Book Review. Land Development in Crowded Places: Lessons from Abroad by George Lefcoe

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BOOK REVIEW


REVIEWED BY A. DAN TARLOCK*

In the past two decades a widespread dissatisfaction with the results of private and public land development has arisen both in the United States and in Europe. It is argued that too much land is being shifted from less to more intensive uses. Rural land is being converted from farms and fields into a variety of higher density residential, commercial, and industrial uses, while the scale of urban neighborhoods is being distorted by high-rise buildings and other large-scale projects built according to sophisticated profit formulas.

This pattern of land development should not be surprising, especially in the United States. The constant shift of land from less to more intensive uses was once considered progress. In the 19th century, land use shifts were encouraged by a law based on the virtues of exclusive control by private owners, and a public domain disposition policy that tried, often unsuccessfully, to put land into the hands of those who would use it most productively. In the 20th century, public domain policy changed from land disposition to retention and management, and the Blackstonian vision of exclusive control over the use and disposition of privately held property underwent modest modifications in response to the pressures of urban development.

After the Supreme Court's decision in Village of Euclid v. Ambler Realty Co. upholding the constitutionality of comprehensive zoning ordinances, the right of


the government to intervene in land use and development choices has been accepted with little question.

Public regulation of land use was easily accomplished because the objectives of the regulation were basically consistent with the needs of the land development industry.\(^4\) In developed neighborhoods, property owners did not object to zoning because they got what they desired—the assignment of collective property rights that retained the status quo and were simultaneously administered by the city.\(^5\) Owners of vacant land were not always wildly enthusiastic about zoning; however, they did not fare too badly in most instances. Zoning and other land use controls did not attempt to buck the market; they only attempted to accommodate market-dictated shifts by ensuring minimum compatibility with surrounding uses.

In the 1970's the theory that the principal function of land use regulation was the accommodation of change came under a vigorous, although unfocused, attack. It was alleged that the theory was generally destructive of environmental values and had failed to respond to housing supply demands. Accordingly, a better alternative was needed, and when Americans have wanted something better, they have often looked back across the Atlantic to Europe. Professor Lefcoe has carried forward this tradition of borrowing from Europe in his informative new book, *Land Development in Crowded Places: Lessons From Abroad.*

*Land Development in Crowded Places* is the product of research in German and Dutch land development funded by the Conservation Foundation and prompted by the American perception of European cities as better places to live. For example, the “City Beautiful” movement of the 19th century sought, somewhat ironically, to transform democratic America into a physical copy of aristocratic Europe.\(^6\) The perception that European cities are preferable places to live because they do a better job of controlling the scale of urban growth and of regulating the conversion of open land to more intensive uses is widespread among planners, architects, and students of urban planning, and is the working assumption of Professor Lefcoe’s study. His basic thesis is that European models of land use development can remedy the chief

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defect in American land use controls—the lack of a satisfactory affirmative mechanism that will achieve a desired plan.

In our system the debate over the results of urban development occurs as a debate over the process of urban development. Those who object to the results of the process generally fail to present a dynamic alternative model. In contrast to what is being attempted with air and water pollution, one cannot pursue a nondegradation policy with respect to land. Thus, the results are attacked indirectly by the argument that greater participation in the choice over a land use conversion must be had by those groups affected, and by the related argument that the state must ultimately play a more direct role in that land use choice. The three principal chapters of the book are organized according to three proposed solutions to this conversion problem: (1) that the choice be shared between the property owner and his neighbors; (2) that the choice be shared between the title holder and the government by a rule that makes development a privilege not a right and thus, in a sense, makes the private developer and the city joint venturers; and (3) that there be direct subordination of private to public choice by making government the primary land developer while relegating the property owner to the status of an agent, executing the government’s development plan, with the right to a reasonable return on the value of his land.

Land Development in Crowded Places is a collection of three essays published in law reviews over the past five years. For the book, the author has made slight revisions in the three articles, placing them between an introduction and an epilogue. Few contemporary scholars have such a firm grasp of the dynamics of modern real estate markets, the complex patchwork of federal and state real estate subsidy programs, and the theories and impacts of public controls such as zoning and subdivision regulations as does Professor Lefcoe. The essays therefore make lively and worthwhile reading as they are filled with interesting information concerning European land development regulation systems that throw considerable light on the American system. However, the book suffers somewhat from a lack of integration among the three essays. Lack of integration is especially a handicap in a comparative study such as this. Property use concepts and land development concepts, because of the cultural context in which they arise, are often difficult to compare. Often, a question concerning the relevance of a concept to the American experience raised in one chapter cannot be fully answered until one finds, by chance, the relevant information in
another chapter. This is, however, a minor quibble. The book is concise, well written, and a sufficient source of information for the reader to form an independent preliminary judgment about the merits of the remedies Professor Lefcoe urges us to consider.

I. THE NEIGHBORHOOD DEFENDERS

Throughout the world, a familiar scenario has been enacted for as long as man has lived in cities. An urban neighborhood grows or "evolves" to a certain scale over time and people, often at the lower rungs of the social order, find their niche there. Then the central government, hereditary or elected, decides to "improve" the area with a modern project that will replace the current residents of the area with others higher on the social scale.\(^7\) Until recently, those objecting to progress were accorded little sympathy, and they certainly lacked the political power to oppose the project effectively.\(^8\) In the past two decades the plight of neighborhood dwellers threatened by progress has improved somewhat because of a widely shared belief that present residents should have more power than the government or potential future residents to shape their destiny, and because of an increasingly skeptical view of the benefits of large-scale publicly subsidized development.\(^9\) Because the financial stakes in any power sharing are very high, just how much power the government must share with its citizens has not yet been resolved.

The first essay begins with short accounts of three conflicts that illustrate different forms of shared power.\(^10\) First, the successful defense of the Rock in Sydney, Australia—the birthplace of the nation and its flinty character—exemplifies the development of both a right of advance notice for large-scale plans and of procedural participation in the formulation of those plans. Second, when Covent Garden lost its famed market, the area became ripe for intense development as central London has no more attractive underdeveloped areas. Such development has been forestalled, in part, because neighborhood protection

\(^7\) See generally S. GEER, URBAN RENEWAL AND AMERICAN CITIES (1965); J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

\(^8\) For a lucid analysis of the politics and aesthetics of a celebrated 19th century urban development, Vienna's Ringstrasse, illustrating this point, see C. SCHORSKE, FIN-DE-SIECLE WIENNA, Ch. 2 (1980). The "Ring" consists of a series of Prachtbauten (buildings of splendor) designed for the Dual Monarchy's liberal elite and aristocracy to the exclusion of almost everyone else.

\(^9\) See H. GANS, PEOPLE AND PLANS (1968).

groups were able to certify themselves informally as the collective bargaining liaison between area residents and city planners. In some instances, neighborhood groups will be unable to block or to modify a project, and the issue then becomes one of the amount of compensation due to the displaced groups. The final case study, the redevelopment of San Francisco's "skid row," sketches the expansion of the standard of compensation from the value of what was taken, a standard widely perceived as inadequate, to the costs of reestablishing oneself in comparable surroundings. There, those who would benefit from the planned project financed relocation housing for those displaced.

Together, the three case studies raise the difficult issue of what rights and remedies should be accorded those asserting the status quo or limited development. In the past decade, lawyers, courts, and legislatures have naively attempted to avoid determining the property rights of neighbors in collective goods such as amenity levels, and instead have offered them a variety of due process rights.\(^\text{11}\) We now see more clearly the limits of due process alone. Participation rights are costly, provide no assurance to any major interest group that its interest will prevail, and are often an inefficient allocation of resources with no offsetting distributional benefits. In his initial essay, Professor Lefcoe wisely rejects providing neighbors with a veto through mechanisms that in effect assign property rights to the status quo. However, he proposes a neighborhood bill of rights, which incorporates elements from each of the three case studies, and nearly sanctions a \textit{de facto} veto.\(^\text{12}\)

In the epilogue, Professor Lefcoe retracts much of this proposal by recognizing that many excluded uses may be beneficial to the community:

In my initial essay, I underestimated the frequency with which

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\item \text{12. } Meanwhile perhaps we are ready to consider the creation of legal guidelines to protect all the world's great cities, so that neighborhood defenders will no longer be needed to stand as impregnable walls against urban change. Perhaps we are ready for the drafting of a bill of rights for neighborhood defenders. Such a bill would encompass the procedural assurances of a right of actual notice to residents, whether owners or tenants, and a hearing in the neighborhood on any plans, even preliminary ones, that could result in major changes in the area. The bill should provide, when plans are controversial and no quick compromises can be reached, for the designation of an officially constituted neighborhood assembly authorized to bargain with planners and developers on the neighborhood's behalf. Finally, if disruptive change must come, all those affected—even tenants—should be indemnified, and for the most serious losses, there should be a forum for adjudicating claims for compensation that would have as its dual objects to make both individuals and the urban place whole.
\end{itemize}

G. Lefcoe, \textit{supra} note 10, at 37-38.
politicians and planners, eager to avoid confrontations, would capitulate to neighborhood groups, in effect tendering them a veto power over new development. Instead of seeking to mitigate the harms of development, many of these groups seek nothing less than to halt new development altogether. . . . [C]ollective bargaining cannot function as an accommodation model unless all parties to the negotiation have something to gain by compromising.\textsuperscript{13}

Given that procedural reforms are usually offered to avoid the underlying and often unreconcilable value conflicts giving rise to the dispute, this reviewer can only agree.

II. THE RIGHT TO DEVELOP LAND

Allocating additional power to neighborhood groups can only be fully evaluated with reference to the land development laws of a country where the expectations of neighborhoods are well established. Professor Lefcoe's suggested bill of rights is a rule making development both a right and a privilege. In Holland and Germany, a landowner can develop more or less as a matter of right only in areas designated for development, provided that the scale of the project remains compatible with the existing or projected neighborhood scale.\textsuperscript{14} Neighbors' interests are defined as compatibility with the proposed project rather than as the status quo. This method is a more explicit collective property rights solution than the one Professor Lefcoe advocates for neighbors protesting the scale of development. Still, the compatibility standard, as illustrated by case studies of development in Amsterdam, allows for considerable change while at the same time protecting the residents' interests in neighborhood stability.

In the United States, neighbors' rights have occasionally been recognized in the continuation of the existing scale of development.\textsuperscript{15} In general, however, third party protestors to a zoning decision have no well-recognized expectations of the scale of a new development. From the time that zoning controls were widely adopted to the environmental concerns of the 1970's, a simple rule concerning the landowner's opportunity to develop his land was in existence. One could develop as a

\textsuperscript{13} Id. at 150.
\textsuperscript{14} Id. at 43-62.
\textsuperscript{15} Neighbors have the strongest expectations that the scale of the status quo will be continued under the Maryland change or mistake rule, see, e.g., Chapman v. Montgomery County Council, 259 Md. 641, 271 A.2d 156 (1971), and in jurisdictions such as Oregon which have adopted a variant of the rule at the same time that map amendments have been reclassified as quasi-judicial acts. Fasano v. Board of County Comm'rs, 264 Ore. 514, 507 P.2d 23 (1973); Neuberger v. Portland, 288 Ore. 155, 603 P.2d 771 (1979).
matter of right so long as one conformed to applicable, yet modifiable, regulations. The function of zoning was not to decide if land use changes could occur but only to accommodate the change to the immediate area. In contrast, European countries formally characterize land development as a privilege not as a right.

In the past two decades, the cumulative impact of growth limitations, the increased procedural requirements for change mechanisms, and the increased reliance on site plan review has been to turn development from a right into a privilege. As Professor Lefcoe notes, “In many communities the right to develop has been almost entirely removed from private landowners.” Since this nation has moved in a highly ad hoc fashion to make development a privilege, the European experience under this principle becomes highly relevant, and somewhat embarrassing, for the United States. The thesis of Chapter Two, The Right To Develop Land: The German and Dutch Experience, is that the European practice of land development is fairer both to the property owner and to producers’ gains to society, in the form of a higher quality environment. In the United States, the costs of development seem to have increased substantially with no demonstrable gain to the public except the preservation of a few more fields and hillsides of limited use to the public.

To operate a system that both promotes housing opportunity through policies furthering compact high density development and improves environmental quality through the preservation of large amounts of contiguous open space, it is essential to demarcate clearly where development shall and shall not occur. Once this basic allocation is made, development must be allowed to proceed with minimum restrictions in those designated areas as compensation for severe restrictions elsewhere. This is exactly the system Germany and the Netherlands have adopted and the United States has been unable to adopt, except in limited instances. We continue to experiment with urban-rural zoning, land development polices tied to the provision of sewer and water service, federal tax incentives for the donation of

open space,\textsuperscript{19} differential property taxation,\textsuperscript{20} transferrable development rights to name a few.\textsuperscript{21} Only when areas have established the opportunity to purchase development rights directly\textsuperscript{22} have programs to preserve open space been successful that do not depend upon public ownership of parks or upon lands open to the public.

The goals of compaction and open space appear easier to accomplish in Germany. German cities, along the lines of the English Greenbelt model, have divided lands among \textit{Aussenbereich} and \textit{Innenbereich} districts. The former are lands outside the area dedicated for development and must be left to traditional agricultural and open space uses; the latter are areas designated for planned development. Some provision is made for extensions of the \textit{Innenbereich}.\textsuperscript{23} However, the dedications to open space required in return for an extension of the \textit{Innenbereich}, which run beyond the conventional payments of land extracted in the United States to hospitals and townhalls, decrease the developer’s profit and thus lessen the pressure on developers to press for extensions of the \textit{Innenbereich}. Additionally, the German tax system bases taxable land value upon present rather than potential use. This mechanism serves to decrease pressure to develop land and thus preserves the \textit{Aussenbereich}:

If we could make a clear distinction between land that can and cannot be developed, many landowners in the United States would receive a more realistic appraisal for purposes of property taxation. In the United States we are accustomed to assume that even if land is presently zoned for farming, it may still be put to more profitable uses. Absent a special statute or constitutional provision, local tax assessors are allowed to appraise land on the basis of recent sales of similar property even if those sales were to developers bent on speculative building. Some German cities did use a comparable system of site-value taxation at the turn of the century in order to confiscate potential speculative gains. Today, although there is very little reliance on the property tax, such local taxes as exist on property are based on imputed rent value in present and not potential use.

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  \item \textsuperscript{19} \textit{See} Small, \textit{Tax Benefits of Donating Easements in Scenic and Historic Property}, 7 Real Est. L.J. 304 (1979).
  \item \textsuperscript{20} \textit{See} Currier, \textit{Exploring the Role of Taxation in the Land Use Planning Process}, 51 Ind. L.J. 27 (1975).
  \item \textsuperscript{22} \textit{See}, e.g., Peterson & McCartney, \textit{Farmland Preservation By the Purchase of Development Rights: The Long Island Experiment}, 26 De Paul L. Rev. 447 (1977).
  \item \textsuperscript{23} G. Lefcoe, \textit{supra} note 10, at 48-49.
\end{itemize}
Flying southeast over the countryside from Frankfurt to Munich, the triumph of the German city is visible. In corridors that could have been developed with thousands of one-family houses, there is forest (almost invariably without the second homes which mar Northern California) and farm land (with few farmhouses because farmers live in small villages and commute to their farms). There are no billboards even along the ribbons of the Autobahn. All of this has been achieved with minimal public intervention because private landowners have no right to build in undeveloped areas.

Though rural landowners have little chance of reaping vast gains, they have some assurance that neighboring lands in a wooded region are not going to be developed piecemeal and city residents are assured that they can use those lands for all the recreational purposes implied in the term "wandering." Lands are not readily transferable from Assenbereich to Innenbereich. Property taxes are minimal and based on present and not potential use, thereby decreasing pressure to develop the land. These are some of the characteristics of a system of property rights from which the right to develop has been largely if not entirely withdrawn.24

Professor Lefcoe concludes that such a system is both fair to the property owners and is a potential model for the United States.

Nevertheless, before one can accept this argument, one needs to know more about the German law of development control25 and about German society in general than what the book provides. For example, ordered landscape where one can go to seek solace is central to the German romantic tradition and provides a cultural barrier to expanding development that does not exist in the United States. Instead, America reserves its spiritual constraints on land use for rugged, unique wilderness areas and national parks.26 However, Professor Lefcoe's conclusion that urban land developers might prefer the German model, which has taken on added significance after the Penn Central decision,27 decided after the study, will come as a surprise to many of the players in the land development game.

Perhaps our courts are correct in refusing to help private owners maintain what survives of the right to develop or redevelop. Individual landowners will survive limits on the right to develop, particu-

24. Id. at 51-52 (citations omitted).
larly as the scope of their affirmative rights become more clearly defined, and property tax liabilities are adjusted to the lower land prices that will sometimes result. We could conceivably reach a point where landowners would no longer be able to realize windfall gains because out-of-scale projects would be prohibited and localities would perfect the taxation of land gains through subdivision and other exactions. At that point legislators might be appropriately inclined to vote subsidies for landowners to restore prized older buildings and maintain valued landscapes.28

III. WHEN GOVERNMENTS BECAME LAND DEVELOPERS

The final chapter argues that because of the combination of persistent inflation, the distorting effect of federal tax laws encouraging shelters, and the costs of environmental controls (at least in areas such as Southern California), private developers are increasingly failing to meet consumer demands for housing.29 Thus, if cities wish to concentrate urban development to provide adequate housing opportunities while minimizing the costs of sprawl and ensuring future generations adequate open space and prime agricultural land, "the only practical means available . . . is by the government's assuming the role of land developer."30 This conclusion is not new. State controlled land development has long been followed in many of the social democracies of Europe; however, as Professor Lefcoe indicates, policies promoting massive redistribution of wealth, which led England, Holland, and Sweden to subsidize housing by spreading the costs of public development through the tax system, will not be repeated in the United States.31

The argument for public land development is basically that the public should be able to recapture the benefits of public goods, which now go to private land developers and owners, and that public planning yields better development for more groups in society.32 For example, more low and moderate income housing might be constructed because the government could more easily finance initial costs and sta-

29. Id. at 69-103.
30. Id. at 82.
31. Id. at 76. Additionally, Professor Lefcoe finds that, at the very least, the Dutch experience contributes to debate concerning the proper role of public land development. Id. at 103-33.
32. Residents of Southern California will be interested in the author's discussion of the role of public works planning in Los Angeles. Many have argued that the public works planning process shortchanged the city on open space, but Professor Lefcoe argues that the private sector (and the United States Departments of Agriculture and Interior) have adequately responded to the demand for recreational opportunities. Id. at 83-88.
bibilize interest rates through a "more steady government borrowing rate."\textsuperscript{33}

The argument against public land development is two-fold. First, a high risk of inefficiency exists because of the removal of property from the tax roles and because of insufficient checks of public land financing.

In theory, recoupment seems prudent. In practice, the holding costs of land development and its uncertainties doom even some of the most astute entrepreneurs; many real estate investment trusts recently went broke trying their hands at suburban land development. Countless local governments marching into this most risky of markets—the market for developing land—where even the most knowledgeable mortgage lenders fear to tread, might as easily multiply as reduce the costs of highways and other public improvements.\textsuperscript{34}

Second, allowing governments to intervene affirmatively in land markets in many ways merely advances the time when conflicts concerning the purchase choice become ripe, and thus the neighborhood veto problem, presented above, is not avoided.\textsuperscript{35} For example, if a governmental unit places a low price on the land, intense development may be encouraged at the expense of environmental goals. Moreover, the same result may occur if the government decides to recoup its purchase price or reap a profit on the purchase. As Professor Lefcoe indicates, one of the most crowded areas of the Southern California coast is Marina del Rey—a publicly developed project which resulted in intense land development after the initial plans for a small craft harbor failed to amortize the revenue bonds sold to finance purchase of the land.\textsuperscript{36} Marina del Rey may be a wonderful place to experience the Los Angeles lifestyle, but one would hardly compare it to the European new towns as an example of successful plans that balance developmental and environmental considerations.

After a thorough discussion of the risks of public land development, Professor Lefcoe surveys the Dutch experience.\textsuperscript{37} Following a great deal of information about the history of Dutch land development, reclamation, and organization of the government, one learns that Dutch projects are well-planned by American standards and incorpo-

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 92.
  \item \textsuperscript{34} \textit{Id.} at 85.
  \item \textsuperscript{35} See notes 10-13 and accompanying text \textit{supra}.
  \item \textsuperscript{36} G. LEFCOE, \textit{supra} note 10, at 94.
  \item \textsuperscript{37} \textit{Id.} at 103-33.
\end{itemize}
rate the design innovations of the Bauhaus and of the Le Corbusier schools. However, one also learns that the Hoog Catherijne redevelopment in Utrecht has failed to halt suburban sprawl and that the Bijlmermeer central high-rise project near Amsterdam, although well designed and constructed and successful as a place to house the native colonials from Surinam and the Dutch Antilles, has been found to be too sterile an urban environment to be reproduced. This negative response to high-rise public housing projects appears to be similar to that of the American public.

The Dutch experience is then used to evaluate tax increment financing. This financing device is being used by many cities, especially in California, to finance urban redevelopment. It allows a city to finance a redevelopment project by issuing bonds that are repaid solely through the increased property tax revenues generated by the project. Although the test of market acceptance for the bonds protects cities against financially unsound projects, Professor Lefcoe finds that inadequate protection from a project constructed through tax increment financing exists, distorting the planning goals of the community or of adjoining communities because tax increment projects are undertaken solely for fiscal reasons. Not surprisingly, the Dutch experience is seen as a useful model for reform legislation to correct the intra- and inter-city planning distortions of tax increment financial projects.

Professor Lefcoe ends his study on a modest as well as a pessimistic note. Because of this country's deep-seated preference for low density, detached housing, he thinks it unlikely that local and state agencies will be delegated the necessary powers to engage in land development reform on the scale he advocates. To implement the Dutch model, for example, the land development agency must have "a near monopoly on all land in each market area" where development is undertaken.

There are two reasons, however, why the author's pessimism may be misplaced and why the study may have more relevance than the author suspects. Each reason is a separate topic in itself; accordingly, I will mention only them briefly here. First, the growing realization that deficiencies in the supply of energy will become a chronic problem makes plausible the development of an energy conservation strategy.

38. Id. at 120-29.
40. G. LEFCOE, supra note 10, at 136.
based on compact, higher density land development. 41 Second, as the author briefly recognizes at the end of the book, it is possible that many of the results he advocates might be reached by the opposite reform policy. The European experience points toward greater centralized control over land use decisions. However, potent arguments are being raised that the current unsatisfactory state of urban growth is the result of the failure to decentralize the system through the explicit assignment of property rights to neighbors and municipalities and the subsequent sale of these rights on the market. 42

On one level, proposals such as land banking, which call for greater central planning, are inconsistent with recent suggestions to create markets in development rights. It is possible, however, to marry the two ideas by confining planning to macro decisions about the location and density of various uses, leaving the market to implement the land use allocations. Such a marriage might have the benefit of providing substantial public benefits at the same time that development decisions are freed from the costly and often trivial controls imposed by the existing regulatory system. This is not the book Professor Lefcoe set out to write, nevertheless, much of what he has to say is useful in evaluating the numerous decentralization reforms now being proposed, and one sign of a good book is that it says more than its author originally intended.