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Land-Use Controls: Cases and Materials. By Robert C. Ellickson and A. Dan Tarlock.

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BOOK REVIEW

LAND-USE CONTROLS: CASES AND MATERIALS. By Robert C. Ellickson and A. Dan Tarlock. Boston, Mass.: Little, Brown and Company, 1981. Pp. xli, 1093. \$25.00.

ROBERT J. HOPPERTON*

A land use casebook that is stimulating, refreshing, and fun, that demonstrates intelligence and a high order of sophistication about the real world, that provides the necessary tools for both legal and economic analysis of land use controls, that is organized coherently, and that is written well and with humor—is there such a casebook? Last May, as I pondered book selection for my summer term Land Use Planning class, I concluded that, although the field was getting crowded, none of the entries stood out. Certainly none met all these criteria.

Somewhat reluctantly, I chose *Planning and Control of Land Development* by Daniel R. Mandelker and Roger A. Cunningham,¹ a book which I had used recently and for which I have a healthy respect. It contains an excellent and comprehensive selection of current cases, a helpful, well-organized treatment of the planning process, and enormously informative and complete notes. In addition, it is not still fighting the thirty-year-old battle of the comprehensive plan with twenty-year-old cases.² It does not contain seemingly endless notes with the “what result?” question,³ nor does it present six chapters and more than two hundred pages on planning,⁴ which inevitably leave students bored and restive. Finally, it does not have a curious sequence that places cases on growth control before cases on zoning.⁵ For all its virtues, however, the Mandelker and Cunningham text is bland and conventional and generates few sparks.

As I was about to submit my book order, a new casebook, *Land-Use Controls: Cases and Materials* by Robert C. Ellickson and A. Dan Tarlock,⁶ arrived in the mail. The preface was intriguing:

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¹ D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* (1979).

² Contrast C. HAAR, *LAND-USE PLANNING passim* (3d ed. 1976).

³ For examples of extensive notes of this sort, see *id.*

⁴ Contrast D. HAGMAN, *PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT* 19-285 (2d ed. 1980).

⁵ Contrast R. WRIGHT & M. GITELMAN, *CASES AND MATERIALS ON LAND USE* (3d ed. 1982).

⁶ R. ELICKSON & A.D. TARLOCK, *LAND-USE CONTROLS* (1981).

The first generations of land-use casebooks, starting in the late 1950s, reflected the notion that substantial governmental intervention in the private land market was desirable and that the primary function of the law should be to facilitate this intervention. Our experience teaching land-use controls for over ten years has led us to be dissatisfied with this outlook. The reader of this book will find that our approach is revisionist in that the premises underlying public land-use controls are rigorously questioned at every opportunity. Moreover, we believe most existing casebooks do not satisfactorily explore the practical problems which confront attorneys involved in modern land-use disputes. Therefore a second basic objective of this casebook is thoroughly conventional: to make an accurate and comprehensive exposition of the current law of public and private land-use controls.⁷

The thought of so irreverent an undertaking as a "revisionist casebook" that questioned old verities and deities left me a bit unsettled. Nevertheless, I read on:

To lay bare this land-use control system, we have relied heavily, although by no means exclusively, on the tools of welfare economics. We have done so for two reasons. First, we believe that it is pedagogically useful to compel the student to evaluate the strength of the case for public intervention. Second, much of the "law" of public as well as private land-use controls consists of poorly reasoned judicial opinions and statutes which yield few insights and unifying themes. We have found that the perspective of welfare economics often helps to explain otherwise mystifying doctrines, and to reveal alternative methods for resolving land-use conflicts. In short, we have chosen to view the land-development industry as a regulated industry, and have asked the question so often heard today in other regulatory contexts: Is the current regulatory system justifiable?⁸

The tools of welfare economics, the question of whether the current system is justifiable, and a combination of the theoretical and practical might enliven the dog days of the summer term. I was tempted, even though a previous collaborative effort by Professor Tarlock⁹ was poorly organized, miserably captioned, and mechanically weak. These days of deregulation and supply-side economics, however, suggested that this new offering would be thought-provoking and topical for both teacher and student. With modest expectations, I selected the Ellickson and Tarlock casebook. Moreover, to provide the authors their best chance to expose the inefficiencies and inequities in the present land use system, I assign-

⁷ *Id.* at xxxiv.

⁸ *Id.*

⁹ E. HANKS, A.D. TARLOCK & J. HANKS, *CASES AND MATERIALS ON ENVIRONMENTAL LAW AND POLICY* (1974).

ed without omissions their first eight chapters for my four-hour, one-quarter summer course.

The results were most satisfying. *Land-Use Controls: Cases and Materials* far outstripped my expectations. It is a superior, eminently teachable casebook that meets the criteria listed at the beginning of this review. Although the book has weaknesses, it is probably the best entry in the land use field.

The book is well structured; its divisions, classifications, and sequences are coherent. Moreover, Ellickson and Tarlock obviously learned valuable lessons from Norman Williams,¹⁰ for they arranged their analyses of zoning into chapters of landowner rights and neighbor rights, an organizational and analytic technique that makes the welter of land use planning law comprehensible. They also emphasize the differences in land use jurisprudence from state to state, as Williams does,¹¹ thus enabling students to see, for instance, that land use planning in California is far different from that in Illinois. In addition, placing the chapter on "Planning, Planners, Plans" *after* chapters on landowner rights and neighbor rights works much better for students than the conventional placement¹² of planning materials in the initial chapter or two of a casebook. This early exposure to actual controls, which theoretically are guided by a land use plan, clarifies and enlivens the elusive ideas of planning and comprehensive plans. The authors' sound design is enhanced by excellent classification and sequencing of topics within chapters. For example, the material on "deals" between local governments and private developers is particularly well done. The authors achieve additional clarity through consistently informative and accurate topic headings.

The authors' excellent thematic development is another strength. Important topics are introduced and then re-examined in different contexts. For instance, the concept of damages as a neglected remedy appears in Chapters Four, Six, and Eight as the authors make a case that the most pervasive error in American land use jurisprudence was the failure of the Supreme Court in *Nectow v. City of Cambridge*¹³ to grant more than an injunction.¹⁴ The repetition of such themes adds measurably to coherence.

The authors' principal theme is their critique of public regulation, a critique employing the tool of welfare economics. Repetitive treatment and clear exposition make this economic analysis comprehensible to

¹⁰ N. WILLIAMS, 1 AMERICAN LAND PLANNING LAW 71-79 (1974).

¹¹ *Id.* at 114-76.

¹² See, e.g., C. HAAR, *supra* note 2; D. HAGMAN, *supra* note 4.

¹³ 277 U.S. 183 (1928).

¹⁴ See also Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 490-93 (1977).

noneconomists and trigger thoughtful questions and comments from students as well as a high degree of class participation. Again, the authors succeed where other casebooks in the land use area either fail or do not even try.

Especially interesting in view of the authors' basic inquiry—whether the regulatory system is justifiable—is Chapter Six, "Alternatives to Public Regulation: Nuisance Litigation, Covenants, and Government Incentives." This chapter, which develops the theme of the greater efficiency supposedly to be obtained through private systems of land use controls, partially fails; the authors' case for private systems is unpersuasive. As Professor Ellickson conceded in 1973, little empirical research tested his intuitive estimates.¹⁵ The empirical research apparently has not yet been done. Two important pragmatic considerations also are ignored: the criticism that private land use controls lack the definitive development permission necessary to developers¹⁶ and the likelihood that private controls always will be politically unpopular. Political rejection seems likely because even the free-market, supply-side advocates in places such as Palo Alto probably are unwilling to exchange zoning's protection of their residential property for the "efficiencies," but uncertain protection, of private controls. Finally, this chapter, which is admittedly not an in-depth treatment of protective covenants,¹⁷ has a weakness typical in such presentations: it inadequately distinguishes covenants from equitable servitudes—a distinction which may be crucial to clarifying much in this confusing area.¹⁸

Besides the strengths already mentioned, coverage is generally more than adequate. I found no need for supplementary cases or statutes. On the other hand, overzealous editing of important cases such as *Southern Burlington County NAACP v. Township of Mount Laurel*¹⁹ and *Golden v. Planning Board of Town of Ramapo*²⁰ and of Justice Hall's dissent in *Vickers v. Township Committee*²¹ is a serious weakness. Students lose too much when such cases are so heavily edited. Even a turgid opinion such as *Ramapo* can be overedited, and elimination of so much of *Mount Laurel* that students get no sense of its structure and reasoning is unfortunate. These weaknesses, however, are offset by inclusion of other interesting

¹⁵ Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 781 (1973).

¹⁶ See Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719, 721 (1980).

¹⁷ See R. ELICKSON & A.D. TARLOCK, *supra* note 6, at 614.

¹⁸ For a skillful casebook treatment of covenants and equitable servitudes, see J. CRIBBET & C. JOHNSON, *CASES AND MATERIALS ON PROPERTY* 637-78 (4th ed. 1978).

¹⁹ 67 N.J. 151, 336 A.2d 713, *appeal dismissed*, 423 U.S. 808 (1975).

²⁰ 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

²¹ 37 N.J. 232, 252-70, 181 A.2d 129, 140-50 (1962) (Hall, J., dissenting), *appeal dismissed*, 371 U.S. 233 (1963).

and stimulating selections such as "How They Assembled the Most Expensive Block in New York's History,"²² "The Battle of Russian Hill,"²³ and Chapter One, "The Land Development Process," which add spice and variety with a purpose. Finally, laced throughout the book is a knowledge of current events and trends that provides enjoyable, informative reading.

Ellickson and Tarlock have produced an admirable work that is substantively stimulating and stylistically engaging, one that makes for animated, refreshing, and enjoyable classroom experiences. They write well, they organize clearly, and they have a sense of humor. Their welfare economics critique provides a timely, critical analysis of planning and land use regulations that students find interesting, thought-provoking, and sometimes convincing. No student, and perhaps no teacher, will finish this casebook with quite the same views after being repeatedly challenged by Professors Ellickson and Tarlock.

²² R. ELLICKSON & A.D. TARLOCK, *supra* note 6, at 1014-23 (excerpts from Hellman, *How They Assembled the Most Expensive Block in New York's History*, NEW YORK, Feb. 25, 1974, at 31).

²³ R. ELLICKSON & A.D. TARLOCK, *supra* note 6, at 334-37 (excerpts from Emch, *The Battle of Russian Hill*, San Francisco Sunday Examiner & Chronicle, Feb. 13, 1972, California Living Magazine, at 6).

