

The Breakfast Club

Constitutional Minute for 1 March 2022

Property Rights versus Community Interest

How does a community balance the rights of individuals to retain and enjoy their property against the need of a community to grow, develop and attract new residents and investment? It is the age-old question of individual rights versus the “common good.” This question, and, at times, this conflict has been going on as long as there has been society; and the question will not be answered or the conflict resolved in today’s essay. But perhaps we can review and clarify some of the issues surrounding the controversy.

First, some facts. No homeowner in Virginia actually owns the land their house sits on. Only two states in the nation offer what is called allodial, or outright/exclusive title to land: Nevada and Texas, and the process of obtaining allodial title can be quite expensive. Essentially, you must pay all or some portion of the real estate taxes the state is foregoing by giving you outright ownership of the land. The rest of us are essentially renting the land and paying for its use through our real estate taxes. There was a time when land purchase in America was allodial. In in 1775 essay: [A Summary Review of The Rights of British America](#), Jefferson writes: “*America was not conquered by William the Norman, nor its lands surrendered to him, or any of his successors. Possessions there are undoubtedly of the allodial nature.*”

The Fee Simple title we obtain when we purchase a property has its origins in the British feudal system where the King ultimately owned all land in the realm. A Fee Simple title is of course transferable to someone else who wants to purchase your interest (or “ownership”) in the property, but neither can they purchase the exclusive and perpetual use of the land. The government, whether local, state, or federal, can have other uses for the land; they are the sovereign land-owner. I have yet to discover when America morphed from allodial title to fee simple title.

The Fifth Amendment protects you from an uncompensated taking of the property, which we’ll return to in a moment, but you have other constitutional protections which also come to bear. One of these is the protection of Due Process secured by the 5th and 14th Amendments. This means you cannot be deprived of your “property” without due process of law. The Equal Protection Clause of the 14th Amendment also comes into play in property disputes.

What if your “property” is not taken, but your ability to use it is reduced or eliminated by regulation after the fact, i.e. after you have purchased it? Regulatory takings are a big problem in this country and produce many lawsuits against governments which initiate the onerous regulations.

The final concern is [Civil Asset Forfeiture](#). Federal and some state laws allow for the taking of property (normally excluding land) when someone is suspected of violating the law. The property used in the violation (ex: a car or motorcycle) or evidence of the violation (cash) is seized, even before charges are filed (and in some cases they are never filed; many innocent people have been caught up in this “robbery by government”). In effect “Civil asset forfeiture proceedings charge *the property itself* with involvement in a crime.”¹ In 2000, Congress enacted the [Civil Asset Forfeiture Reform Act](#) (CAFRA) “to provide a more just and uniform procedure for *Federal* civil forfeitures,” but the action still takes place. [One study](#) showed that in 2014 police departments across the U.S. confiscated more

property than did thieves. Innocent citizens often must sue to have their seized property returned.

Let's now turn to community development.

I know nothing about the specific techniques and processes of community development. There are entire college degrees, even [Masters Degree programs](#) devoted to the skill. For those interested in knowing more about the topic, here's [a free online course](#) in Community Development I found with a simple search. Much of Community Development seems to be simply common sense.

When you are considering moving to a new area, perhaps because of a new job, what community features do you look for? Are there sufficient schools, restaurants, businesses you'll patronize (think Walmart, Lowes, etc), movie theaters, parks, gyms, nice-looking homes? The list is endless. You are looking for a community with affordable housing and features which will support your lifestyle. You may also pay attention to whether a certain community has undesirable features: dilapidated buildings, slums, unkept lots, discarded trash. How do communities come to have attractive features and avoid undesirable ones? Community development, of course.

Nearly four million new Americans were born in 2020.ⁱⁱ Where will these new citizens live when they reach adulthood? Meanwhile, the babies of twenty years ago need lodging right now. Another 1.2 million legal immigrants came to this country in 2020.ⁱⁱⁱ They need also homes of apartments now. Some of these people will seek a home in your community. Will there be one for them to rent or purchase? As new people move to your community the demands on government services increase and this demand must be paid for. Tax revenue must increase or services cut back.

What is the best way to develop a community? Logically, community development should be development of the community by the community. But average citizens have neither the time, knowledge nor inclination to do the planning required for development.

"Developers," as we typically call them, make their living developing. They are always on the lookout for land they can develop to put bread on their table. But there is only so much land still open for new development in a community. And then we must consider zoning.

Zoning laws, deemed constitutional by the Supreme Court in 1926 ([Village of Euclid v. Ambler Realty Co](#)), are often seen as hinderances to citizens enjoying their property as they wish. But once again we face the perpetual question: how do you balance the rights of individuals to enjoy their "property" against the collective right of a community to develop themselves into an attractive, safe environment for residents to live their lives. Adding to zoning laws are the rules and regulations of Planned Urban Developments (PUDs) usually governed by Homeowners Associations. Yes, some of the rules are obnoxious, but they are the price you pay for living in a well maintained neighborhood.

NIMY ("not in my back yard") is a phrase community developers encounter frequently. Everyone wants their favorite community feature close by, just not literally behind their house. But how many of these "NIMY" citizens would volunteer to take a seat on the Planning Commission?

Community development is one of those jobs that simply must be done. How's that saying go: "You can please some of the people all of the time, all of the people some of the time, but you can't please all of the people all of the time."^{iv}

What would you like to see discussed next week? Send me an email.

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ⁱ <https://www.heritage.org/research/reports/2014/03/civil-asset-forfeiture-7-things-you-should-know>

ⁱⁱ <https://www.cdc.gov/nchs/fastats/births.htm>

ⁱⁱⁱ <https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration>

^{iv} Variously attributed to either Abraham Lincoln or 15th Century English Monk, John Lydgate.