

Private Property Rights

The moment the idea is admitted into society that private property is not as sacred as the laws of God, and that there is not a force of law and public justice to protect it, anarchy and tyranny commence. – John Adams

Private property rights are fundamental to American society. The founders believed in the right of individuals to hold and use their own property so strongly that they specifically protected those rights in the United States Constitution. The 5th Amendment to the Constitution of the United States declares “...nor shall private property be taken for public use, without just compensation.”³³

Perhaps no issue is more important to individual liberty than private property rights. North Dakotans showed their support for this issue in 2006 by approving an amendment to the North Dakota Constitution that restricted the government’s right of eminent domain. The measure passed with more than 67 percent of the vote.³⁴

The results of the constitutional measure were not the end of governments’ attempts at taking private property. In fact, those interested in eroding private property rights have only become more devious and are moving faster than anyone would have expected.

Extraterritorial zoning

Local governments are using a quirky state law to restrict land use. By placing regulations on land, planners can manipulate landowners and dictate land uses to fulfill their planning fads.

By law, North Dakota cities are able to regulate land use outside of their city limits. It is called extraterritorial zoning.³⁵

The Advisory Commission on Intergovernmental Relations met January 23, 2008, in Fargo. During the course of the legislative hearing, many citizens stepped forward to share their grievances with extraterritorial zoning. Burleigh County Commissioner Doug Schonert testified, “When Bismarck decided to exercise its authority to establish a four-mile jurisdiction, the Burleigh County Commission strongly objected. There was no strong reason for this move as Burleigh County already had zoning and planning in place.”

“Cities typically assert their zoning jurisdiction with a mantra of ‘Smart Growth,’” said Frank Matejcek. “Smart Growth displaces lower-income families. It drives up the price of land. It raises concerns about increasing housing costs due to diminishing supply. It interferes with the ability of the market to provide affordable housing.”

“Fargo’s efforts to control land miles and miles from its city limits in order to implement its rules and regulations on citizens who are not in the least bit interested in being citizens of Fargo must be stopped immediately,” said R.D. Knutson.

Solution in sight

The policies that prohibit private landowners from using their land the way they see fit needs to be changed. No one is suggesting that there should not be any zoning regulations city-wide and county-wide, but regulations must be minimal, and those being

Recommendation: Eliminate comprehensive planning and extraterritorial zoning laws to protect private property owners.

EFFECTS OF ET ZONING

Large cities, such as Bismarck, Fargo, Grand Forks, and Minot have the authority to zone land four miles outside of their city limits. What are some of the problems associated with extraterritorial zoning? What does this have to do with private property rights? One man near Bismarck, Brian Bitner, found out the hard way.

Wanting to get the gravel road past his property paved, Bitner approached the Apple Creek Township Board (just outside of Bismarck). The board said that it was a good idea to pave the road, but it lacked the funds to carry out the project because its main revenue source, building permit fees, was now going to the Bismarck city coffers, due to the provisions of extraterritorial laws.

When Bitner was about to add on to his garage, he discovered he would have to go through a rezoning process “to include a new survey, sub-division platting, storm water management plan, etc.” It would cost him somewhere between \$6,000 and \$10,000.

The city also told him he would have to give land for a wider road easement. Compensation? \$0.

Because Bitner lives inside the extraterritorial jurisdiction, yet, outside the city limits of the City of Bismarck, he is subject to city regulations but cannot vote in city elections or run for city office himself. One of the major grievances the original thirteen colonies had with the British Monarch was the fact that the colonists were subject to the Crown’s taxation but were not able to have a say in such policy matters; thus the phrase “no taxation without representation.” To morph that phrase to fit this situation, the phrase could read “no regulation without representation.”

The only mechanism that existed to protect Bitner’s property rights is the appointed extraterritorial commission, so he can’t even work to turn out of office anyone who treats him unfairly.³⁶

regulated must have a vote to hold officials accountable.

The 2007 Legislature passed a law that restricted extra-territorial zoning to half its legal limit and allowed for the Legislative Council to study “the extraterritorial zoning authority of cities and the impact of that authority on other political subdivisions.” The law will expire in 2009.³⁷

Three essential changes to North Dakota’s laws are needed: First, the constitutional right to vote for those doing the regulating must be restored. Second, the appointed boards must be replaced by duly elected officials. Third, landowners should not have to jump through so many regulatory hoops simply to construct a garage, deck, or any other basic addition to their house. The only way to safeguard the rights of property owners is to eliminate extraterritorial zoning.

On June 3, 2008, Rep. Dwight Wrangham testified in front of the Advisory Commission on Intergovernmental Relations. His testimony laid the groundwork for what can be a blueprint for eliminating extraterritorial zoning. He said,

*The question is who should do these things, not whether they should be done. The question is, should a city be allowed to enforce its ordinances and control citizens’ private property uses outside of the city’s legal corporate boundary? The question is, should cities be allowed to govern the citizen’s uses of their private property in an area where the citizen cannot vote for the officials of that government? Isn’t the right to vote for governance and to own private property the very reason this, the greatest nation in the world, was formed?*³⁸

Cities maintain that they need to use extraterritorial zoning to make sure that roads and sidewalks line up. Regional transportation groups, such as Metropolitan Planning Organizations, already exist to accomplish such tasks.

DID YOU KNOW?

Planning still takes place without extra-territorial zoning. Townships and counties have legal authority to do it.



Proponents argue that without extraterritorial zoning there wouldn’t be any utilities planning. Rep. Wrangham also addressed this issue, saying,

I serve on the board of an electric cooperative. We plan line extensions, substations and future power supply needs based on projections of community growth. Cities and water systems do the same... I don’t think it is right for government to tell private property owners they cannot develop a particular parcel because the utility didn’t plan for it. There may be need for a special assessment or a contribution of aid to construction if the property owner wants the services, but that should be their option.

Wrangham also addressed the charge that “hodgepodge” development would occur outside of cities without extraterritorial zoning. He said,

Private property owners know the best way to develop their property. They bought it with their own money. They care about it. Their personal interest and market pressure will make proper development their first choice. Do we need standards and limitations on how and what can be done with private property outside the corporate city limits? Absolutely, and that will be done by the townships who have been

charged with zoning for over 60 years, by NDCC 58-03-11, and the counties who have been charged with subdivision platting for about 30 years by NDCC 11-33.2.

Eliminating extraterritorial zoning will restore voting rights to those disenfranchised. Current law still provides planning and zoning. There would be few, if any, problems by doing the right thing.

Comprehensive planning

Other laws trampling property rights in North Dakota require counties to develop comprehensive plans. NDCC 11-33-03 states that county zoning regulations “shall be made in accordance with a comprehensive plan.”³⁹ NDCC 11-33.2-04 states that proposed subdivision regulations may include provisions “ensuring that the location, layout, or arrangement of a proposed subdivision shall conform to a comprehensive plan.”⁴⁰

These laws have dangerous consequences for property rights across North Dakota. All language referring to a comprehensive plan needs to be removed from the North Dakota Century Code for the following reasons:

1. Effective comprehensive planning is impossible.
2. Rather than plan rationally, planners promote current planning fads.
3. Comprehensive plans are “boilerplate” plans regurgitated from other parts of the country.
4. Growth Management Areas restrict property use.

Is it possible to plan comprehensively? Sure, plans put in place by well-intentioned people can be called comprehensive. If enough interest groups are brought together to discuss and rubber-stamp such plans, it gives the impression that the best plan was selected out of many alternatives. However, how can

planners be certain that the plan they have chosen is the best plan available?

Burleigh County’s comprehensive plan

To illustrate the point, let’s examine Burleigh County, which, at the time of the writing, is in the process of having SRF Consulting update its comprehensive plan. There are more than one million acres of land in Burleigh County, which means there are probably tens of millions of parcels of land. Suppose that each parcel of land has a dozen possible uses. Deciding the best use of each parcel of land is dependent on dozens of other variables (i.e. how are adjacent parcels used?).

So there are dozens of uses for each parcel of land that are determined by other parcels of land that total in the tens of millions. There is almost an infinite number of possible plans that planners can choose from. How can they or any other small group of people possibly be able to collect enough data for enough plans to be able to select the best (or even a good) plan? According to Cato Institute fellow and planning expert Randal O’Toole,

A rational plan would look at these and other alternatives and ask such questions as: how much will each alternative cost taxpayers? How much will it impact landowners? What effect will the plan have on housing prices and the costs of doing business? SRF did not answer these questions for their proposal, much less for any of the alternatives that they failed to consider. Without knowing the answers to these and many more questions, there is no reason to think planners can prescribe future uses on more than a million acres in Burleigh County—and more than a million reasons to think they cannot.⁴¹

What exactly is “smart growth”?

Because it is virtually impossible to collect enough data in a timely fashion to make any type of comprehensive plan effective, planners resort to national planning fads. The current fad is called “smart growth.” Smart growth is a planning theory that creates compact urban areas with vast open space in rural areas. Its goal is to reduce “urban sprawl.” Plans being implemented in Cass County, Grand Forks County, and, possibly in the near future, Burleigh County, pack people and development into Growth Management Areas, leaving rural areas undeveloped. Smart growth completely ignores the biggest reason why people move out of cities in the first place: seclusion. By moving into rural developments, people are showing that they want to live in rural settings with big yards.

Smart growth has other negative effects. For instance, limiting development to specified growth management areas reduces housing opportunities, and reduction in the supply of

houses creates high housing prices. The basis for writing comprehensive plans is to control growth, yet if growth occurs the price of housing will significantly rise. Will young families continue to move into Grand Forks, Cass and Burleigh counties when housing prices rise?

Proponents of smart growth argue that it costs too much for cities and counties to deliver services to developments that have low density. Fed-Ex, UPS, Qwest, and other utilities manage to cover their costs.

In fact, smart growth has been found to be costly to taxpayers. Planners cite the book *Costs of Sprawl – 2000* as the basis for concluding that higher densities lead to less per capita spending on infrastructure. After examining actual city expenditures for more than 700 United State’s cities, Dr. Joshua Hutt and Wendell Cox, Heritage Foundation visiting fellow, concluded that proponents of smart growth have wrongly concluded that higher densities lead to lower infrastructure costs per capita.⁴²



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http://www.policynd.org/NDPC_Investigates.asp

The real motivation behind creating growth management areas is to reduce what planners call “urban sprawl.” But, as Iowa University professor Dr. Jerry Anthony pointed out, even if it is the planners’ goal to eliminate urban sprawl, growth management areas do not accomplish that objective.⁴³ Furthermore, according to the US Census, North Dakota is more than 99 percent rural open space. Urban sprawl is not a problem.⁴⁴

Planners promote this fad in the context of a larger planning movement. The American Planning Association, which promotes smart growth, lists what they call good comprehensive plans on its website. It should come as no surprise that all of these comprehensive plans are very similar to what SRF has proposed for Burleigh County, even though SRF did not write any of them.

For example, Kent County, Maryland, lists “develop designated growth areas in cooperation with the towns” as one of its strategies.⁴⁵ Madison County, Georgia’s plan states that “it is felt that growth should be confined to the designated zones and that development should be limited in agriculture areas.”⁴⁶ Both counties have populations of approximately 20,000.

Boulder County, Colorado, has a population of about 225,000, yet, it also has listed in its plan a strategy that would restrict urban growth to locations “within or adjacent to existing urban areas in order to eliminate sprawl.”⁴⁷

Multnomah County, Oregon, of which Portland is the county seat, has a plan that states that the county’s policy “is to establish an urban growth boundary.”⁴⁸ Multnomah’s population in 2006 was more than 680,000. The fact is that growth management areas harm property rights because they give development authority to planners, rather than property owners. Landowners on one side of the arbitrary urban growth boundary can develop their land, while landowners on the other side cannot.

There is, perhaps, no greater right in the United States more important than the right to hold and use property. When the government regulates how people can use their property, all rights are lost. Eliminating extraterritorial zoning and comprehensive planning are two ways to restore something that John Adams called, “as sacred as the laws of God.”