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Comparative American-Soviet Environmental Land Use Laws

B. An American View

Donald W. Stever, Jr.*

There are relatively few differences between the rights of property owners in the United States vis-a-vis the government, and those of property users in the Soviet Union vis-a-vis its government.

What Mikhail Galyatin indicated as the definition of property, "a bundle of rights," the principal ones being use, transfer and enjoyment, is in a sense largely meaningless today. In *United States v. Willow River Power Company*,¹ the Supreme Court said that "property" is whatever the Court says it is in the context of the dispute at hand. There are relatively few rights, other than procedural rights, that homeowners truly have when the government in our society decides to limit what use can be made of the property and I suspect that the same is true in the Soviet Union.

Where I do see significant differences are in the rights of the neighbors of the property which is the subject of an action. In the Soviet Union, if the State decides to do something with property and the neighbors do not like it, they have no effective means to affect the decision. In this country, a developer who seeks to change the use must, at least in large urban areas, receive some permission from the local government and, in such a case, the neighbors have significant rights to challenge the government permits.

But getting back to the concept of property ownership,

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1. *United States v. Willow River Power Co.*, 324 U.S. 499 (1945).

something that has not been said about this society is that nearly one-third of the land in the United States is owned by the Government, that is, by the people. Of that one-third a significant percentage of it is occupied or used by individual citizens whose relationship to the United States Government as land users is probably not significantly different from the relationship of individual or collective land users in the Soviet Union to the State. They occupy the land by virtue of licenses that are given to them for specified periods of time, and what they can do with the land is specified by the license that they hold from the United States. The literature of competing interests and disputes among them for the use of public lands in this country, particularly water rights disputes, is interesting and of historic proportions.

People who reside in the vicinity of a parcel of property, the uses of which are about to be changed, are very powerful in this society. I would, however, underscore that this power does not necessarily produce environmentally sensitive decision-making. What is needed in this country, and also in the Soviet Union if there is to be a serious attempt in that society to explore providing additional public participation in connection with land use changes, is a system that minimizes the potential for non-relevant considerations to drive the decision-making of government and private decisionmakers.

In my experience in this country as an academic lawyer and one who has represented both citizen groups and developers, the factors that compel local decision-makers to decide either to permit or not permit a particular land use change within the community have little to do with the economic, social, or environmental merits of the project. They have to do with irrelevancies, politically extraneous issues. We have not yet come up with a system to eliminate extraneous issues from land use decisions. However, there have been attempts at it. Professor Ian McHarg at the University of Pennsylvania has attempted one scheme in his book "Design with Nature."²

2. McHarg's approach is to develop a series of resource constraint maps from a meticulously compiled data base, and predicate rigid development criteria on the ecosystem carrying capacity.

There are small attempts being made here and there to apply such policies aimed at environmentally sensitive decision-making. It remains to be seen whether those will be successful. McHarg's scheme is an extremely capital intensive one. It costs a great deal of money to set up a system that would function in the way that McHarg envisions it, and his is the most ambitious of the schemes.

We need, perhaps, to explore other avenues to eliminate irrelevancy in the land use decision-making process or to instill relevant environmental considerations. We need a way to discern the significant environmental problems from those which are either insignificant or simply make-work arguments which have little to do with reality.

Let me touch for a moment on centralized environmental decision-making and planning. It has been suggested that the mid-1970s movement toward centralized decision-making (the elimination of local control over such decisions) is positive in nature. I question whether that in fact is the case. For every example of success by a centralized land use decision-making entity, one can point to at least an equivalent failure. Perhaps the most centralized land use decision-making that this country has ever seen is the process used by the Nuclear Regulatory Commission (NRC) and its predecessor in the siting and construction of nuclear power plants.³ I do not think there is anyone in this country, other than those who sit on the Board of Directors of an electrical utility, who would say that process has produced rational nuclear power plant siting. If you look within a forty mile radius of where we are today you will see four nuclear power plants that are sited in locations which, from the standpoint of public safety, defy logic.⁴ The NRC's centralized rules, basically the rules under which every existing power plant was sited in this country, if read literally (and the NRC did) would allow an electric utility to site a nuclear power plant in the middle of Central Park in New York City. The rules would allow this, though Consolidated

3. Atomic Energy Act, § 1, 42 U.S.C. § 2011 (1954).

4. The three Indian Point units in Buchanan, New York and Shoreham on Long Island, New York.

Edison, of course, has the good sense not to try.

The water projects in the Western portion of the United States are another good example of centralized long-range planning and decision-making by the federal government. Large water projects have produced environmental insults of enormous magnitude and significant battles in recent years.⁵ The bottom line, of course, is that we cannot sit back and say that merely shifting the decision-making to a higher level of government will necessarily produce better decision-making.

My final comment involves the role of planning. The word "planning" has become a sort of euphemism in the land use game. The Standard Zoning Enabling Act, which back in the 1920s and 1930s was successfully promoted by Herbert Hoover, was adopted by virtually every State legislature as the State enabling process for local government control of land use. It envisions a "planned" land use scheme, a sort of planned real estate economy, if you will. On its face, the Standard Zoning Enabling Act plainly requires that land use decisions be made pursuant to a "comprehensive plan."⁶ The comprehensive plan is to be developed by an expert body, the theory being that the long range comprehensive plan will somehow instill rationality into the land use decision-making process over time.⁷ The Soviet Union has a very clear institutional direction toward planning its economy. Centralized planning is in every element of Soviet decision-making. Land use planning from a centralized standpoint should thus be very attractive in the USSR.

What we have seen in this country, however, is that the Standard Zoning Enabling Act concept of planning has simply not worked. There are comprehensive plans in most communities. There are regional plans. There are statewide development plans in all of the states. These plans are in some cases very lengthy written documents. In virtually no place except perhaps Oregon are these plans followed with any degree of

5. See, e.g., *T.V.A. v. Hill*, 437 U.S. 153 (1978).

6. See, e.g., *N.Y. Town Law*, § 263 (McKinney 1987).

7. This approach was, I believe, essentially the intellectual product of the English "garden city" theorists.

seriousness.⁸ However, if you were to compare, for example, the Comprehensive Plan for the City of White Plains, New York that was drafted fifteen years ago with the actual land use patterns, you would think you were looking at two different cities in two different parts of the world. They simply bear no relation to one another. Planning is whatever the current land use patterns look like.

I have listened to planners and lawyers who believe in planning talk about how wonderful it would be if people would only follow what the planners say. I am not sure that what the planners say is necessarily useful or correct. Even if it were, planners do not appear to have been listened to very carefully in this society. I would be interested to know whether the plans in the Soviet Union are listened to with any greater degree of seriousness.

8. See, *Willamette Univ. v. Land Conservation and Dev. Comm'n*, 45 Or. App. 355, 608 P.2d 1178 (1980); see also *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d, 288 N.Y.S.2d 888 (1968).