junkyard or landfill. The author of this piece hadn't realized that there are ways of avoiding land use surprises on the free market, such as deed restrictions, privately planned developments, and purchase of buffers and development rights. Furthermore, the writer didn't understand that in a free market, it is not monetary values that are guaranteed, but rather the right to use one's property peacefully. The value of your property is a function of what other's will pay for it. No political statute can change the law of supply and demand.

As I began reading about the history of land use controls in the United States, I discovered that one of the justifications behind early 20th Century zoning laws was that "zoning protected property rights." New York City's Fifth Avenue merchants wanted to be protected from the invasion of the garment industry, and San Francisco businessmen wanted to be insulated from the spread of Chinese laundries throughout their city. Probably few, if any, of the early supporters of zoning understood that zoning was actually a violation of property rights: that political controls over private land use constituted a gross violation of the free market concept. Researching the topic further, the same conclusion was constantly buttressed: total private property rights have never existed in this country. There have always been political controls on the use of one's land and property. These laws have always gone beyond the common law rule which recognized that one should not use one's own property in a manner to physically invade another's property. These political controls have included nuisance and public health laws, taxes on the value of real property, and the legitimization of property confiscation for "public use" via the Fifth Amendment. In short, government "protection" of property rights is one of those political myths which the government uses quite effectively to legitimize its conquest over us. Governments and property rights are like oil and water; they don't mix. Despite all the propaganda and rhetoric to the contrary, governments can only negate property rights, not protect them.

Up to this point, my research had been primarily negative, focusing on the statist aspects of zoning. Voluntaryism, however, is a philosophy of living peacefully with others; the advocacy that all human affairs should be by mutual consent. In the absence of a coercive government, how would the problems addressed by nuisance and zoning laws be handled on the free market? Were there good historical examples of common law rules which provided the basis for peaceful land use and development, without neighboring property owners feuding with one another? Yes there were, and prime examples of voluntaryist land use controls were found in such private developments as Levittown, N.J., Reston, Virginia, and Columbia, Maryland (developed by The Rouse Company). In Columbia during the early 1960s, The Rouse Company bought over 15,000 acres of land between Baltimore and Washington. This was done without the use of eminent domain or resort to condemnation proceedings. Nevertheless, there were five "holdouts," property owners who would not sell. Imagine what would have happened to these property owners if The Rouse Company had been a government entity. Despite these objectors, Columbia became one of the largest and finest private communities in the world. Everything proceeded on the basis of mutual consent. Rouse purchased the land from willing sellers, placed deed restrictions upon its future use, and then resold the land to willing buyers. In short, I discovered that there were various ways that private communities have provided "public goods" without interference by coercive governments. Thus, the purpose of this paper is not only to explicate the negative history of political zoning, but to shed light on the positive, voluntaryist approach to private land use controls.

Zoning: A Police Power

There are basically four ways that governments exercise power and control over "privately owned" land. Zoning is a subcategory of one of them. The four methods are: 1) the power of eminent domain (the power of the government to take title to private property by paying a compensation of its own determination); 2) regulation of land use via zoning and nuisance laws which are derived from the state's police power to protect the public; 3) taxation of land; and 4) government expenditures on infrastructure - such as its provision of water, sewerage, and highway systems. Although the last two modes of government operation are as pervasive (and pernicious) as the first two, they are not a matter of concern in this article.

What distinguishes the power of eminent domain from the power of regulation is whether or not government takes title to the land in question. When eminent domain is exercised, the private land owner is dispossessed of the title to the land and is offered some monetary compensation. When a government agency builds an airport runway, it will condemn, and must pay for, the land upon which the runway is situated. Owners of land near the airport will be prevented from building high-rises on their land so that airplanes may approach the runway. Both the original owner of the condemned land and the adjacent prop-

continued on page 2

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Voluntaryism and Land Use Controls

continued from page 1

erty owners lose property rights. In the former case, the original owner loses all right and title to the property in return for whatever compensation the government awards; in the latter, the owner retains title. The portion of his building rights that have been forfeit is not a compensable loss.

Since the power of eminent domain has been discussed in an earlier issue of THE VOLUNTARYIST (see Whole No. 32, "Property Rights or Eminent Domain?") no extended discussion is necessary here. However, a few additional comments about the contradictory nature of government in the United States are in order. In contrast to most of the constitutions of the fifty states, there is no explicit grant of the power of eminent domain in the United States Constitution. Nevertheless, the courts have always viewed its exercise as an inherent attribute of the federal government's sovereignty. Thus the Fifth Amendment to the Constitution legitimizes the exercise of a power which is not even mentioned in the document it amends. To claim, as the Fifth Amendment does, that private property shall not be taken for public use without just compensation, means that property rights are not absolute and that the government may take property from an owner without his or her consent. The fact that compensation is to be offered is beside the point. (How can the compensation be termed "just" if the original owner does not want to sell?) Any time that the power of eminent domain is exercised, a theft has occurred. The government has stolen land from a person unwilling to sell.

The constitutions of the fifty states are also the basis for the exercise of each state's police power, and all "private" property in the United States is held subject to the police power. The police power refers to government actions for "the promotion and maintenance of the health, safety, morals, and general welfare of the public. It is grounded in the belief that an overriding public interest of general, widespread benefit asserts a superior claim over private property. Zoning is a perfect example of this principle. When the police power is applied to all citizens and landowners in like manner for broad public benefit, no monetary compensation is due those whose property is 'used' or taken." (For example, the police power is the basis for state seizure and slaughter of diseased animals, and the seizure and destruction of buildings in order to put out large fires.) Since the federal and state courts have consistently upheld zoning as a proper extension of the police power, they have also determined that governments need not be responsible for changes in the value of property due to zoning laws. In other words, the loss of potential market value caused by zoning classifications, does not impair the validity of zoning legislation or impose any obligation upon the legislature to compensate the land owner. Supreme Court Justice Oliver Wendell Holmes summed up the statist view of the police power in two different cases. In 1922, in the Pennsylvania Coal Case he wrote that, "Government could hardly go on if, to some extent values incident to property could not be diminished without paying for every change [caused by] the general law" (269 US 393 at 413). Six years later he wrote: "Property must not be taken without compensation, but with the help of a [legal] phrase (the police power) some property may be taken or destroyed for public use without paying for it, if you do not take too much" (277 US 189 at 209).

Zoning may be defined as the method by which the legislature of a political jurisdiction exercises control over land by dividing or classifying it into certain areas and then subjecting it to particular planning restrictions. Zoning laws now control such matters as how the land may be used (residential, commercial, agricultural, etc.), the type of buildings that may be erected, the size of lots, the width of streets, the height of buildings, and setback requirements (minimum distance of buildings from property lines). In some municipalities there is still no formal zoning, even today. Nevertheless, in a city like Houston, Texas, where this is the case, there are subdivision controls, a minimum housing ordinance, a building code, and seventeen separate land-use ordinances covering things such as trailer parks, rendering plants, and commercial landscaping. In other areas without zoning, there are performance standards. For example, if you have a junkyard on your land, the local government requires you to screen it off from public view. In most cases, even if there is no zoning, these government regulations amount to the same thing: government control over privately owned resources. In other countries, this is something we call fascism. In short, zoning "permits" the owner to retain title to his land, while dictating the owner's "right" to do certain things if he wishes to develop or use the land.

In areas where zoning only permits one use, government policy effectively dictates how the land may be used, if the land owner is to develop the property. The free market way of accomplishing this would be for neighbors and/or adjacent land owners to negotiate a private covenant under which the property owner in question would agree to forego certain future usages or to restrict the property to a specific use in the future. The difference between this free market approach and that of legislative zoning is that on the free market a person's neighbors would not be able to force the owner to make such promises. Under zoning legislation they do; the majority uses the police power to impose their view of development on the neighborhood. If a landowner uses his land in a manner not consistent with the law, he will either be fined, jailed for contempt (until such time as the landowner agrees to cease and desist the illegal usage), or the land itself will be seized and confiscated by the public authorities in their efforts to end the illegal use. Ultimately, the police power means the courts will uphold the right of the police to kill a person who refuses to abide by the will of the legislature .

Nuisance Law versus Zoning

The Latin legal maxim, 'Sic utere tuo ut alienum non

laedas', epitomizes the common law approach to land use controls: "Use your own thing so as to not harm that of another." At English common law, the basic limitations on the use of property were incorporated in the law of nuisance, the action that a landowner could bring if his right to the use of his land was being interfered with. Thus the common law of nuisance was used to resolve land use disputes. At common law, a nuisance was defined as "the substantial interference with the plaintiff's use of his land by the unreasonable conduct of the defendant." Nuisances extended to "everything that endangered life or health, gave offense to the senses, violated the laws of decency, or obstructed the reasonable and comfortable use of property." The general principle (based upon the idea of homesteading, or "a prescriptive easement," as the common law terms it) was that land use prior in time would prevail over latter ones. For example, if neighbors of a landfill found its operation offensive, they would only be able to prevail against it as a nuisance, if their housing development predated the development of the landfill. If the landfill was in operation before their homes were built, its operation would not be prohibited or be deemed a nuisance. Thus, noise, smoke, and offensive odors are not necessarily, in and of themselves, nuisances. Under certain circumstances, one may have an affirmative easement to maintain a nuisance on one's own land (either by "grant, implication, or prescription").

During the late 19th Century, the State and its judicial courts took over the law of private nuisance and created a new concept of "public nuisance." This became the bridge that linked the law of private nuisance to the 20th Century law of zoning. In bringing a suit of private nuisance, one or more affected landowners are generally the plaintiffs. In a public nuisance suit, a public officer (zoning or health official) brings suit to abate a nuisance that affects a large number of people. A public nuisance is further removed from that of private nuisance when legislative bodies declare certain kinds of land use to be a public nuisance, even though there are no harmful consequences traditionally regarded as a nuisance. An example of this might be the operation of a hair salon in one's home, thus violating a law which prohibits businesses in a residential district.

The key regulatory device for the enforcement of zoning regulations is the requirement that all new construction or new land uses (and even substantial rehabilitation of existing structures) may not be undertaken until official authorization is given. Zoning or building permits must be obtained before anything is done on the land. Failure to obtain a permit, or failure to comply with the zoning or building codes automatically makes the property a public nuisance. Building codes include regulations regarding the types of materials used in construction, fire safety, and the use of gas, water, and electricity within the building. In addition, housing codes often exist, and are frequently made retroactive. Such codes set out minimum requirements for any buildings in which human beings reside, whether or not newly constructed. Although it may not happen often, people have been evicted from their habitations for failure to meet the specifications of a housing code. At other times, buildings have been torn down by the political authorities because their owners would not obtain building permits or bring their buildings into compliance with the building code. Zoning codes may be applied retroactively, so as to outlaw preexisting, nonconforming uses. The police power of the state, exercised under the guise of zoning, building, and housing codes, is one of the most coercive elements of political government.

A Very Brief History of Zoning

The record of land use controls in the Anglo-American legal system is one of the triumph of the State over private property. The English Parliament, as early as 1588, and again in 1592, passed national land use legislation regarding the size and location of housing. In 1606, in "The Case of the King's Prerogative in Saltpetre," it was decided that a private landowner was obligated to build military fortifications and trenches upon his own land, at his own expense. The "King's prerogative" or "police power" mandated that his efforts were noncompensable since they were in the "public interest" and for "the general welfare."

In the American colonies, a similar ideology prevailed. Colonial land controls took various forms, from the requirements that the colonists construct fences and plant shade trees, to the restrictions in Boston in 1692 that certain industrial uses be confined to particular areas of the city. New York City in the same period approved legislation prohibiting animal slaughterhouses altogether. Government controls existed throughout the 1700s, but came into their own during the 19th Century. In 1811, the New York City Commissioner's Land Plan compulsorily divided the city into lots 25' x 100'. In 1826, New York City authorities prohibited a church from using its burial ground. "The church sued; and the court, citing protection of community health, upheld the law." During the 1860s, tenement housing reform originated in New York City, where the first regulations outlawing public privies and prohibiting basement occupancy were passed in 1867.

A city law of Modesto, California in 1885 was probably the first modern zoning ordinance in this country. It prohibited the establishment of public laundries or wash houses in certain parts of the city. A similar situation existed in San Francisco, where city authorities objected to the lack of drainage, and the nuisance resulting from the laundry water being turned onto city streets. There, laundries were prohibited, too, unless licensed by the city. On December 28,1885, a Chinese laundryman, Yick Wo, was arrested and prosecuted for operating an unlicensed laundry. The case was appealed to the Supreme Court of California, where his conviction was upheld. Other California litigation, as well as cases decided by the United States Supreme Court, "established the right of municipal authorities to restrict practically any kind of business, the operation of which might be a menace," or a threat to public safety, sanitation, or morals within city boundaries. Under this reasoning, the operation of livery stables was restricted in St. Louis in 1893.

By the beginning of the 20th Century, the agitation for more comprehensive land use controls began. In 1904, Baltimore City passed an ordinance limiting the height of city buildings. Similar laws were passed in Indianapolis, New York, and Boston, where height districts were created that covered the entire city. The most fully zoned city of the time was Los Angeles, where district zoning went into effect in 1909. This legislation, upheld by the state courts in 1911, "established the right of the city to regulate any lawful business, by holding that the power to regulate the carrying on of certain lawful occupations in a city includes the power to confine their operation to certain limits, whenever such restrictions may reasonably be found to protect the public health, morals, safety, and com-

fort." The Los Angeles law also included a retroactive provision, under which nonconforming uses could be terminated.

By 1913, homeowners and real estate men in Wisconsin, Minnesota, and Illinois had lobbied their respective state legislatures to empower cities of certain size to "establish residential districts from which manufacturing and commercial establishments would be banned." In New York, the cities of Syracuse and Utica legislated "residence districts" in which buildings other than single or two-family dwellings were prohibited. In December 1913, another official New York City document was released which supported zoning (REPORT ON THE HEIGHTS OF BUILDINGS...). In 1914, the New York State legislature amended the charter of New York City to permit the City's Board of Estimates to zone the city. It took two years of further agitation by the Fifth Avenue merchants before a zoning resolution was passed on July 25, 1916. (The Fifth Avenue Association, representing those who owned or occupied the city's most expensive retail land, "demanded that the city protect their luxury block from encroachment by the new tall buildings of the garment district.")

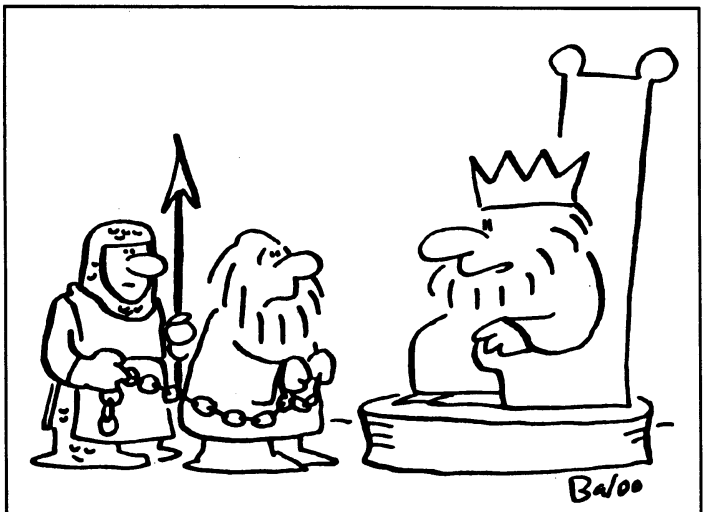
During the first two decades of the 20th Century, business and professional groups were instrumental in bringing about local zoning ordinances. For example, the Los Angeles Realty Board was highly supportive of the first city-wide zoning in their city. J.C. Nichols, a nationally prominent builder and developer from Kansas City who relied upon private deed restrictions in his residential subdivisions, pointed out that this was not enough. He said that residential developers required municipal assistance (in the form of zoning laws) to control unregulated development around their privately created communities. Other architects, city planners, engineers, and real estate men all believed in the desirability and "necessity to bring some order out of the chaos that has resulted from the anarchistic development of our cities." Such groups as the National Association of Real Estate Boards, the Chamber of Commerce of the United States, the American Society of Civil Engineers, the American Society of Landscape Architects, and the National Housing Association all banded together to push zoning. Zoning (and building codes) not only eliminated many of the problems traditionally associated with the operation of private deed restrictions, but was a way of eliminating many small competitors in the land development and building industries. These professionals and large scale developers and builders were also joined by city politicians and bureaucrats, who expected that their sphere of influence would be broadened under zoning regulations. Future development could be "regulated" so that city authorities would not be overwhelmed by the demand for municipal services. Most backers of zoning were probably sincerely interested in promoting orderly land use and better communities, but they also saw zoning as a tool to buttress their personal profit and power.

Court Cases on Zoning

Although the courts have occasionally challenged the application of a zoning law to a particular piece of property, they have always upheld the exercise of the government's police power, and have "never held against zoning in any basic sense. This carries forward a tradition from the earlier days, both in this country and England, in which the rule of government" prevailed over private property rights. The authors of this statement, Linowes and Allensworth, conclude that in Anglo-American law there is no right to use your property as you like: "[H]ere are important constraints on the use of property that suggest that property rights do not exist."

An early 20th Century example of this is the California case of Hadacheck v Sebastian, which was eventually decided by the United States Supreme Court (239 US 394). In 1902, J.C. Hadacheck acquired 8 acres of land, outside the city of Los Angeles. The land, which contained clay deposits, was devoted to the manufacture of brick. Around 1909, after the city had annexed the land on which the brickyard was located, a municipal ordinance was passed which limited brickmaking to certain areas of the city. Hadacheck challenged the law, on the basis that denying him the use of his land as a brickyard lowered the value of his real property by several hundred thousand dollars. Both the California Supreme Court (in 1913) and the US Supreme Court (in 1915) decided that the city had the right to prohibit what hitherto had been a lawful use. "The police power was available to stop nonconforming uses, to deal retroactively with uses incompatible with those allowed by law." According to this reasoning, there is no such thing as private property rights in the United States. At any time, the political authorities, may, under the guise of zoning and the police power, declare a hitherto legal use "nonconforming" and prohibit its exercise. And the prohibition against "ex post facto" laws does not apply because most zoning enforcement is a civil action, not a criminal one.

By the early 1920s the national zoning movement had achieved remarkable results. In September 1921, Secretary of Commerce Herbert Hoover appointed an Advisory Committee on Zoning. Within a year, the Department of Commerce issued a Standard Zoning Enabling Act, which furnished state and local governments a model law under which to empower their towns and cities to exercise the police power to zone. By 1925, over one-quarter of the states had passed similar enabling acts. (Zoning also received a "boost" in 1934, when the Federal Housing Administration was created. Only builders in municipalities with zoning regulations were qualified to receive FHA mortgage insurance.) The supporters of zoning believed that when a test case went before the Supreme Court that the Court would be more inclined to support zoning if it



"I hate to cut your head off, but it's all part of the political process."

had seen widespread adoption throughout the country. By the end of 1925, zoning had been brought before the highest judicial tribunals in twelve states, and nine of them had upheld the police power. Only in Maryland, New Jersey, and Missouri had zoning been declared unconstitutional.

The constitutionality of comprehensive zoning was upheld in 1926, when the United States Supreme Court decided the case of Ambler Realty v the Village of Euclid (272 US 365). This test case originated in Ohio, where the federal district court judge had "held that zoning ordinances were necessarily unconstitutional because they 'took' property without compensation." The case was a classic one of commercial real estate being rezoned residential, with a resulting loss of potential property value to the property owner. The Supreme Court had already heard arguments in the case, when Alfred Bettman, a well-known national supporter of zoning and friend of Chief Justice Taft, filed a friend of the court brief. Bettman pointed out that the question before the court was the constitutionality of comprehensive land use regulations, not whether the Village of Euclid had exercised the power of eminent domain (which would require compensation). The Euclid ordinance was "frankly and expressly an exercise of the police power." "The community," Bettman wrote, "was not taking or destroying any property or property rights for public use but was invoking a general power over private property, which [was] necessary for the orderly existence of all government."

"Bettman's brief saved the day for zoning. One justice who had previously been persuaded that use-zoning was unconstitutional changed his mind, and on November 22, 1926, the high court upheld this form of regulation in a momentous four-to-three decision." Justice George Sutherland, who delivered the majority opinion, believed that the exclusion of buildings devoted to business from residentially zoned areas bore "a rational relation to the health and safety of the community." The problem with this justification is that "the health and safety of the community" is as open-ended a concept as "the general welfare." Sutherland justified the exclusion of businesses from residential areas on the grounds that there would be less traffic, children and pedestrians would be safer, that there would be less disorder, and that municipal fire and police protection would be made less difficult and less costly to provide. He also added that "the construction and repair of streets may be rendered easier and less expensive, by confining the greater part of the heavy traffic to streets where business is carried on."

In 1948, the Supreme Court was called upon to adjudicate the issue of public policy versus private covenants. It took a very statist view, upholding the right of the government to abrogate private agreements. In Shelley v. Kraemer (334 US 1), the Court held that it would not enforce a private covenant designed to exclude members of the Negro race from a neighborhood. Private covenants contrary to public policy (such as nondiscrimination laws) were not illegal, but the parties to them could not use the state's judicial system to enforce them.

Private Places and Contractual Communities

A covenant is usually a promise not to do something, and in the real estate world a restrictive covenant usually refers to restrictions recorded in the deed of a property. The law of equitable restrictions on land, sometimes termed easements or servitudes, has often been used by real estate developers to assure that the land is used according to a certain scheme. Typically such agreements might provide for residences only, or allow houses of a specified value, certain size, or style of architecture, or protect against the conduct of objectionable businesses, and restrict building to a specified distance from the street and other property lines. Some covenants "run with the land," (an old practice under the English common law) and others are set out in the sale or purchase agreement.

One of the earliest uses of private covenants was found in St. Louis, Missouri, where during the 1850s and 1860s, nearly one hundred subdivisions or private places were formed within the city. "A private place could encompass one or more streets and was governed by an elected lot association. Not only did each private place own and maintain its streets, but in many cases it also owned the sewers, water mains, and utility easements."

> The rules for each private-place association were laid down in its "indenture," or restrictive covenant. Most covenants were framed by the initial subdivider and contained house set-back requirements, restrictions against multi-family housing, and private building codes. Covenants authorized the collection of annual assessments to pay for the upkeep of the streets, water mains, parks, and other common areas. If a lot owner refused to pay annual assessments, the association had the power to place a lien on the property and sue in a court of equity. In this respect, the private-place is similar to the modern condominium... .

David Beito, author of the foregoing quote, adds "The private places carried on functions that everywhere else have been considered essential government services." But of course, they were not governments in the traditional sense. The rights and powers of the homeowner's association ended at the boundary line of the subdivision. They seldom had any control over vacant land bordering their neighborhood. In contrast to the politically coercive methodology of zoning, the developers and owners of private-places respected the property rights of everyone, whether they were inside or outside the boundary of the development.

The private places of St. Louis, and other early subdivisions like Tuxedo Park, New York (1885), Riverside, Illinois (1869), Country Club District (Kansas City, 1906), and River Oaks (Houston, 1925) were the forerunners of today's "new towns." They paralleled the construction of new company towns, such as Gary, Indiana (U.S. Steel, 1906), Kohler, Wisconsin (The Kohler Company, 1916), and Chicopee, Georgia (Chicopee Manufacturing Company, 1924). In time, they have been followed by such mammoth places as Irvine Ranch (93,000 acres in Orange County, California developed by The Irvine Company), California City (90,000 acres in Riverside County, California developed by Kaiser-Aetna), and Valencia (44,000 acres near Los Angeles, California built by Newhall Land and Farming Company). The essential element that links all of these projects is their reliance upon private enterprise. The entrepreneurs who built these places all realized that contractual communities were the key to creating and maintaining value, both for investors and those who chose to live in their new towns.

The Rouse Company and Columbia

Columbia, Maryland, the planned development of The Rouse Company of Baltimore, Maryland, is one of the fin-

est examples of a contractual community in the United States. As of April 1995 there were nine major villages and a Town Center in Columbia, where 81,00 people lived. "Columbia exploded three myths about new towns." The giant developments in California had nearly all started from farm lands owned by family or corporate interests. James Rouse proved that it was possible to assemble enough land to start a new town. Furthermore, he demonstrated that new towns could be financed by private enterprise. Rouse did not resort to federal loan guarantees provided by Congress in 1966 to private developers of new towns. Earlier developments, by contrast, like the three Levittown locations (Long Island, NY, Bucks County, PA, and Burlington County, NJ), relied heavily upon government mortgage money under FHA and Veteran's Authority programs. Finally, Rouse showed that it was possible "to win zoning approval from development-shy suburbanites."

From the very beginning of Columbia, Rouse realized that creating a private community that would be "truly in scale with people" depended upon the profit-motive. "Profit," said Rouse, "hauls dreams into focus with reality. It moderates the temptation toward imposing one's bias on others. ... You hav[e] to estimate at every step of the way how people are really going to choose, not the way you want them to [choose]." Rouse was convinced that "if you can create an environment that is good enough, people will pay for it." He once stated that "Unless Columbia makes an outrageous profit, it [will be] a failure." Columbia not only had to attract enough inhabitants, who wanted to live and own there, but it had to earn "an outrageous profit," as Rouse termed it, to show the financial community that "new cities are [not] a pointless risk." (Rouse proved his point. The Baltimore SUN reported on October 10, 1995 [page 6A] that his company "has earned about $100 million in profits on land sales, primarily in Columbia.")

The idea for a new town midway between Baltimore, Maryland and Washington, D.C. may have occurred to Rouse during the late 1950s. Howard County, Maryland was predominantly farming land at the time. Beginning in 1962, through exceedingly careful control and negotiations, Rouse was able to acquire over 15,000 acres of county real estate with sufficient contiguity to be treated as one entity. He obtained a loan of nearly $25 million from Connecticut General Life Assurance to pay for the 169 parcels he purchased at an average price of $1500 per acre. Once the Howard County government granted "new town" zoning to the project in 1965, another $50 million of long term financing was obtained from such sources as Chase Manhattan Bank and the Teachers Insurance and Annuity Association of America.

To attract industry and to provide jobs for the residents of Columbia, The Rouse Company paid for a four-mile railroad spur and expanded the city beyond its original scope. The General Electric Industrial Park was created on 2139 additional acres of farms and gravel pits, that Rouse purchased several years after Columbia started. This land cost over $19 million, more than six times the average price per acre Rouse had paid in late 1962 and 1963. With the addition of the acreage for the General Electric Company, Rouse had bought a total of 17,868 acres for $44 million, at an average cost of $2485.

The Columbia Park and Recreation Association is the name of the homeowner's association set up by The Rouse Company under the terms of its sales agreements. The Association is a private, nonprofit corporation with a full time manager, professionals, and grounds maintenance staff. The Columbia Association is responsible for the community's buildings, swimming pools, lakes, pathways, parks, and landscaping. To pay for this and other services, such as child and day care, arts and craft classes, tennis and golf clubs, the Association is empowered by private covenant to collect from every property owner in Columbia, an assessment of up to 75 cents per year of $100 assessed valuation. Apartment dwellers have the Columbia Association's levy included as part of their rent. Another arm of the Columbia Association, and which falls under the covenants which govern the residents of Columbia, is the Architectural Committee. This group functions as a review board and must approve all construction plans in advance. It has the power to require changes, or even reject building projects entirely. From a voluntaryist point of view, the only major flaw in the planning for Columbia was that The Rouse Company did not assume the responsibilities for certain public services within the community. The local government of Howard County levies a property tax on homeowners in Columbia, and maintains the streets, the roads, the schools, and provides fire and police protection.

Unlike coercive political government, The Rouse Company could not resort to condemnation proceedings in order to assemble and purchase the properties it needed to form Columbia. In order to prevent land prices from rising as it bought up more and more land, Rouse disguised its intentions by buying through many intermediary agents. Despite the secrecy and their best efforts, the agents employed by Rouse were not able to buy up all the properties in the proposed area. There were five-holdouts, owning some 850 acres, who refused to sell under any conditions or at any price. Finally by 1971, Rouse had paid $3,000 an acre for one 112 acre holdout, which became the site of the Howard County Community College. As of 1995, one of the holdout properties was still undeveloped, and the rest had been privately developed.

As Rouse found out, most people have a price for their land. As one of his real estate agents put it, their "job [was] to find out what it [was] - money, terms, a life estate. Everything can be acquired if you solve all the difficulties." Farmers had to be satisfied that they would be able to harvest their crops that were in the ground. "Several elderly couples insisted on the right to live where they were until they died. One woman would agree only to lease her land for 99 years, giving Rouse an option to buy after that." Another farmer wanted to preserve a life estate on his property for his horse. On one 810 acre property where a life estate had been preserved for the owner, Rouse had not purchased the timber rights. When the elderly resident threatened to sell his valuable stand of timber, Rouse bought the timbering rights and topsoil for more than $40,000 and let the trees stand. All such problems were overcome by human ingenuity and the respect for individual property rights.

Another example of a contractual community formed in the same manner as Rouse's Columbia is Walt Disney World, an entertainment and resort complex that lies southeast of Orlando, Florida. Disney World consists of 28,000 acres, which encompasses a wildlife preserve of 8200 acres. "To avoid holdouts as well as to keep the land prices in the area from escalating, Walt Disney had by

1964 acquired the land in small parcels using various holding companies. Using middlemen, stealth, and more than 100 dummy corporations, [Disney] went on a secret land-buying spree near Orlando, paying about $400 an acre." One important aspect of the development is that Disney purchased much more land than was needed for, or intended for, Disney World. He wanted "to create a buffer zone" around the theme park "and avoid the motels, fast-food stores and unsightly neon cacophony that developed around Disneyland in California." By being able to control the surrounding environment, Disney management would not only be able to guide future development, but also assure itself of a profit as land around Disney World increased in value. Like Rouse, Disney aimed to show "that through free enterprise you could take virgin land and develop it without any government subsidy."

Conclusion

As these examples of contractual community governance illustrate, there are marketplace institutions that provide many, if not all, the normal services offered by politically sovereign governments. Spencer MacCallum has argued that "there are no longer any political functions being performed at the municipal level and upward in our society that differ substantially from those that we can observe being performed on a smaller scale entirely within the context of normal property relations." There are two major differences between contractual communities and the typical community political government. First, the governing body of a contractual community (usually called a residential community association) does not have the power to levy taxes like its political counterpart. The fees that they charge are based on market place competition, not political whims. Secondly, in a contractual community the relationship between the party that owns the property and the people who live there is based upon an explicit contract entered into by both parties. Such a contract cannot be changed unilaterally, nor by the majority of residents. In political communities, the relationship is non-contractual (what the government would call "constitutional") in nature, and can be changed by the government or a majority of the voters. The institutions of political governance reserve to themselves the right of final constitutional interpretation and enforcement by liens, seizures, and imprisonment.

The whole point of contractual governance is to stabilize land uses and property values to the benefit of all parties involved in owning or residing on the land. It pursues this goal in a free market manner by linking ownership, management, and the maintenance of property values. All the parties involved in these arrangements are mutually satisfied or withdraw from them. "The slightest neglect of the public interest or lapse in the form of corruption or oppression" in the contractual community penalizes itself by a decline in rent and property values. By contrast, zoning and political officials suffer no personal loss if their controls don't work. In fact, they sometimes benefit from unworkable regulations, which they themselves obviate through the receipt of payoffs, bribes, or other forms of political intrigue and corruption.

The fact that many people do not view zoning as a destroyer of property rights demonstrates how few people really understand the meaning of private property. Zoning is simply stealing. Not only is its claim to promote the general welfare bogus, but the exercise of the police power effectively negates all private property in land in the United States. "In essence, zoning grants a cadre of public official and favored private [interests] the free exercise of state power to force their designs on the use of someone else's property." Zoning is "legal mumbo jumbo for uncompensated takings under the exercise of the police power." Furthermore, the history of zoning aptly illustrates the truth of Ludwig von Mises' observation that one government intervention must lead to another. Early zoning laws were not aimed at controlling undeveloped land. Later, zoning laws were expanded to include all real property.

Contractual governance of communities, whether residential or commercial, often goes far beyond the scope of public sector regulations. These restrictions, which might include specifying what colors a homeowner can paint the house, do not constitute a violation of property rights because they are contractually set out in the sales and purchase agreement. In the area of land use and planning, "private innovation" has usually preceded "public action." Many features now common to zoning laws were first initiated by private developers. This includes such planning items as the superblock, the cul de sac, set back lines, planting strips, underground utilities, and design and placement of open spaces and provision for recreational amenities.

Land use planners cannot predict all the changes that will come about in the future. As Bernard Siegan noted, in 1913, when New York City planners began their zoning work, they could not anticipate the impact of the automobile or the Great Depression, or even foresee the advent of air conditioning or penicillin. In a free society, land use controls and building codes would exist under the framework of private covenants and insurance company standards (to be met as a precondition to obtaining insurance coverage). Free market decision-making is usually wiser than that of bureaucrats and politicians because the free market links authority and responsibility: on the free market, the person or organization who makes the decision has to pay for it. The most effective type of voluntary zoning is the result of private covenants, market pricing, and competition. The social potential inherent in the development of property and real estate under voluntaryism is beyond the wit of man to foresee.

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"Will Rothbard's Free-Market Justice Suffice?"

[Excerpts from Murray Rothbard's "Yes" answer. Reprinted with permission from the May 1973 issue of REASON Magazine. Copyright 1973 by the Reason Foundation, 3415 S. Sepulveda Blvd., Suite 400, Los Angeles, CA 90034., pp. 19, 23-25]

The anarchism/limited government controversy must be considered in two parts: the moral, and the practical or utilitarian. Morally, which for me is the prime consideration, it seems to me unquestionable that, given the libertarian premise of nonaggression, anarchism wins hands down. For if, as all libertarians believe, no one may morally initiate physical force against the person or property of another, then limited government has built within it two fatal principles of impermissible aggression. First, it presumes to establish a compulsory monopoly of defense (police, courts, law) service over some given geographical area. So that individual property-owners who prefer to subscribe to another defense company within that area are not allowed to do so. Second, the limited government obtains its revenues by the aggression—the robbery—of taxation, a compulsory levy on the inhabitants of the geographical area. All governments, however limited they may be otherwise, commit at least these two fundamental crimes against liberty and private property. And even if one were to advocate the first feature without the second, so as to have only voluntary contributions to government, the first aggressive and therefore criminal feature of government would remain. Anarcho-capitalism advocates the abolition of these two features, and therefore the abolition of the State, and the supplying of defense service along with all other goods and services on the free market.

Dr. Hospers maintains that if one private agency should "predominate in a certain area, it would in effect be the government. ... there would be very little difference" between that and a single government agency of protection. ... It must be pointed out that even in these conditions, it makes a great deal of difference, because (a) individuals can always have the right to call in another, competing defense agency; and (b) the private agency would acquire its income from the voluntary purchases of satisfied customers, rather than from the robbery of taxation. In short, the difference would be between a free society and a society with built-in and legalized aggression. Between anarchism and archy.

To sum up, on moral grounds I don't think the limited archists have a leg to stand on: given the libertarian axiom, they must logically end up as dedicated anarchists. What then of the utilitarian arguments? First, I must state that for me the claims of morality and justice are so overwhelming that utilitarian questions are of relatively little moment. But even for those libertarians who would weigh the utilitarian more heavily, I would say this: that *usually* in human affairs, the moral and the practical go hand in hand; and, second, that at the very least, you should agree that the moral argument sets up, not indifference, but a heavy presumption on behalf of anarchism.

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