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RIGHTS OF OWNERSHIP OR RIGHTS OF USE?—THE NEED FOR A NEW CONCEPTUAL BASIS FOR LAND USE POLICY

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The conventional concept of "ownership" in land is detrimental to rational land use, obstructive to the development of related environmental policies, and deceptive to those innocent individuals who would trust it for protection. A new conceptual basis for land use law and policy is required to reconcile the legitimate rights of the users of land with the interest of society in maintaining a high quality environment. This essay is intended to promote discussion of ways to reconcile these objectives.¹

Were the prevailing legal concepts of land ownership in the United States not already established, it is highly improbable that any similar body of doctrine would develop; rather, law more appropriate to modern social and economic realities would evolve. The existing aggregation of laws and practices pertaining to land ownership and use are beneficial primarily to persons interested in exploitation or litigation. They provide little protection to the owner who lacks continuous economic and legal counsel and who is unable personally to influence political decisions. Moreover, the laws are even less helpful to communities and the general public in maintaining or restoring the quality of the environment.

The persistence of archaic concepts of ownership rights is possibly the principal obstacle to effective land use planning. A redefinition of the rights flowing to an individual from his ownership in land is thus

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1. For a general treatment of land in American society, see M. CLAWSON, *AMERICA'S LAND AND ITS USES* (1972).

a necessary concomitant to land use planning, as well as to environmental management. Land law rooted in the conventions of Tudor England cannot be expected to serve the needs of the post-industrial society now emerging.

THE CONFUSING LEGACY OF CONVENTIONAL LAND "OWNERSHIP"

In his essay on "Control of the Use of Land in English Law," W. O. Hart, then Clerk of the London County Council, observed: "The English Law of real property never developed a true theory of ownership: title was, and still is in essence, possessory and, moreover, relative rather than absolute."² The prevailing principles, terminologies, and deficiencies of English land law were transplanted to colonial America, and, although changed circumstances led to changed concepts and practices, the basic elements of law as interpreted in seventeenth and eighteenth century England have continued to influence land law and policy in the United States. The absence of an adequate theory of land ownership and the status of man-land relationships at the time of the English colonization of America were basic forces which have shaped the tough resistance of the American political-legal system to effective public control over the uses of land.

Throughout the history of law in Western society, property in land has been distinguished from other forms of property, and rights of ownership have been distinguished from rights of use. Rights pertaining to land have never been absolute in fact, and only rarely in theory. As R. G. Crocombe observes, "The word ownership is misleading. A person does not really own land: he owns rights in land."³ Authority over the uses and disposition of land has always been residual in society, whether represented by the community, the monarch, or the state, and survives today in the concept of "eminent domain."

Except as allocated to specific persons for designated uses, land in Anglo-Saxon England was "folcland," that is, belonging to the folk.⁴

2. LAW AND LAND 23 (C. Haar ed. 1964).

3. South Pacific Commission, *Improving Land Tenure: A Survey of the Problems of Adapting Customary Land Tenure Systems to Modern Economic Conditions in the Region Served by the South Pacific Commission* (1968).

4. For the history of English land law, see K. DIGBY, *AN INTRODUCTION TO THE HISTORY OF THE LAW OF REAL PROPERTY* (1875); W. HOLDSWORTH, *AN HISTORICAL INTRODUCTION TO THE LAND LAW* (1927); A. SIMPSON, *AN INTRODUCTION TO THE HISTORY OF THE LAND LAW* (1961).

Under feudalism, distinctions between the rights of ownership and of use continued. As the English economy outgrew the provisions of the common law for the adjudication of disputes over the uses of land, however, the Court of Chancery, where adjudication was not rigidly bound by precedent and tradition, assumed increasing importance. Although Parliament in 1535 enacted the Statute of Uses to clarify and reconcile the complexities which had accumulated regarding rights in the conveyance, utilization, and alienation of land, economic forces and legal conservatism soon combined to diminish public benefit from this legislation. As a result, the legacy of English land law that was transmitted to the American colonies was highly technical, complex, and unsystematic. Moreover, since real property law is a province of the individual states, its unsystematic complexity has increased over the years—its deficiencies remaining largely unresolved.

The period of the European colonization of America witnessed a transition in the status of man-land relationships from vestiges of feudal land tenure to the treatment of land as a marketable commodity. The transition continued over several centuries and was influenced by economic forces and opportunities, rather than by a theory or master plan. In America the great opportunity lay on the frontier, where land was free from the traditional encumbrances of communal, seigniorial, or royal authority. The possession of land conferred security, economic freedom, and social status, and the settler in America developed a deep hunger for ownership of land such as he could never have hoped to satisfy in the Old World. As an owner of land, he owed no obligation to neighbor or posterity, and very little to the state. He came closer to holding his land in “fee simple absolute” in a literal sense than anyone ever has under Anglo-American law.

Freed of the vestigial constraints of feudalism, the landholder in America developed a tenacious attitude toward unfettered rights of private land ownership. Most important of these was the right to treat land as a commodity—to buy and sell, to speculate, and, under the right of ownership, to take from the land whatever might be of value. This strong sense of a private right of ownership combined with the abundance of unpreempted land and the disinclination of government to interfere with land use to establish a tradition of private property in land that has proved highly resistant to the imposition of public land use controls. With a few exceptions pertaining chiefly to public nuisances, the rights of ownership fully covered the rights to use or to

dispose. No other society appears to have gone so far in leaving the fate of the land to the discretion of the private owner.

The development of public land use policy in the United States thus began inauspiciously with a people emotionally committed to a myth of private rights in land ownership. Although the pressures on available land caused by an increasing population and expanding economy have somewhat eroded the commitment to this extreme form of economic individualism, public opinion has continued to adhere to its basic tenets. Whether the refusal to examine underlying concepts stems from a conscious fear of the effect of possible alternatives or merely from a subconscious sense of tradition, the effect has been the frustration of the rational use of land in the long-range public interest and oftentimes the failure to protect the interests of the individual landowner.

ANOMALIES AND DEFICIENCIES OF THE OWNERSHIP CONCEPT

The case for conventional ownership of land cannot be made by reference to history or theory. The history of American land law and its English antecedents makes evident that the right to hold, enjoy, develop, and protect land, as well as to profit from its use, was never absolute nor contingent upon ultimate legal ownership. The strongest defense for the prevailing concept of land ownership is the empirical fact of its existence. American folklore vaguely envisioned a moral right in lawful possession that stood against all claims except those of the state for taxes and those of creditors to whom the land had been mortgaged. The doctrine of eminent domain (the government's power to claim private land for use by or for the public), however, involved a concomitant recognition that the ultimate owner of land was the society as a whole. Moreover, the myth of a moral right to absolute possession is not generally supported by interpretations of natural law, nor uniformly by the idea of absolute possession as a civil right. There are advantages in the private ownership concept which account for its persistence, but not all of these advantages are derived from the mere fact of ownership; there are a number of contingencies for which ownership offers at best a partial solution.

Legal fact and popular concept are seldom entirely consistent in any field of law. With respect to land, the fixation on private property has tended to obscure the reality that peaceful possession rests upon the public affirmation and protection of whatever rights do in fact exist. If privacy is an objective, land ownership does not assure it. The privacy

of an owner may be invaded by public authorities for many reasons, among them tax assessments and a myriad of public uses such as highways and airports. Nor is ownership a barrier against such effects of modern civilization as noise, glare, litter, and atmospheric pollution.

The rights of ownership being conditional, the practical question of the meaning of ownership consequently relates to the conditions under which alleged rights of owners may be, or would be, enforceable. At best, ownership supports a right to sue for damages or injunctive relief. In most communities, defense against casual trespass is a responsibility of the owner, not of the local government through the police, and the owner's ability to enforce his rights is limited by law, and often by circumstance.

It is logically anomalous to concepts of private ownership in land, but nevertheless a fact, that many state laws confer upon privately owned utilities the power of eminent domain over privately owned real property. If the exercise of this public power is essential to the siting of power plants and the routing of transmission lines, it is dubious that the generation and distribution of electrical energy is an appropriate activity for private enterprise. It would be more consistent with popular concepts of private property rights if eminent domain were invoked only by agents of the public. Logically, the sites and routes of power lines, pipelines, and generating plants would be publicly owned; if operation was through private enterprise, the use of leases or franchises to the utility from the government would be appropriate.

Just as conventional concepts of land ownership cannot assure privacy, they cannot guarantee personal and economic security. It is not uncommon for an individual to be murdered or robbed on his own land, the market value of land may fall as well as rise, and the burdens of ownership may be increased through taxation and special assessments. The relative permanence of land does make it acceptable collateral for loans, and this economic advantage, together with the relative stability of land values, offers the most reliable benefit to be obtained from ownership as presently defined. Any such benefit, however, is obtainable only to the extent that land is treated as a commodity and is enjoyed exclusively by the owner, often at the expense of his neighbors and society generally.

Although some laws governing nuisances and threats to public safety have traditionally limited the lawful uses to which an owner may put his land, these limitations pertain to the use, and not the ownership, of land. It is at this point, where rights of use are claimed to follow from

the rights of ownership, that legal and political conflict over the rights of use characteristically arise. Although the principal advantage of land ownership has been in concomitant freedoms of use, especially to sell or otherwise convey for a consideration, the most numerous and flagrant abuses of land tend to be associated with its treatment as a commodity. Some of the worst practices are perpetrated by corporations engaged in land sales and speculation. Ironically, the same transaction by such an enterprise which proves economically profitable to a stockholder may, unknown to him at the time, result in a serious loss of what he considers valuable environmental amenities.

The composite picture of land ownership rights in the United States is anything but consistent. The basic deficiency in the law of land ownership lies in the inadequacy of its philosophic foundation. It is difficult to build a logical case for, or against, a body of law which has grown, virtually ad hoc, in response to pressures and events. As K. E. Digby observed with respect to the evolution of the English law of real property: "[T]he nature and attributes of the various classes of rights are to be accounted for by reference rather to their history than to any principles of jurisprudence."⁵ Digby concluded that the confusion engendered by provisions of the Statute of Uses "renders any real simplification of the law of real property impossible, without a more thorough rebuilding of the whole structure from its foundations and the substitution of a systematic or scientific for a historical classification" ⁶ Since Digby's time, significant rationalization, if not any real simplification, has occurred in English law, notably through the Town and County Planning Acts. In the United States, however, there are as many different systems of land law as there are states and their 10,000 local subdivisions, with additional legislation pertaining to federal lands and territories. Of course, the mere fact of variation does not in itself imply deficiency; it does, however, reflect the absence in American society of a guiding philosophy of man-land relationships.

The closest Anglo-American law could come to developing an adequate theoretical foundation for rights of land ownership and use was a very inadequate approximation to such a theory provided by the doctrine of natural law. The most influential American expositor of natural law doctrine in relation to land was Thomas Jefferson.⁷ His

5. K. DIGBY, *supra* note 4, at vi.

6. *Id.*

7. See Caldwell, *The Jurisprudence of Thomas Jefferson*, 18 *IND. L.J.* 193 (1943).

opinions, however, tended to be broadly philosophical and political, rather than more narrowly jurisprudential, and frequently embraced contradictory propositions for which he offered no resolution. Jefferson argued that the system of land inherited from Norman England could not be applied to colonial America without the consent of its inhabitants. He compared the European settlers of America to the Saxon invaders of Britain, declaring: "Their own blood was spilt in acquiring lands for their settlements, their own fortunes expended in making settlement effectual; for themselves they fought, for themselves they conquered, and for themselves alone they have a right to hold."⁸

Jefferson thus alleged that the British crown had no claim to title of unoccupied lands in the colonies and that their use and disposition by the Americans was justified by conquest and occupancy. This taking of possession of unoccupied land appeared to be a natural right, but, reasoning that even natural rights could be abridged or modified with the consent of the people or their deputies, Jefferson believed that the personal ownership of property must be deemed a civil rather than natural right. Although he believed that society should guarantee to everyone "a free exercise of his industry, and the fruits acquired by it,"⁹ he held that the rights of an individual, natural or civil, never extended to harming the equal rights of others.

Moreover, Jefferson did not believe that the civil law of one generation could bind succeeding generations. "Each generation," he wrote, "has the usufruct of the earth during the period of its continuance. When it ceases to exist, the usufruct passes on to the succeeding generation, free and unincumbered, and so on successively, from one generation to another forever."¹⁰ Beyond the obvious consideration that every generation to some extent reinterprets existing policies and laws, this philosophic proposition was hardly applicable in the practical world and was clearly not supportive of conventional practices regarding land ownership.

Thus, the man who, more than any other, may be described as the father of American democratic ideals left a confusing legacy of thought regarding the rights of the individual and the rights of society vis-à-vis the ownership and use of land. No other public figure in the formative years of the nation had greater concern for land policy and for the rights

8. 2 THE WORKS OF THOMAS JEFFERSON 64-65 (P. Ford ed. 1904).

9. *Id.*

10. *Id.* at 298 (letter to John Wayles Eppes, June 24, 1813).

of the individual farmer and homesteader. The persistence of his ideas in a populous, industrial, and interdependent society has had effects he could hardly have imagined and many of which have been utterly inconsistent with his values. Nevertheless, his insistence upon the need for the adaptability of law and institutions to the changing circumstances of society is the clearest and most pertinent contribution of his thought to the present debate over land use policy and law.

NEEDED: A NEW CONCEPTUAL BASIS

The conventional belief that land may be "owned" as of "right" rather than as a socially derived privilege is undercut by a number of considerations, several of which have shaped land use arrangements in other societies. Common among primitive and pastoral peoples, for example, is the belief that because no man made the land, no man may possess it as his "own." This viewpoint, which has been adopted in some sectors of the ecology/environmental quality movement, is totally unrelated to Marxist theory, being derived from a theory of man-environment relations rather than from socio-economic philosophy. Although in exceptional instances land may be "made" in the sense of being made available for human use through human effort, any one individual rarely is equal to the task. Thus, the polders of the Netherlands, which were socially engineered, "belong" to the nation.

A second consideration which has persisted throughout the evolution of the law of real property involves the contrast of the transiency of man in time and space against the relative permanence of land. This consideration, indeed, is the basis for distinctions between real and personal property. Since real property cannot be separated from its environment and since successive generations will depend upon it for sustenance, the integrity of the land and its ecosystems demands that the arbitrary personal use of any part of it be subject to social interposition if the acts of an owner pose a threat to the continuing welfare of the community.

From this consideration follows the principle of stewardship, under which ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present.¹¹ The ownership concept as it developed in the United States emphasized the rights of personal possession but suggested no attitude of responsi-

11. See C. LITTLE & R. BURNAP, *STEWARDSHIP: THE LAND, THE LANDOWNER, THE METROPOLIS* (1965) (prepared for landowners in the New York Metropolitan region by the Open Space Action Committee).

bility to the public or to posterity. Beyond the law, however, there has been recognition of an ethical concept of stewardship. Although the roots of this attitude, which at times assumes a semireligious or mystical character,¹² are ancient and multicultural, its assumptions regarding man as belonging to the totality of nature are more consistent with reality as revealed by science than are the technical principles of judicial logic evolved in response to the exigencies of economics and political power.

A fourth consideration with respect to land ownership, having no historical tradition, is that the ownership concept developed under relatively constant social conditions entailing no massive rapid changes in land value or usage. In America the relative abundance of cheap land and the minimal demands of society upon landowners continued from the time of the European settlements until the late nineteenth century. By the mid-twentieth century, however, radical changes in man-land relationships were effected by great increases in population and per capita wealth. The impact of technology upon land use was no less dramatic, new modes of transportation making every part of the nation readily accessible to popular use and exploitation. Air-conditioning and cheap energy altered human ecology and land use patterns over large areas of the nation. Following World War II, the escalating market value of land had an impact on American society equalled only by the concomitant destruction of the landscape and the generally disastrous dispersion of housing and commercial activities over the countryside. The cumulative effect of these changes has been to bring into question the social desirability of the rights of land ownership as presently construed. The case for ownership of land would be stronger were the personal freedom and independence of most Americans actually dependent upon it. The present status of land ownership, however, is beneficial chiefly to developers and speculators, as well as to exploiters of values attached to the land. While to the individual home owner mere ownership offers little more than the illusion of security, the advantages accrue to the indifferent despoiler of the land and landscape whose interest is with neither land nor environment but rather with the economic returns from his land transactions.

Together, these considerations suggest that a more appropriate mechanism than conventional ownership is required to govern and ensure the right to use land in particular ways and for particular purposes and the

12. See L. BAILEY, *THE HOLY EARTH* (1919).

ability to obtain reliable protection, consistent with the public interest, from invasion of such right. Systematic means are needed to balance the various uses of land in society. The proposition guiding any such alternative should be that, next to man, land is the fundamental element of the human environment and the one most important in shaping the character of society.

The need for a change in laws governing land arises as a concomitant of other major social changes. English land law experienced periods of major change at critical junctures in English history. The change from a communal to a feudal land system followed the Norman Conquest and from feudal to commercial, illustrated by the Statute of Uses, marked the birth of modern England. The third dramatic change occurred when England reached "saturation" with respect to demands upon land and when social and ecological considerations gained ascendancy over market considerations. The series of Property Acts taking effect in 1926 and the subsequent Town and County Planning Acts have restated and restricted the rights of the landowner, although, in a characteristically English manner, the changes have been incremental and reformist rather than expressive of a radical new ideology.

English land law was transplanted to America at a time when the powers inherent in private land ownership had reached a zenith. The conditions favoring free exercise of such powers have continued for over 300 years, becoming deeply ingrained in American ethics, attitudes, and expectations. Radical changes in the American economy and lifestyles in the mid-twentieth century found the nation poorly equipped by psychology or by law to cope with the rapidly mounting problems of land use. The persistence of the traditional land ownership concept in the face of such vastly altered societal circumstances represents perhaps the most costly deficiency of the traditional concept—its inability to adapt to meet changing circumstances. Cheap energy, together with a free market in land, have encouraged the disintegration of cities and the sprawl of economic activities and settlements across the country, entailing heavy fixed costs in public services and transportation of people and materials and involving attendant losses of environmental amenities. The energy crisis of recent months demonstrates the manner in which the decentralizing effect of land use policies has defeated the efficient use of mass transit in suburban areas.

The cumulative effect of the most recent quarter-century of private land use decisions has been the disintegration of the physical structure

of American society. These decisions have, of course, been influenced, often inadvertently, by public policies relating to taxes, credit, highway construction, low-cost housing, and civil rights. An interlocking set of conditions and policies devised to deal with them have converged to destroy urban as well as rural environments and to overwhelm the burgeoning suburbs with expenses and problems. It is in the face of this disintegration of the social fabric that land use planning and the control of urban growth have at last become major subjects of political concern. In the absence of a fundamental change in the rights of land ownership, however, serious efforts to implement rational land use planning legislation are likely to be ineffectual.

SOME ELEMENTS OF A RATIONAL POLICY

In the search for alternative principles of land policy, it is essential that temporary economic advantages (or disadvantages) to particular individuals be distinguished from definable long-range benefits satisfying social and ecological criteria. It also is necessary to distinguish theory from actual effect. Failure to make these distinctions would almost certainly increase the probability of opposition from persons owning land even though many of the traditional rights of ownership would be replaced by rights of use. If those rights of ownership presumed to ensure the security and responsibility of the individual landowner could be maintained more effectively in some other way, there might be a generally recognized advantage in abandoning the concept of land ownership. Thus, assured protection of the socially and ecologically harmless rights which now are allegedly protected by ownership would certainly be a prerequisite to the willing acceptance by landowners of any new set of legal principles under which land itself is not owned.

A second prerequisite would be provision against the "tragedy of the commons" effect.¹³ Land, as such, would be no more "ownable" than air or water, but the *uses* of land would be the object of law and of rights, as presently is the case with water. The objective would not be to substitute bureaucratic for commercial decisionmaking over land use but rather to clarify and specify this decisional process, as well as to assure more adequate protection to the legitimate interests of individuals and the present and long-term needs of society.

Following are some propositions, none of which is intrinsically new, which might serve toward these purposes. Any element of novelty lies

13. See Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243.

in the combination of these propositions to form a new conceptual basis for land law and policy, the goal being the construction of a foundation in jurisprudence for the environmental policies which must be devised to safeguard our future in a finite world.

First, rights of ownership should be redefined to apply not to land itself but to specific rights to occupy or use particular parcels of land, or both, in accordance with publicly established criteria. Rights to use might be bought and sold, and could confer possession, but the land itself would cease to be the representative symbol of these rights. The ultimate repository for such rights would be in society, and their administration, while through government, could involve extensive citizen participation.

Second, rights of occupancy would be defined by law, with land classified according to its economic and ecological capabilities, and would be regulated by provisions specifying the obligations of occupancy and governing the acquisition of additional rights. The term "rights" would encompass those activities in relation to the land in which the occupant or user might freely engage, as well as those aspects of privacy and of security from external damage or annoyance which society through government would undertake to defend and protect. Obligations concomitant to custody of land would include, in addition to traditional restrictions against public nuisance, measures designed to protect air and water quality, the integrity of ecosystems, and the character of the landscape, whether manmade or natural. The classification system, allocating specific rights to particular areas or parcels of land, would be the product of public planning. For any given piece of land, only those rights allocated to it could be exercised, although not all available rights would have to be exercised. Furthermore, a purchaser might buy some but not all of the rights pertaining to a parcel of land; he could, for example, purchase the right to farm without also obtaining the rights to mine or to develop the land. The combination of rights and obligations thus defined could apply to communities and public authorities, as well as individuals and corporations. Such application would be especially important with respect to land used for public works, such as power plants, energy transmission lines, airports, highways, military installations, scientific research, recreation, historic preservation, and natural resources development.

Finally, taxation would apply to the economic value of the rights actually possessed and exercised, not to the land itself or in anticipation

of rights that *might* be obtained for the particular piece of land. The tax rate could be adjusted to compensate the public for any burden, such as air pollution, that a particular land use might place upon a community. This system would put an end to the practice of assessing land at its presumed market value regardless of its use. The owner of the right to farm a tract of land, for example, could be taxed only in relation to that right, even though the farm was surrounded by land for which highly taxed development rights had been granted. In addition, since capital gains in land per se would not be obtainable, the owner of the right to farm a piece of land could not follow the present practice of holding land off the market in anticipation of an increase in its value. He could not develop the land or sell development rights to others unless he possessed such rights, and any changes in the use of land not included among the rights already possessed by the user would require purchase of additional rights from the appropriate public authority. Conversion of farmland to an industrial site, for instance, would require the purchase of a right or franchise to develop. The assessment of rights would reflect the profitability of the development and the costs and benefits to the community. In this regard, the right to remove minerals, soil, or timber from land would require conditional permits drafted to protect ecological and amenity values and to ensure the economical handling of the materials. This arrangement would replace existing severance taxation.

A major objective of these changes in land law would be to assure that publicly created values in land would accrue to the public. Thus, increases in the value of land at newly constructed interchanges on interstate highways would afford no opportunity for profit to the existing land users. Whether development rights or franchises would be granted would depend upon considerations of areal physical planning and public necessity and convenience. A development franchise could not be granted without an environmental impact study and, if granted, could stipulate style of construction, siting, landscaping, and provision for traffic flow and public utilities.

Surrender of development rights, and avoidance of attendant financial liabilities, would require restoration of land to a condition at least equivalent, in most cases, to its predevelopment status. Derelict billboards, abandoned buildings, mines, quarries, and other residuals of discontinued development would be taxed at rates sufficient to compel their owners to undertake remedial or restorative measures. The intent of these

provisions would be to make development more responsible and more carefully considered. It would also make development less spontaneous and less profitable to would-be speculators. Special provision should be made, however, to prevent the destruction of potentially useful structures or of buildings of artistic or historic value. Certificates of exemption might be issued to relieve owners of these nonproductive "improvements" from taxation at development rates.

A secondary purpose of the proposed changes would be prevention of socially and ecologically harmful speculation in development. Although a grant of development rights would confer limited authority to change the uses of land in certain ways, major environmental changes, such as development of a shopping center involving public services and transportation, would require an additional franchise. If, as has been suggested, development taxes must be paid as long as a right to development is held, developers could not escape errors of judgment or miscarriage of projects merely by abandoning them. Until the development rights were sold or surrendered, they would continue as liabilities accruing against the holder. Some form of public receivership would doubtless be necessary to take custody of abandoned property and to restore the land with funds obtained from forfeited equities or from penalties for the failure to restore the land.

A virtue of the foregoing approach to land use policy is that decisions affecting the public would in effect become public decisions, a circumstance that occurs imperfectly, if at all, under the laws currently prevailing in most states. The decisional process could be made more open and explicit than generally is the case under the system of private land ownership. The "rights to use" approach would direct public action away from litigation and toward planning and administration.

Among the probable effects of removing land per se from the market and from treatment as a commodity would be a temporary price instability until completion of redefinition of rights in terms of use. Although in the interim prices of land would probably be depressed, a traumatic effect on the real estate economy might be avoided if the existing market value were redefined to be the value of its present use. The immediate effect of the proposed changes on expansive economic growth would be negative; the long-range impact, however, would be to stabilize economic activity and reduce the incidence of failure in land development projects. In terms of the effect upon the public revenues, taxation of land would be replaced by taxation of rights in

land. Structures built on the land could, as at present, be taxed separately. The incidence of these taxes would require careful study, since there would be no inevitable direction in which the tax burden could be shifted.

FEASIBILITY OF THESE PROPOSITIONS

The principal effect of the foregoing propositions would be to take from private persons, individual or corporate, the power to effect significant alterations in the environment without public consent. It does not follow, however, that the power of environmental planning and management would be transferred to public bureaucracy. Use of citizen boards of review and open planning sessions, as well as provision for input from science and the design arts, could result in more socially and ecologically responsible land use decisions than might be expected under the existing technicalities of land use law.

The objectives of these propositions are, in a very fundamental sense, conservative. They are intended to preserve and to conserve, to encourage and to enforce responsibility toward society and posterity, and to reduce the likelihood of rash and destructive uses of land and resources. Moreover, they are intended to do these things without loss to the real freedoms currently enjoyed under ownership of land, except where their exercise would be prejudicial to society.

It should be apparent that the proposal to replace rights of land ownership with rights of use implies the possibility of major changes in the power structure of society and in the processes of decisionmaking with respect to land use. These changes are certainly not imminent; to what extent might they become feasible?

The propositions which have been suggested may, in certain respects, appear similar to those advanced more than a century ago by Henry George.¹⁴ The philosophical foundation of both approaches is ecological and stems from the belief that, in a logical and meaningful sense, land, as such, can no more be owned than air or water. The purpose of the propositions advanced in this Article, however, is more limited than that of George's, and the alternatives are more numerous, more complex, and less definite.

No general reformist device such as the "single tax" is proposed, nor would the tax on uses suggested in this Article necessarily force land

14. See H. GEORGE, *OUR LAND AND LAND POLICY* (1871); H. GEORGE, *PROGRESS AND POVERTY* (1879).

into economic productivity or cause it to be withheld from use. It is the value of the use that would be taxed, not the value of the land. Payments for rights of use correspond to Henry George's "rent," and, although no claim is made that this form of taxation is necessarily more equitable than those presently practiced in the United States, it may be suggested that the effects of taxation might be clarified and criteria for equitability more adequately defined.

Whatever its deficiencies, the existing system of land ownership, and its variations and modifications, has produced relationships and results that are generally, if imperfectly, understood. Remedies exist for most abuses, although their practical availability is often expensive and belated. Substitution of another system of law for man-land relationships will not be easily accomplished. This Article has advanced the proposition that the changes which have been occurring in modern society have made the present land ownership system increasingly dysfunctional to rational economic and ecological objectives. Nevertheless, recourse to a different system should be undertaken only after careful study of the probable consequences of such a change.

The importance of research on the relationships between land use and the laws governing proprietary land units has been stressed by D. R. Denman, Professor of Land Economy at the University of Cambridge.¹⁵ Study of the proprietary structures in land and of relationships between the proprietary land unit (ownership) and the enterprise unit (use) has been undertaken by the National Institute of Agrarianical Research, Rural Economy and Research in France.¹⁶ The problem of finding an optimal relationship between rights of ownership and rights of use thus is not unique to the United States.

Professor Denman in his inaugural lecture declared: "Property rights in land or rights analogous to them are, in the last analysis, the only power by which men can execute positive plans for the use of land and natural resources."¹⁷ Denman argues persuasively that much of the frustration and failure in present land use planning has resulted from the failure of planners to recognize adequately "the positive influence of property rights in land" and that "the planning process has not super-

15. D. DENMAN, *LAND USE AND THE CONSTITUTION OF PROPERTY: AN INAUGURAL LECTURE* (1969).

16. See Brun, *Droits de Propriete et Droits d'Usage du Sol Agricole: Un Essai de Description, Economie Rurale* (No. 75, 1968).

17. D. DENMAN, *supra* note 15, at 2.

seded the property sanction.”¹⁸ The apparent need is to find an appropriate institutional means for reconciling the right of the individual to own with the need of society to plan. Rights of ownership in land as they have been conventionally interpreted in the United States have not met this need. The wise course would therefore seem to be to identify those analogous rights which, even if retaining the terminology of private property rights in land, would redefine those rights to serve better the public interest.

18. *Id.*