SB

228

SENATE COMMITTEE REPORT
First Committee of Referral

DATE: 2/27/08

FURTHER: State Affairs

Date of 5-Day Notice: _____
(in accordance with Uniform Rule 23)

DATE TURNED IN TO OFFICE: 03/18/08

Community & Regional Affairs Committee considered SPONSOR SUBSTITUTE FOR SENATE BILL NO. 228

SB 228 MUNICIPAL LAND USE REGULATION

"An Act relating to and permitting certain uses and occupancies of real property that do not comply with changes made to municipal land use ordinances."

and recommends:

[ ] be **replaced** with [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] adopt **previous** [ ] **SCS** or [ ] **CS** _____ (_____)

[ ] attached amendment(s)

[ ] adopt _____ Letter of Intent

[ ] further referral to _____ Committee

SENATE BILL:
[✓] Same Title
[ ] New Title

HOUSE BILL:
[ ] Same Title
[ ] Technical Title Change
[ ] New Title w/ SCR #____

NEW FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#
CED	2/28/08			✓	

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal	Indet.	Zero	FN#

[ ] **APPROPRIATION - no fiscal note**

SIGNATURES AND RECOMMENDATIONS:	PRINTED LAST NAME	DO PASS	DO NOT PASS	NO REC	AMEND
	Thomas				✓
	Wagoner				✓
	Stevens			X	
	Kookesh			X	
CHAIR:	Olson	✓			

SPONSOR STATEMENT

Senate Bill 228
Municipal Land Use Regulation

The freedoms we enjoy are inextricably linked to the property we own. This individual right should be carefully preserved and respected in the face of advancing local government while at the same time allowing a community some measure of self determination. This bill ensures a balance between the two sides of this tension.

SB 228 has three parts that govern the changing of local land use ordinances. The first part provides that if an ordinance is changed to prohibit a use of land that was previously permitted, the use of the land that was permitted under the old ordinance must be allowed to continue unless it is determined that the use constitutes a common law nuisance.

The second part of SB 228 provides that if a municipality passes an ordinance that prohibits a home business, which was permitted under the old ordinance, the owner of the property must be allowed to continue his or her business until the ownership of the property is transferred. If that home business owner applies for a change or expansion, the municipality cannot refuse that application unless it would have a "negative" effect on the neighbors and area. The factors that are suggested are the same as the previous section.

The third part of SB 228 protects the use of property owned by older or disabled Alaskans by prohibiting municipalities from enforcing a change in the ordinance for ten years or until the ownership of the property is transferred, whichever is first. This part of the bill recognizes that it would not be a right use of governmental power to force older or disabled Alaskans to immediately alter the use of their land, simply because an ordinance is passed. Alaskans have traditionally respected the privacy of individuals and this bill recognizes that this privacy should extend to land use.

SENATOR FRED DYSON

Contact: Jeremy Thompson
(907) 465-2199

February 2, 2008

ALASKA STATE SENATE

Contact:
Interim Address:
10928 Eagle River Road
Eagle River, AK 99577
(907)-694-6683
Fax# (907)-694-1015

Session:
(907)-465-2199
FAX# (907)-465-4587
State Capitol
Room 121

Senator Fred Dyson

SB 228 Municipal Land Use Restrictions

SECTIONAL ANALYSIS

*** Section 1.** Amends AS 24.10.200 by adding the "regulation of the use of real property" to the list of limitations on the power of local government rule.

***Sec. 2.** Adds the new section AS 29.40.045. The section is divided into three parts. Part **(a)** says that if an ordinance governing land use is changed, and there exists a piece of property was being used for purposes that were previously permitted, that use must be allowed to continue unless the use constitutes a nuisance defined by common law. Part **(b)** says that if an ordinance is changed to prohibit a home business that would have been previously permitted, the home business must be allowed to continue until the property has changed hands. If the owner of the property wishes to expand or change the business, he must be permitted to do so unless the municipality determines that the change would have a negative effect on the area. Part **(c)** says that if an ordinance is passed governing the land use of property held by a disabled person, the use previously permitted must be allowed to continue until the ownership is transferred, and the section gives the definition of "disabled person" and "disabled veteran."

FISCAL NOTE

STATE OF ALASKA
2008 LEGISLATIVE SESSION

Fiscal Note Number:
Bill Version: SS SB 228
() Publish Date:

Identifier (file name): SB228SS-CED-CRA-02-28-08
Dept. Affected: DCCED
Title: Municipal Land Use Regulation
RDU: Comm Asst & Ec Dev (405)
Component: Community & Regional Affairs
Sponsor: Dyson
Requester: Senate Community and Regional Affairs
Component Number: 2879

Expenditures/Revenues (Thousands of Dollars)

Note: Amounts do not include inflation unless otherwise noted below.

	Appropriation Required	Information					
OPERATING EXPENDITURES	**FY 2009**	**FY 2009**	**FY 2010**	**FY 2011**	**FY 2012**	**FY 2013**	**FY 2014**
Personal Services							
Travel							
Contractual							
Supplies							
Equipment							
Land & Structures							
Grants & Claims							
Miscellaneous							
TOTAL OPERATING	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**
CAPITAL EXPENDITURES							
CHANGE IN REVENUES ( )							

FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts							
1003 GF Match							
1004 GF							
1005 GF/Program Receipts							
1037 GF/Mental Health							
Other Interagency Receipts							
TOTAL	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**	**0.0**

Estimate of any current year (FY2008) cost: 0.0

POSITIONS

Full-time							
Part-time							
Temporary							

ANALYSIS: *(Attach a separate page if necessary)*

This legislation would allow property owners to continue an existing use of property if a municipal ordinance changes the permitted uses. The bill contains three sections which would allow for the existing use to continue if:

1) the existing use does not constitute a nuisance;
2) the existing use is a home business which use may continue until the ownership changes; or
3) the existing owner is at least 65 years of age, a disabled veteran or a disabled person existing use may continue for up to 10 years or until the ownership changes, whichever comes first.

This legislation has no fiscal impact on the operations of the division.

Prepared by: Tara Jollie, Director — Phone 907.269.7959
Division: Community and Regional Affairs — Date/Time 2/28/08 4:32 PM
Approved by: Emil R. Notti, Commissioner — Date 2/28/2008
Agency: Commerce, Community, and Economic Development

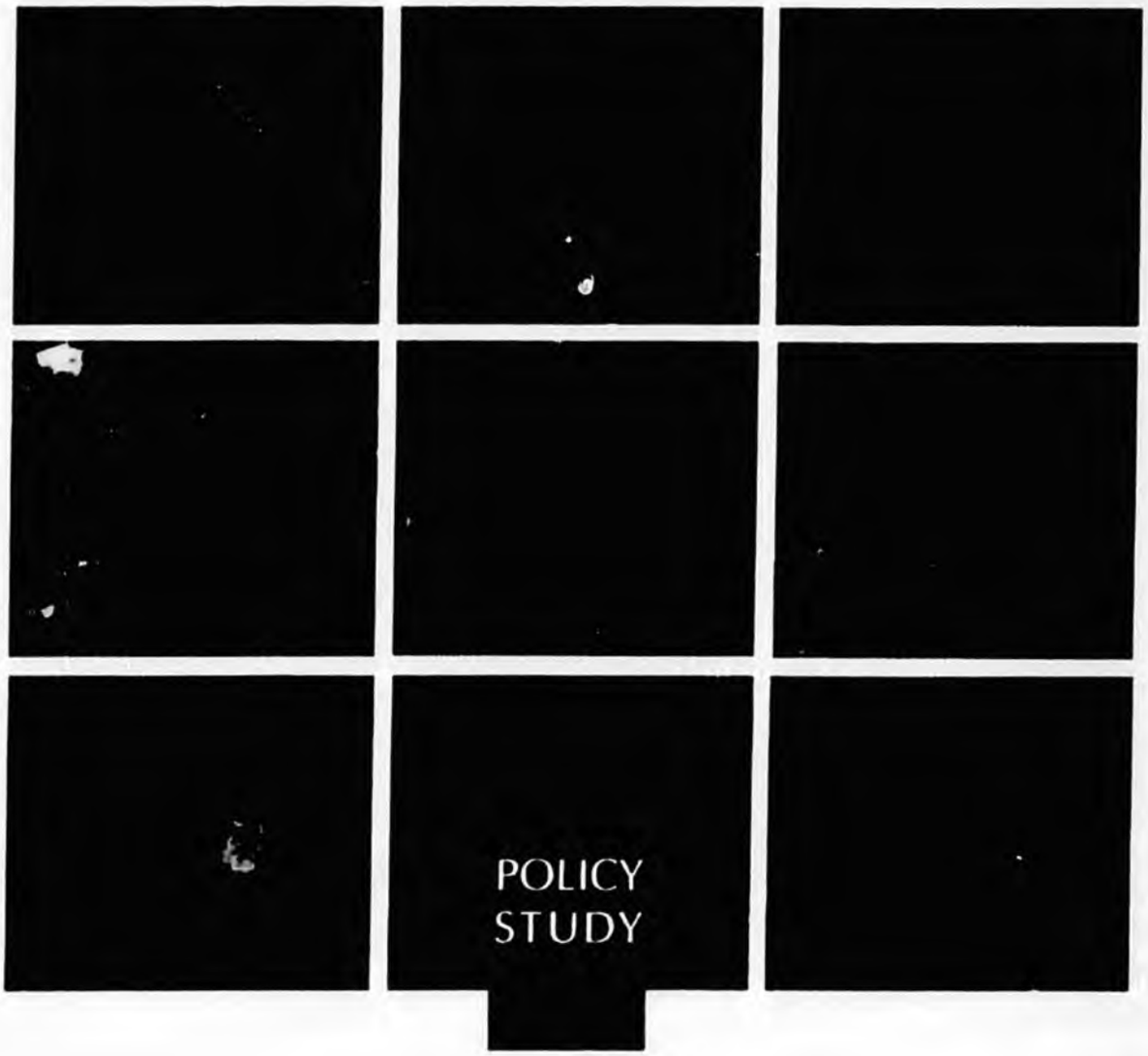
(Revised 11/19/2007 OMB)

Reason

April 2006

Statewide Regulatory Takings Reform:
Exporting Oregon's Measure 37 to Other States

By Leonard C. Gilroy, AICP



Statewide Regulatory Takings Reform:
Exporting Oregon's Measure 37 to Other States

By Leonard C. Gilroy, AICP

Executive Summary

Since the widespread adoption of municipal zoning in the United States in the early twentieth century, there has been an expansion in the character and scope of state and local land controls and an increasing recognition that land use regulation significantly infringes on private property rights.

The nature of land use regulation has evolved beyond the common law, nuisance-based tradition that characterized the first century after the nation's founding. This nuisance-based approach was primarily focused on preventing harm to the property rights of others and giving property owners wide latitude in determining the best use of their land.

By contrast, contemporary land use regulation often uses public policy to mandate the private provision of amenities that benefit the community-at-large. As the regulatory scheme influencing local land use has grown more prescriptive and restrictive, there has been an increasing curtailment of private property rights. Landowners in many communities nationwide have been restricted in their ability to use their land in the ways that they had intended when they purchased their property, dramatically reducing their property's value and imposing an economic hardship on them.

The expanding reach of state and local land use regulation has led to a burgeoning property rights movement and increased calls for: (1) statutory or constitutional measures to reduce the infringement on private property rights resulting from government regulation (so called "regulatory takings"), and (2) compensation for landowners when their property rights have effectively been regulated away.

The experience of Oregon points to a new way of establishing clear boundaries for regulation and balancing the rights of private property owners with government's right to enact policies advancing the public interest. After decades of burdensome state and local land use regulation, a majority of Oregon voters took a decisive stand in favor of property rights in November 2004 and passed Measure 37, a ballot initiative designed to provide relief to landowners whose properties have been devalued by three decades of regulation and protect Oregon's property owners from economic hardship that may result from future regulations.

Measure 37 requires that local governments either: (1) compensate landowners when land use restrictions reduce the value of their property, or (2) waive the restrictions and reinstate the rights that property owners had at the time they bought their land.

Citizens, activists, and elected officials across the nation can look to Measure 37 as a model for regulatory reform.

Measure 37 represents a major advance for the national property rights movement by establishing a system that restores the rights of private landowners that had previously been taken away via regulatory action. It can be seen as simply having revealed the hitherto hidden costs of the state's heavy-handed approach to land use regulation and redirecting these costs in a more equitable and just manner that respects the American tradition of strong private property rights. Measure 37 also provides a check on government power by ensuring that state and local governments adequately weigh the costs and benefits of public action. In fact, Oregon's experience suggests that property rights are critical to successful planning efforts in the United States and that urban planning may not be sustainable unless it incorporates property rights into the regulatory framework.

The national property rights movement has been galvanized in recent years by Measure 37's passage, as well as widespread popular disenchantment with the abuse of eminent domain highlighted by the U.S. Supreme Court's *Kelo vs. New London* decision. Public recognition of the need to protect the constitutional rights of private property owners has never been higher.

Citizens, activists, and elected officials across the nation can look to Measure 37 as a model for regulatory reform as they continue the push to protect private property rights from the expanding reach of government and prevent landowners from being forced to bear the hidden costs associated with government regulation.

Part 3

Addressing the Impacts of Land Use Regulation

A. Property Rights and the Evolution of Land Use Regulation

With the rise of municipal zoning in the United States in the early twentieth century and the subsequent expansion in the character and scope of state and local land controls has come an increasing recognition that land use regulation can significantly infringe on private property rights. Historically, zoning was an outgrowth of the common law of nuisance and trespass, which governed land use since the country's inception and essentially defined and limited each property owner's rights to those that do not inflict harm upon or diminish the rights of his neighbors.

Nuisance laws are relevant to the discussion of regulatory takings because not all regulations—particularly those that prevent harm to the rights of others—infringe on private property rights. Under the common law of nuisance and trespass, the rights associated with property ownership do not include the right to create unlawful nuisances or violate another's property rights.[15] If a nuisance-based regulation serves to prevent a landowner from engaging in activities that would harm or violate the rights of others, such as polluting a stream that runs through a neighbor's land, then the landowner has no right to compensation because he has no right to use his property in such a manner in the first place.

Conversely, the common law of nuisance or trespass does preserve for landowners the right to engage in activities on their land that do not violate the property rights of others. If Landowner A wants to stop Landowner B from engaging in some activity that does not directly impact his right to use his property as he sees fit, Landowner A can offer to either (1) pay Landowner B to stop engaging in that activity for a period of time, or (2) purchase an easement from Landowner B to permanently stop the activity. The contemporary use of conservation easements and purchase of development rights programs are consistent with this approach to land regulation.

Municipal zoning can be seen as an attempt to codify and extend nuisance law on a city-wide scale. It is the product of an attempt by local governments to prevent land uses which, while not necessarily a nuisance in and of themselves, are potentially offensive or harmful to others,

particularly in areas with pre-existing residential or commercial development.[16] Zoning is intended to avoid nuisances by dividing a city into districts and prohibiting certain types of land uses within each district, effectively segregating land uses.[17] It is within this context that zoning restrictions have been upheld as a valid exercise of government "police power," through which national, state, and local legislative bodies enact regulations in the interest of protecting the health, safety, welfare, and morals of citizens.

However, zoning regulations can serve to limit private property rights by prohibiting landowners from using their land in the way they see fit or in the way that maximizes land value. For example, a landowner who purchased a 20-acre property in an area with no zoning restrictions would in theory be allowed to subdivide his property into 40 half-acre parcels for housing development. But if the area is subsequently zoned for rural residential development with a minimum lot size of five acres, then the landowner's right to subdivide would effectively be restricted to the extent that he would only be allowed to subdivide into four five-acre parcels (one-tenth of the original number of parcels allowed in lieu of zoning), significantly limiting the economic potential of the property. In some cases, communities have established minimum lot sizes sufficiently large that certain types of development, including residential, are effectively eliminated as a financially viable alternative. In addition, since the intent of minimum-lot size regulations is usually to slow growth and preserve open space, the imposition of the regulation effectively represents a wealth transfer from the property owner, whose development rights have been curtailed, to the community-at-large, who collectively reap the benefits of preserved open space. In other words, the regulation forces the private landowner to pay (via the "lost" development potential) for the benefit received by the public.

Historically, the payment of compensation to landowners whose property values have been reduced through regulation, including zoning, is rare and has generally been associated with the total, or near-total, taking of private property. The courts have largely upheld the government exercise of the police power via zoning as non-compensable regulatory activity, so long as the owner retains some reasonable economic use of his property.

Yet, the concept of the "police power" has gradually expanded over time to cover all manner of state or local government action. As a result, the courts are predisposed to viewing any action ostensibly undertaken for a "public use" or "public purpose" as a valid exercise of the police power.[18] For example, the U.S. Supreme Court has consistently upheld the state and local government power to restrict a wide variety of uses and activities not considered nuisances under common law, such as siting adult theaters in certain locations, building houses on lots smaller than one to five acres, permitting three or more unrelated tenants to share a single home, mining gravel, and constructing tall buildings.[19]

With the expansion of the activities deemed legitimate exercises of the "police power" has come a widening of the scope of zoning regulation. New York City—which passed the country's first citywide zoning ordinance in 1916—offers an illustrative example. The City's original ordinance contained three zoning districts (residential, commercial, and unrestricted); five height districts;

and three classes of area.[20] The current zoning ordinance would likely be unrecognizable to drafters of the original ordinance, as it has expanded to include dozens of zoning districts and a numerous other land use controls—such as minimum lot widths, minimum lot areas, floor-area ratios, minimum side-yard widths, minimum driveway length, maximum building height, and minimum parking requirements. The New York City example is hardly atypical; many local zoning ordinances have seen extensive modification and expansion over the years.

Noted constitutional scholar and property rights expert Bernard Seigan explained the expanding nature of zoning in this way:

> *[Z]oning has been the story of unrealized expectations. To date, we have had six or seven different zoning systems or strategies in this country. Each has been introduced with what has turned out to be greatly inflated rhetoric as to what it would accomplish. ... Each zoning system, in turn, has for the most part failed to meet the expectations created by that rhetoric. The result, every time, is a new effort at the drawing boards, producing more and increasingly severe rules and regulations that, experience suggests, are not likely to be more successful than the previous ones.*[21]

Along with the increased scope of zoning regulation has come a wide array of other types of land use controls. For example, comprehensive planning—the legislative adoption of policy statements that aim to coordinate future development according to a set of goals regarding such matters as land use, transportation, housing, utilities, conservation, and community facilities—has become ubiquitous in urban policy and often uses zoning regulations as a primary implementation mechanism. Further, mandatory local comprehensive planning and zoning has become an integral component of state planning enabling statute reforms and is heavily promoted in the "smart growth" movement. For example, Oregon is widely recognized among urban planners and growth management advocates as the national model for statewide land use planning and development control. State law requires all city and county governments to develop comprehensive plans that protect farms, forests, and other resources and that provide for community needs such as housing, recreation, and economic development. (See Appendix A for further discussion of Oregon's system of land use regulation.)[22]

In conjunction with zoning, subdivision regulations are another means by which local governments have stepped in to place greater controls over private land development. While the primary focus of zoning is to control the use of land and the density of development, governments use local subdivision regulations to control the division of land tracts into building lots and the provision of infrastructure by specifying requirements for road widths, sidewalks, landscaping, buffers, grade of infrastructure, bulk and height restrictions, lot and yard widths, floor-area-ratios and other aspects of development.

In addition, the development approval procedures adopted by local governments often require that designated government bodies (such as municipal planning departments and planning commissions) review and approve proposed subdivision plats before a property owner is given permission to divide and sell his land. The proliferation of local development regulations and

approval processes has shifted the balance of property rights over time from a condition in which landowners had tremendous discretion to develop their properties in the manner they saw fit to a system in which government has the final say on what property owners can and cannot do with their property. In some cases, zoning has become specific enough that land uses are largely determined by the local government. The development approval process itself has led to increased local administrative discretion and procedural delays that have served to increase the costs of property development. One recent study by the Lincoln Institute of Land Policy found that developers in both 1976 and 2002 felt that subdivision standards and zoning regulations both substantially increased the cost of the homes they built.[23]

Local governments have also increasingly imposed "exactions"—requirements that property owners pay for or provide public amenities as a pre-condition to development approval—to shift the costs of infrastructure provision from the public sector to private property owners. Exactions may take a variety of forms—including required land dedications and impact fees levied on property owners—and typically provide funds for water and sewer infrastructure, roadways and bike paths, schools, and recreation facilities. While exactions are often upheld as valid exercises of the police power, local governments have become more creative in imposing exactions that have little to do with addressing the tangible impacts of the project in question, leading to charges that some types of exactions (1) unduly restrict private property rights, resulting in regulatory takings, (2) confer benefits to the public disproportionate to the actual impacts of the proposed development, and (3) regulate for the purpose of raising revenue rather than to promote public health, safety, and welfare.

For example, the landmark 1994 U.S. Supreme Court regulatory takings case *Dolan v. City of Tigard* involved a hardware store owner in Tigard, Oregon, who wanted to expand her store, but was required by the city to dedicate part of her property for a storm drainage system and another part for a bicycle path intended to relieve traffic congestion in the city's Central Business District, both as pre-conditions for project approval. The Court found that the city's dedication requirements amounted to an uncompensated taking of property, as the city could not demonstrate why the store expansion created the need for the dedications. The Court upheld the use of exactions to advance legitimate public interests, but only when the exactions required are "roughly proportional" to the impact of the proposed development.

Another famous example of a regulatory taking via exaction comes from California. In 1982, James and Marilyn Nollan requested permission to rebuild their beachfront bungalow in Ventura County, California. The California Coastal Commission—the state's coastal development regulatory agency—conditioned their permit approval on a requirement that they provide an easement for public beach access through their property. The Nollans sued the Commission on the grounds that the easement requirement was an unconstitutional taking of their property. In 1987, the U.S. Supreme Court ruled in *Nollan v. California Coastal Commission* that requiring a permanent physical occupation of the Nollan's property as a condition for building permit approval represented a compensable taking. According to the Court's logic, if the state of California finds

that an easement serves an important public purpose, it should use its eminent domain power to pay for it, rather than it compelling coastal property owners alone to provide this public benefit.

Though these two cases represented "wins" for property owners, state and local governments routinely impose a variety of exaction requirements on property development that, while upheld by the courts as valid exercises of the police power, also place a significant financial burden on property owners. In their seminal book on land use exactions, *Regulation for Revenue: The Political Economy of Land Use Exactions*, authors Alan Altschuler and José Gómez-Ibáñez's argued that crafting regulatory systems explicitly to produce revenue (rather than in the interest of public health and safety), represents "a dramatic power shift...from the owners of property to government officials." Prior to 1960, only about 10 percent of American local governments imposed exactions, but by the mid-1980s this total increased to 90 percent.[24]

Finally, over the last century state and local governments have increasingly adopted a variety of regulations to address environmental and historic preservation concerns. At the local government levels, this often occurs by either expanding the scope of existing zoning and subdivision regulations or through the use of special district regulations such as overlay zones, special zones placed over an existing zoning district (or parts of districts) that apply a special set of regulations in addition to the requirements of the underlying zoning district. Examples of some of the areas covered in special district regulations include wetlands, historic districts, habitat conservation zones, view corridors, and floodplains.

For example, in concert with federal and state wetlands regulations, some communities have established wetlands overlay districts that preclude many forms of development on wetlands or anywhere within a certain buffer (25 feet, for example) of delineated wetland boundaries. Property owners are required to submit development plans to regulatory bodies to evaluate the potential impacts on wetlands before the owner is allowed to proceed. If regulators find that the proposed development would result in a disturbance or loss of wetlands, the owner may be offered a permit with strict conditions on development or denied permission to develop the property altogether. Either way, restrictions on the use of the property can lower its value substantially and preclude any number of uses of the property that would have otherwise been available to the owner. In addition, the development approval procedures mandated by wetlands regulations often impose lengthy and costly development delays.

While wetlands do offer certain environmental benefits (such as natural water filtration and wildlife habitat provision), the benefits of preserving wetlands accrue to society-at-large but are paid for only by owners of properties that include wetlands. Hence, property owners impacted by wetlands regulations have brought numerous regulatory takings lawsuits against federal and state governments. Yet, over the last three decades, state courts have rarely sided with landowners in these disputes, despite the fact that a growing number of states have enacted wetlands protections; plaintiffs in federal wetlands cases have fared little better.[25]

Historic preservation ordinances and districts are another type of special district regulation increasingly used by local governments to protect cultural landmarks and maintain the character of older neighborhoods. This type of regulation generally mandates a rigorous design review process for development proposals (either district-wide or on specific parcels) and establishes requirements for building colors, facades, and other architectural and structural details for new or renovated buildings. While they may protect a public good and enhance community welfare to a certain extent, historic preservation regulations also allow governments to impose strict development controls and building renovation requirements at minimal public expense, while simultaneously restricting private landowners from using their land for alternate, viable uses, such as commercial or residential development.

For example, one analysis of historic preservation regulations in Ohio found that a city's designation of an individual farmhouse on a 30-acre parcel as a historic landmark would effectively cost the property owner between $600,000 and $900,000 in renovation costs and foregone revenues from taking the property off the market.[26] Had the cost to preserve the farmhouse instead been spread over the entire city (which ostensibly benefits from the home's historic designation), each housing unit would have received a $98 assessment. This situation provides a stark example of how the regulatory process can place an inordinate financial burden on a minority of landowners for the benefit of the community-at-large.

While zoning, subdivision regulations, exactions, and special district regulations comprise the main areas of land use regulation that impact property rights, they do so to varying degrees depending on the specific nature of the regulation itself. For example, planned unit developments (PUDs) offer developers an opportunity to build projects that deviate from traditional zoning and subdivision regulations by giving them greater flexibility in land use, density, and design characteristics like setbacks and building height. In this way, PUDs offer more options to landowners and are less restrictive than traditional zoning and subdivision ordinances.

The increasing breadth and depth of land use regulation over time has significant implications for property rights and regulatory takings analysis. The nature of land use regulation has evolved beyond the common law, nuisance-based tradition—primarily focused on preventing harm to the property rights of others, refraining from controlling land uses that do not produce tangible spillover effects, and giving property owners wide latitude in determining the best use of their land—to an approach that is much more prescriptive.

This nuisance-based approach stands in stark contrast to the tendencies reflected in contemporary land use regulation, which often uses public policy to mandate the private provision of amenities that benefit the community-at-large. As the regulatory scheme influencing local land use has grown more prescriptive and restrictive, there has been an increasing curtailment of private property rights.

The contrast between the two approaches is summarized in the following figure. The zoning regulations with the lowest impacts on property rights give property owners the greatest freedom to

use their property as they see fit, providing the uses do not create nuisances or spillover impacts for neighbors and the community. The highest impact land use regulations tend to be most prescriptive and substantially restrict land uses, giving property owners the least amount of freedom (short of a physical taking of property).

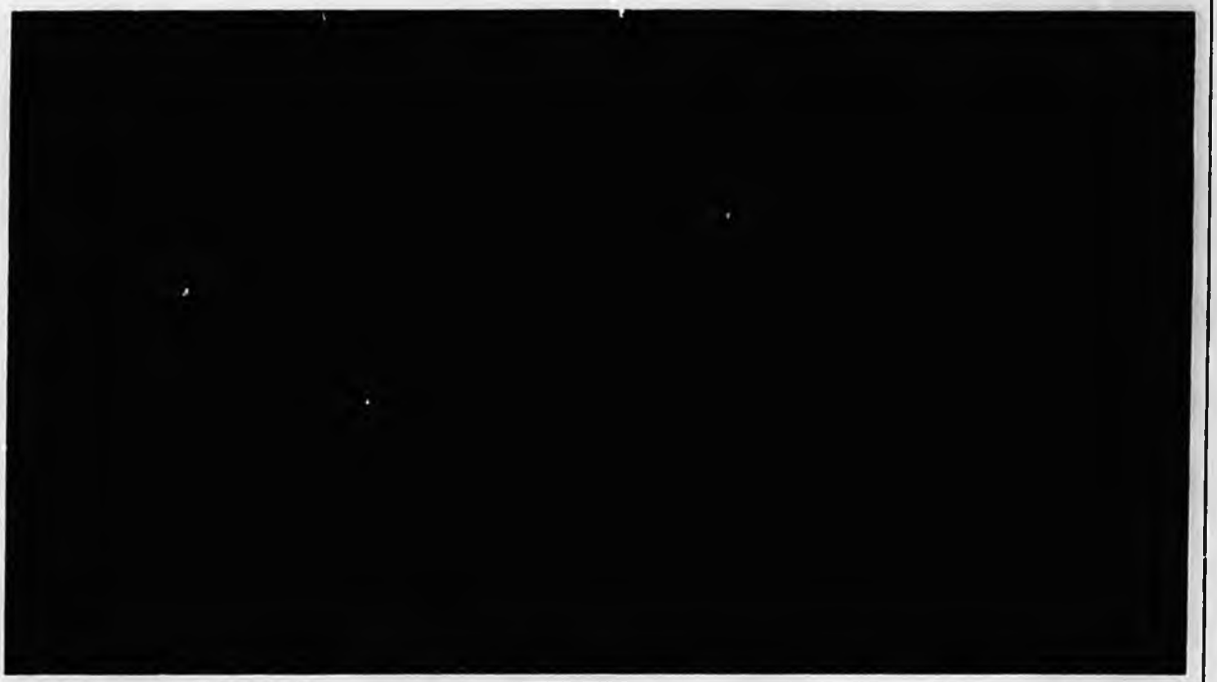
Recognizing the historical shift toward more prescriptive and restrictive land use regulation, the modern property rights movement has focused on advancing three key principles:

(1) that the notion of property ownership implies that landowners should be allowed to enjoy the full use of their property, provided that such use does not harm other people or their properties;

(2) that land use regulation has gone too far in forcing a minority of private landowners to bear the costs of providing public goods that benefit the entire community; and

(3) that fairness requires that private landowners be compensated by government to pay for the public benefits it receives through regulatory action.

Relative Impacts on Property Rights of Various Land Use Regulations



YAHOO! NEWS

Back to Story - Help

China land rights activist goes on trial

AP Associated Press

By HENRY SANDERSON, Associated Press Writer
Tue Feb 19, 9:26 AM ET

A Chinese land rights activist went on trial for subversion Tuesday for protesting the Beijing Olympics in a case highlighting China's efforts to clamp down on dissent before the Summer Games.

Yang Chunlin, led into court in handcuffs and leg irons, pleaded not guilty in the hearing before the Intermediate People's Court in the northeastern city of Jiamusi, said his lead attorney, Li Fangping.

Yang, a laid-off factory worker, became involved with farmers outside Jiamusi demanding redress for farmland taken from them by officials for development. He gathered 10,000 signatures for an open letter demanding land rights for farmers. To rally support, he posted the letter on the Internet with the title: "We want human rights, not the Olympics."

Yang's case is among the most highly charged before the August Games, challenging the Communist government's ambitions to use the Olympics to boost its legitimacy.

The official charge against him — inciting subversion of state power — is one commonly used against political dissidents, and in eight months in detention, Yang has been given little contact with his lawyer or family, who have said he was tortured.

Much of the nearly five-hour trial session was spent arguing about whether Yang's Olympic protest slogan counted as subversion, said an account posted on a human rights Web site that was corroborated by Li.

"Debate centered on 'We want human rights, not the Olympics,'" said Li. He said two types of evidence were presented against Yang: one involving the Olympics petition, the other articles Yang had written which allegedly attacked the socialist system and state leaders.

Li said his defense team argued that the land the farmers lost had been seized illegally because it was taken without the Cabinet's permission as required by regulations.

The Intermediate Court on Monday reversed an earlier decision to hold the trial behind closed doors and instead opened it to the public, a move that likely reflected Beijing's nervousness over the attention the case has drawn from overseas media and human rights groups.

"This decision came from Beijing. They want a trial that looks good," said Nicholas Bequelin, a researcher for Human Rights Watch in Hong Kong. "The charges are clearly in contravention of international standards, criminalizing speech."

Calls to the Jiamusi court seeking comment were not answered.

Yang was detained in July and formally arrested a month later. His sister said earlier that he was tortured while in detention, with his arms and legs stretched and chained to the corners of an iron bed.

China has been cracking down on dissent ahead of the Olympics. Earlier this month, a Chinese court sentenced democracy activist Lu Gengsong to four years in prison for "inciting to subvert state power."

Another well-known activist, Hu Jia, was taken from his home in December and arrested on similar charges. He is in custody, and there is no word on when he will face trial.

washingtonpost.com

Church Sues Fairfax County To Keep Religion Classes

Offering Courses Violates Zoning Ordinances, Officials Ruled

By Maria Glod
Washington Post Staff Writer
Tuesday, July 18, 2006; B05

McLean Bible Church, a Tysons Corner megachurch, has sued Fairfax County so it can continue to offer religion classes that officials say violate zoning rules.

In a 14-page suit filed July 3 in U.S. District Court in Alexandria, the 10,000-member church says the classes are a regular part of church life, which is protected under the freedom of religion.

Fairfax officials say the church can't host the classes -- which can help students get a master's degree in theology or divinity at Lanham-based Capital Bible Seminary -- without county permission to operate as a college.

Colby M. May, a lawyer with the conservative American Center for Law and Justice, which filed the lawsuit on behalf of the church, said fewer than 100 people are enrolled in the classes at any time. Some students seek academic credit, and others don't, he said.

"We're not a college or a university and don't have a desire to be a college or university. We're a church," May said. "These classes are to study the Bible and study the sacred writings and denominational views of the Christian faith. It's pretty routine for churches everywhere in America, and in Fairfax County, to have studies of the Bible."

Fairfax spokeswoman Debra Bianchi said county officials declined comment on the suit because it is pending in court. But she said the county plans to file a written response within 60 days.

McLean Bible Church, which sits on a 43-acre campus on Route 7, has long had a tense relationship with some nearby residents, who have complained that the complex -- which includes a bookstore, a 2,400-seat auditorium and a cafeteria -- is too large for the suburban neighborhood. Neighbors have said the church brings too much traffic to the area's clogged roads.

Last year, the McLean Citizens Association approved a resolution urging the county to uphold its decision to bar the classes.

"We're concerned about the potential for unlimited and uncontrolled growth of the school project," said Jim Robertson, an association member. "We don't object to a school. All we asked is that they limit the number of students and the times of the classes. The bottom line is traffic."

In the lawsuit, the church notes the "presence of vocal opposition to the church" and alleges that the

zoning decision "appears to be based more upon political pressure than legal principal."

The classes are "just part of the Christian education program," said Stuart Mendelsohn, an attorney for the church who is also a former Fairfax County supervisor. "They are no different than other classes any church holds, and a church ought to be the one who decides that, not the government."

The dispute over the classes began in 2004, when Fairfax officials found that the church violated zoning rules by holding the classes. The church says the classes fall under a provision that allows use of the campus for "groups or activities which are sponsored by the church and consistent with its ministry objectives."

But county officials said the church needs permission to run a college. According to a March 2005 county report, zoning staff noted that Capital Bible Seminary had set up an office and library at the church and that the classes were "designed as part of a degree program which may lead to a graduate theological degree."

At that point, the county report said, 40 of 130 students attending the classes were "associated with the church."

McLean Bible appealed the ruling after limiting Capital Bible Seminary's presence by doing away with the seminary's office and library. According to the lawsuit, the church also offered to ensure that students would not be able to complete a degree solely by taking classes at the church. Fairfax denied the appeals.

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Family's New Fairfax Home Stuck in a Regulatory Forest

Trees Could Harm Blind Children, Parents Contend

By Lisa Rein
Washington Post Staff Writer
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Their seven-bedroom, $2.2 million dream home is in spotless, move-in condition. It's an elegant hideaway on 1.6 acres in Oakton, set back from a winding, tree-lined road -- a perfect place for their four youngest children to grow up.

But for 36 days, Karen and Joe Bartling and their children have been homeless. Along with their college-age son and the family's Labrador retriever, they have been holed up in a tiny efficiency apartment in Chantilly with a pullout couch, all of their belongings in a storage locker.

The Bartlings can't move in until their builder plants 20 to 80 trees on their property that Fairfax County says are required in part because the builder cut down too many mature trees during construction.

But to the Bartlings, the trees are nothing but booby traps wrapped in wire and wooden stakes: Four of their five children -- who were adopted from Korea, China and India -- are blind. For them, trees are bumps and scrapes waiting to happen.

"I don't want my kids having black eyes running into trees all day," said Karen Bartling, 48. "These kids have enough obstacles in their lives. The last thing we want is trees in our yard."

In a suburb whose last patches of green space are disappearing, the prospect of a canopy of hickories, oaks and maples would be welcome to many homeowners. Not the Bartlings. "For our family, trees don't work," said Joe Bartling, 48, who works in the District as a forensic investigator. "Maybe for other families, trees work."

The Bartlings said they planned to build a swimming pool and put a swing set, trampoline and barbecue in the back yard, leaving precious little room for a forest. The trees would be scattered around the property, making it impossible to fence them off.

The odyssey started June 9, the day the Bartlings were supposed to close on their house on Coulter Lane. The piano mover arrived at 11 a.m. at their old, much smaller house on a forested lot in Oakton. The rest of the trucks were loaded by noon. Then the builder, NV Homes of McLean, called at 1 p.m. to cancel the closing, the Bartlings said. The county had denied the builder a permit for occupancy of the house.

The day before, an NV Homes representative had shown the Bartlings a new plan for their lot with more than 80 trees in the front and back yards, in addition to the row of old trees the builder had left at the edge of the property. The trees were not on the original lot plan. The couple did not agree to the new proposal, believing they could work it out after the closing.

What the Bartlings didn't know was that the county was requiring the builder to come up with a new tree conservation plan for the site after a neighbor notified the county that a contractor for NV Homes had illegally cleared a dozen 25-year-old, 100-foot trees during construction. This violated Fairfax's limits on clearing and grading.

Things got testy. NV Homes asked the Bartlings to sign a document agreeing to accept and maintain the 80 new trees and restrict any changes to the land, so they or any future owner would never cut down the trees. "Can you imagine paying that much money for a house and having someone telling you what you should do on your property?" Karen Bartling asked.

They called the county and got a lawyer and have been negotiating ever since. Yesterday, the county, the developer and the Bartlings reached a precarious agreement that could allow as few as 20 trees to be planted. But nothing is final.

Fairfax requires builders in residential developments like the Bartlings' -- four homes on 10 acres called the Estates at Oakton Hollow -- to preserve trees on 20 percent of the property. The trees can be old or new, to replace those that were knocked down for construction. NV Homes planned to put a "significant portion" of the trees on the Bartlings' lot, county spokeswoman Merni Fitzgerald said. This was partly because some of the other lots lie in a septic drain field that needs to be cleared, said Hugh Whitehead, a county urban forester.

The builder also recently cleared some trees on another lot it may develop in the subdivision, county officials said, prompting a new round of planning to replace them. In both cases, dozens of new trees are needed to make up for the old ones, Whitehead said.

Normally, the county allows trees on a private lot to be removed once the developer is released from bond. But in this case, NV Homes had violated the rules, and stricter requirements applied, officials said.

"It gets pretty sticky sometimes with homeowners wanting to do what they choose with their property," Whitehead said. "I'd certainly hope that most people want trees. I've been surprised by people who buy a lot and proceed to cut down every tree on it for one reason or another. They don't see the benefits."

Whitehead said he sympathizes with the Bartlings, who have tried to reach a resolution with the county and NV Homes as they pay $219 a night for lodging. The number of trees required plunged to 68 and then 50, and the builder and county dropped the requirement prohibiting the trees from being cut down, said the Bartlings' attorney, Gorham Clark. Last week, the Bartlings agreed to accept some trees but demanded $250,000 in compensation from NV Homes. In response, NV Homes threatened to terminate the Bartlings' contract and resell the house. Whitehead, asked about the Bartling case, said he is willing to accept fewer trees. "This is not a situation where I typically find myself," he said.

James Sack, NV Homes' general counsel, declined to comment.

The Bartlings are born-again Christians who said their faith led them to children with special needs. After their son Joel was born, fertility problems led them to adoption. They brought Hannah, 11, a bright fifth-grader who sings in the church choir, home from Korea nine years ago. David, a precocious 6-year-old from China, literally appeared on the couple's doorstep less than two years ago after another couple decided they could not handle a blind child. The year before, Karen Bartling had read in a publication for parents and teachers of blind children that Jesse, from Korea, and Abi, who had been abandoned malnourished on the streets of Calcutta, needed homes.

Life at the Towne Place Suites has been a mix of improvisation and anticipation. Everyone needed new clothes, and the children new toys. Five-year-olds Abi and Jesse, not good sleepers to begin with, are uncomfortable sharing beds with their older siblings, their mother said.

Meanwhile, with the lock on the interest rate on their mortgage about to expire, the Bartlings have taken to calling their predicament their Extreme Screwover.

"We're just sitting on the sidelines waiting for NV Homes to deliver us a home we contracted for," Joe Bartling said. "Since when are trees more important than people?"

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Alexandria's End Run on Public Smoking

City Wants to Use Zoning Laws to Make Eateries Tobacco-Free

By Annie Gowen
Washington Post Staff Writer
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Frustrated that the state legislature failed to ban smoking in bars and restaurants, Alexandria officials have come up with a maverick plan of their own that would prohibit smoking in all new eateries and make it more difficult for existing establishments to allow people to light up.

The unusual proposal would use the city's zoning authority to mandate smoke-free restaurants.

If successful, Alexandria would become the first jurisdiction to bar restaurant smoking in Virginia, where the state legislature severely limits local authority. That means individual governments do not have the power to institute outright smoking bans in restaurants and bars, such as those adopted in the District and several Maryland jurisdictions.

So Alexandria has decided to use its limited powers to achieve the same result.

"This is something we all wanted," said Mayor William D. Euille (D). "It would be nice if the state would mandate and make it happen. But obviously they're passing the buck on this . . . so we need to move forward to do what we need to do, and we found the loophole to do it."

Euille said the city's proposal was a result of "creative, outside-the-box" thinking.

Alexandria would seize control of the smoking issue with such mundane tools as use permits. When a bar or restaurant came to the city to request a permit, the city would require it to be smoke-free before granting the permit. Restaurants that have permits must agree to go smoke-free in three months or risk future restrictions or even closure.

The state legislature evaluated several proposals to restrict smoking in public places this year -- always a difficult sell in a tobacco state -- and ended up with a measure that requires restaurants to post signs if they allow smoking.

Health advocates hope that Gov. Timothy M. Kaine (D) will amend that bill to ban smoking in restaurants altogether, but even if he did so, such an amendment could have difficulty winning approval in the House of Delegates.

The city's proposal won praise from anti-smoking advocates yesterday, even as others who have watched the smoking battle unfold in the legislature privately expressed doubt it would withstand a legal challenge.

"This is a brand-new approach to me," said Teresa Gregson, a lobbyist for the American Heart Association in Richmond. "I haven't heard of anybody using their zoning powers. I like it. It stirs up trouble and throws a whole new mix in the pot."

In a memo, Alexandria City Attorney Ignacio B. Pessoa wrote that if other jurisdictions protect residents from the dangers of secondhand smoke, while Alexandria does not, the city is likely to suffer an "economic disadvantage." Thus, the city is within its local authority to use zoning to require smoke-free dining, he argued. Montgomery, Prince George's, Howard, Talbot and Charles counties in Maryland as well as the District have smoking bans. Baltimore approved one this week, and the Maryland legislature is considering a statewide ban.

Alexandria's plan would require all new restaurants to be smoke-free, as well as existing restaurants with outdoor seating on public sidewalks -- which include many cafes in the popular Old Town and Del Ray shopping districts. Restaurants that want to continue to allow smoking would not be able to make upgrades or renovations and would risk being shut down, according to the plan.

"Alexandria would be the first jurisdiction in Virginia to link maintaining the economic vitality of the city as a restaurant destination with the abatement of the public health menace of secondhand smoke," Pessoa said.

The city has 2 million visitors annually and is expecting more when it is linked by water taxi to the massive National Harbor complex across the Potomac River in Prince George's County, set to open next year, Pessoa noted.

About a third of the city's 360 restaurants participate in the Proud to Be Smoke Free program, begun more than a year ago, officials said. That program is voluntary.

Others had reservations.

"I don't like it. I'd be against it," said Pat Troy, who owns an Old Town pub where smoking is allowed in the bar and on patios. "I want to stand up for people who want a cigarette or a smoke. The rights are being taken from people right and left. After a while, we'll have no rights left."

Asked about Alexandria's proposal, David Sutton, a spokesman for Richmond-based Philip Morris USA, reiterated the tobacco giant's position on smoking bans: that restaurateurs are the best gauge of their patrons' needs.

"We believe business owners -- especially those owners of restaurants and bars -- are most familiar with the needs of their patrons, and we think they should be afforded the opportunity to determine a smoking policy for their establishment," Sutton said.

Del. David L. Englin (D), whose district includes Alexandria, said he does not believe the proposal violates state law. "It's groundbreaking," he said. "It's a community making proper but creative use of its existing authority to protect public health."

The City Council approved an early draft of the proposal at its meeting Tuesday night and could hold a public hearing as early as next month. The mayor said he expects lots of public discussion in the coming weeks -- as well as a possible court battle if the measure is approved.

"I think we're going to be successful at this in the end," Euille said. "I'm sure there will be some legal

challenges, but hey, you never know until you try it."

The Importance of Maintaining Property Rights

1. The three most-influential political philosophers impacting the formation of American law were Charles Montesquieu, William Blackstone, and John Locke
2. Charles Montesquieu - "Let us therefore lay down a certain maxim: that whenever the public good happens to be the matter in question, **it is not for the advantage of the public to deprive an individual of his property** – ***or even to retrench the least part of it by a law or a political regulation***"
3. William Blackstone - "So great moreover is the regard of the law for private property that it will not authorize the least violation of it – no, not even for the general good of the whole community"
4. John Locke - "the preservation of property [is] the reason for which men enter into society. Government . . . can never have a power to take to themselves the whole or any part of the subject's property without their own consent, for this would be in effect to leave them no property at all"
5. Samuel Adams - "first, a right to life; secondly, to liberty; thirdly, to property – together with the right to support and defend them"
6. John Adams - "The moment the idea is admitted into society that property is not as sacred as the law of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. Property is surely a right of mankind as real as liberty"
7. John Jay (original Chief Justice of the U. S. Supreme Court and an author of the *Federalist Papers)* - "It is the undoubted right and unalienable privilege of a [citizen] not to be divested or interrupted in the innocent use of . . . property. . . . This is the Cornerstone of every free Constitution"
8. Adam Smith, famous economist of the Founding Era, foresaw the tendencies of governments to impinge the rights of private property, forewarning: "As soon as the land of any country has all become private property, the landlords [e.g., the governments], like all other men, love to reap where they never sowed, and demand a rent even for its natural produce"
9. Noah Webster, a Founding Father who served as a judge and legislator, declared that property is "the exclusive right of possessing, enjoying and disposing of a thing; ownership. In the beginning of the world, the Creator gave to man dominion over the earth, over the fish of the sea and the fowls of the air, and over every living thing. This is the foundation of man's property in the earth and in all its productions. Prior occupancy of land and of wild animals gives to the possessor the property of them. The labor of inventing, making or producing anything constitutes one of the highest and most indefeasible titles to property"
10. John Adams (signer of the Declaration and framer of the Bill of Rights) and William Paterson (signer of the Constitution and Justice placed on the U. S. Supreme Court by President George Washington) - "All men are born free and

equal, and have certain natural, essential, and unalienable rights, among which may be reckoned the right of . . . acquiring, possessing, and protecting property"

11. James Madison declared that "Government is instituted to protect property. . . . This being the end of government, that alone is a just government which impartially secures to every man whatever is his own. . . . That is not a just government, nor is property secure under it, **where *arbitrary restrictions* [i.e., restrictive zoning requirements], exemptions, and monopolies *deny to part of its citizens that free use of their [own] faculties***"

12. Fisher Ames, a Framer of the Bill of Rights, forcefully declared that "The chief duty and care of all governments is to protect the rights of property"

13. John Dickinson, a signer of the Constitution, declared: "Let these truths be indelibly impressed on our minds: (1) that we cannot be happy without being free; (2) that we cannot be free without being secure in our property; (3) that we cannot be secure in our property if without our consent others may as by right take it away"

14. John Adams – one of only two signers of the Bill of Rights – declared: "Property must be secured or liberty cannot exist" and that "[i]t is agreed that **the end of all government is the good and ease of the people in a secure enjoyment of their rights without oppression**"

15. Thomas Jefferson similarly declared that the purpose of government "is to declare and enforce only our natural [inalienable, God-given] rights and duties and to take none of them from us," including the right to own, use, and enjoy one's own private property

16. An early public school textbook on ethics, reprinted for generations, transmitted these original principles to young Americans, teaching them: "Property is something which one owns and has a right to own. . . . Everything which you see or touch belongs to you or to somebody else. If it belongs to you, you have the right to do what you please with it, provided you do not abuse it: if it belongs to somebody else, you have no right to it whatever"