

Planning In A Free Society

Thomas J. Shepstone

Much of Planning Is Headed in the Wrong Direction

Planning is needed now more than ever. Nonetheless, much of it is headed in the wrong direction. It lacks the maturity of a philosophy consistent with a free society. Planners have, too often, become tools of special interests with barely concealed goals of stopping growth. Much of planning has become little more than a collection of reports and processes twisted by NIMBY's into weapons to chase development somewhere else. The profession will only prosper when it gets back to basics.

Planning, to be meaningful, must be rooted in the values of free society. Unfortunately, for many in our profession, free markets and planning are no more than competing concepts. Notwithstanding this, planning, as a foundation for law and public investment, is essential to the free markets. Those free markets, in turn, are the guarantors of individual freedom. Moreover, the human progress that all planners seek is unachievable without free markets.

All progress depends upon freedom of the individual. The pursuit of happiness by millions of individuals acting in their own interests motivates each to constantly strive for new and better ways to do things. It is this tremendous energy that drives society forward. The freedom to choose a different path, to pursue one's own dreams is a prerequisite. Absent freedom, innovation and their rewards there is no motivation to invest in society. The failure of all socialist utopian schemes is largely attributable to this simple truth.

Economic Freedom Is the Foundation for Progress

More precisely, it is economic freedom on which progress depends. Political freedom is not enough. A democratic society where individuals choose their leaders creates the conditions for economic freedom but does not assure it. Our American Indian reservations offer an example. Native Americans are free to choose their leaders but their economies are tightly controlled by the Bureau of Indian Affairs. The ability to start new enterprises and pursue individual dreams is limited by myriad regulations from Washington making free enterprise virtually impossible.

Native Americans have little or no economic freedom because land hasn't been given them to own individually. Instead, reservation lands have been put into trust for tribes who are forced to operate as collectivist societies. Tribal land can only be leased for relatively short periods and then only after long delays. Tribes are instead encouraged to pursue community enterprises that too often collapse into political struggles unrelated to economics. No one owns the land and, so, no one is in a position to make the individual economic gains that motivate success. Economic freedom demands land and the property rights associated with it, to pursue individual happiness.

The Genesis story relating how Joseph acquired all the land for Pharaoh during the seven years of famine provides a further insight. "Joseph's land policy" was to allow the Egyptians to trade their land to the Pharaoh for a guaranteed livelihood. The result was that "the land passed over to the Pharaoh, and the people were reduced to slavery, from one end of Egypt's territory to the other." Absent land and individual property rights, there is no economic freedom - no liberty.

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Land Use Law Should Serve to Protect Property Rights

Liberty, and property rights, demand one other ingredient, however. Freedom demands law. It is the framework of free society. No one improves a property or invests in an enterprise without some assurance of a common set of rules that; a) protects the owners interests from exploitation by others, and b) provides a basis for doing business with others. The function of the law is to create the conditions for economic freedom and, thereby, the opportunity for progress.

This principle goes back to the Magna Carta itself, which made even the King submit to the law and forced him to respect the rights of his nobles. Laws governing the taking of private property for public use, establishing the right of contract and dealing with trespass all serve to provide individuals with a sphere within which they can operate freely to pursue their own interests without fear that someone else will take it from them arbitrarily. The rule of law undergirds freedom. It is the opposite of rule by man, which is both discretionary and arbitrary in nature.

Land use law also serves to protect property rights. A law restraining one landowner from polluting the well of another by establishing a setback for sewage systems protects the property rights of both parties. It establishes a common rule giving both the right to develop. Absent such a rule, one landowner, acting only on his own interest might locate a sewage system too close to the lot line and effectively prohibit his neighbor from ever developing his lot. Law, when it operates in this simple fashion, protects all parties, maximizes development opportunities and serves a broader public purpose of protecting the groundwater supply for all.

Too Much of Land Use Law Has Been Misdirected

Unfortunately, there are a multitude of laws artificially limiting the use of land without corresponding benefits. Zoning regulations are replete with standards bearing no relationship to the public interest. Regulations that restrict innocuous home occupations, establish large arbitrary setbacks without evidence to support their need and impose low density requirements to discourage lower-valued housing are examples. Much of zoning is of this nature - established by copying regulations from one community to another without regard to need. Over time these ordinances also balloon in size as local officials overreact to particular uses and proposals.

How do we separate what is reasonable and unreasonable? How do we discern when a law serves to detract from rather than enhance property rights? The answer is to be found in basic economics. Most of us are familiar with externalities and the "tragedy of commons." Unfortunately, we seldom give thought to how these concepts work or how we might account for them in the specifics of the plans and regulations we develop. We fail, also, to consider the externalities and unintended consequences connected with the law itself. Understanding economics is the key to forging effective law that maximizes property rights and progress.

When a landowner builds so close to the property line that he causes an impact on his neighbor without having to pay for it he creates an external cost. That is the economic basis of all building setback regulations – eliminating the external cost by imposing a standard that works for all.

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If the setback is based on science and is founded on the need for light, air, emergency access or similar health and safety factors, it works well. If, however, it is arbitrarily set at some higher number intended to reduce density or “preserve rural character,” it can create unintended sprawl, as so many communities have learned. It also benefits existing homeowners at the expense of vacant property owners by effectively giving the former extended control over the latter.

This is particularly so when the new setback is much larger than that of already developed properties. When government forces one neighbor to give up his property rights to protect another without similar sacrifices by both, it creates an externality. More importantly, because external costs to the vacant lot owner represent gains to the owner of an improved lot, there is a powerful incentive for the latter to advocate regulations on the former - to keep the burden as much as possible on new development and preserve the status quo. This is the root of all NIMBYism.

Managing Tradeoffs of Property Values is The Challenge of Land Use Law

Land use law is principally about tradeoffs of property values. Managing those tradeoffs fairly is an enormous challenge. We long ago learned from Adam Smith and others that government does it poorly, precisely because it is heavily biased toward the status quo, but also due to inability of any manager to take into account the millions of interests involved, assign values to the tradeoffs and deliver a fair decision. Only the free market and its price system are able to do that.

Nonetheless, markets are not perfect in allocating costs. Markets themselves must be constructed on a foundation of law to have any opportunity for success. Therefore, there is an essential role for government. John Locke taught us there can be no liberty without law, but the paradox is that too much regulation or market intervention can destroy the very markets they are intended to protect. It is the ultimate economic tradeoff. A fine balance is required to sustain the economic freedom that supports individual freedom. Government is, at once, the guarantor of our liberty and its greatest threat. Managing it is like having car with a stuck gas pedal - it will get you there, but it needs constant braking and from time to time it needs fixing.

Delivering this balance is where we come in as planners. No other profession bridges the worlds of design, economics and law as ours does. Our focus is different. Environmental protection and affordable housing are not isolated causes for us. Rather, they are part of the same challenge. There are always tradeoffs among these and the other goals. Finding the right balance where markets are not capable of dealing with all the externalities is the essence of our job.

Planners Have The Skills To Measure Tradeoffs and Devise Market Solutions

As planners, we are in a good position to advise communities how to measure impacts not yet priced in the marketplace. We can devise the minimum amount of market intervention that will address community needs without unnecessarily disturbing those markets or creating unintended consequences in the form of governmental externalities. We have the capacity to design market-based incentives to solve the problem with the help of the marketplace. **Most importantly, as planners, our interests are, by definition, less with the status quo than with the future residents of a community who may not yet even be dreaming of making it home.**

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These characteristics serve planners well when we apply them as principles. Unfortunately, we too often allow ourselves to be identified with narrowly defined interests such as economic development or open space protection. We fail to recognize the tradeoffs, or, more often, pretend they do not exist. Because most of us represent public entities most of the time, we tend to view planning and property rights as competitive ideas rather than complementary principles. We skirt problems by drafting mushy goals that obfuscate rather than illuminate the challenges. Worst of all, we follow the path of least resistance and resort to defending the status quo when we should be speaking for future generations.

Planning Should Be About Managing Growth with the Least Possible Market Intervention

Notwithstanding these failures, I'm optimistic about planning. We have a long way to go before we are a truly mature profession, but the "smart growth" movement, however, good or bad its specific ideas, gets one very important thing right; planning is about dealing with growth and constantly finding ways to do it better. Applied correctly, it inherently accepts the role of markets. This is a giant step forward. Still we can do better, much better.

Planning should be about data gathering, analysis, projection of needs, infrastructure planning (including open space), capital budgeting and formulation of community visions that will inspire creative design of public and private improvements. We have the capacity to do those things if we are realistic about our role with respect to free markets and avoid trying to simply impose a superior vision of our own. Planning, because it serves as the foundation for land use law, also imposes a duty for us to find new ways to minimize market intervention, that is to say limit government. We tend to ignore this responsibility. So much of our time is spent on matters of intervention that we accept it as a good thing, forgetting that too much of it can be counterproductive.

Achieving balance is the challenge we've not met. We don't talk enough about property rights, economics and law. We forget land use regulation is a derogation of the common law, a form of coercion and exercise of the police power. We need to strictly scrutinize every word of a land use regulation for necessity. We must start always from the premise that every zoning standard is a diminution of someone's property rights and therefore must be justified as a means of protecting everyone's property rights. We need to emphasize the rule of law and its critical role in protecting everyone's freedoms.

Planning Must Protect Property Rights, Price the Commons and Inspire a Community Vision

There are several ways we can do better. The first is to reconstruct the role of the comprehensive plan. The very term is problematic. While it is useful for suggesting planning must take into account a number of issues, it also promises more than it can deliver. No governmental plan can truly consider all relevant factors for managing growth. It can provide, at best, only a snapshot of the most important elements to existing residents and those drafting the plan. Moreover, no community can devise a plan that can be implemented without the cooperation of the market and markets take unexpected directions. Planning is, nonetheless, important for assembling those policies required to protect property rights, price the commons and frame the community vision.

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A community plan should, in many ways, be thought of as a market analysis. What are the trends and likely future demands for housing, facilities and services? How much recreation and open space will be needed to achieve a livable community, as opposed to keeping things the way we remember them? The plan should be a set of performance goals adaptable to such growth as the market delivers. These should include priorities for public spending on infrastructure, suggesting where the community can achieve the most for its investment. Finally, the plan should articulate a vision in the spirit of Olmstead and other great designers, all of whom addressed what could be, rather than what shouldn't be. A community plan should, in a word, be inspiring.

Few plans today meet this test. They are awash with meaningless terms such as "encourage" and "enhance." Plans are almost entirely focused on controlling land use, with little attention to questions of design or infrastructure, and almost none on tax policies that influence growth in powerful ways. Our plans are focused on minimizing change rather than maximizing opportunity. We must make plans that look forward. How much are we likely to grow, what facilities will we need, how much will they cost and how can we best provide for them? These are the planning questions now getting lost in fervent attempts to keep things as they are. We must get back to the basics of planning. We need to adopt a growth neutral posture that allows us to anticipate what the market will deliver and plan for it rather than engage in fruitless attempts to frustrate it.

Planning Must be Objective - Facts Must Prevail

Our plans should serve as foundations for transportation improvements and other infrastructure investments. Capital budgeting should be an integral part of all planning. Finding better ways to provide these services and facilities is key. The options should not be limited to continuing things as they are, but examine options such as privatization, regionalization, discontinuance of services and ideas such as congestion pricing that harness the power of the market. We should consider alternative tax policies to support these services, including the land tax, which would distribute the burden of financing services more fairly and encourage growth in existing centers.

Plans should also address land use by spelling out performance standards grounded in the specific conditions of the community. If the community's predominate soil types make it difficult to ensure the long-term proper functioning of septic systems, for example, a community should consider a policy requiring that all lots employing such techniques include enough land area for a replacement system in the event of failure. Although such a policy needs to allow room for new technology and may require revisiting from time to time, it is grounded in health and safety. It is both tangible and growth neutral. Commercial landscaping and traffic access standards fall into the same category. Community plans should be the foundation for all such standards.

These standards should be largely derived from objective analysis of the community, not the subjective input of individuals who attend meetings, answer surveys or participate in visioning processes. This is not to say any of these are not useful. Indeed, they are essential. They play an important educational role and identify matters demanding objective analysis. They provide, also, a source of alternative interpretations of the data. Still, the persons who participate represent only a small slice of a community and often have a particular viewpoint not characteristic of

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the community at large. Those who participate also represent today, not tomorrow. Planning is about tomorrow. Therefore, someone must speak for those future residents.

Planners have the facts to do. We can, with other professionals, use them to craft community planning standards. We bear the great risk, however, of believing our opinions matter more than the facts. It cannot be so in a free society. There is no room for elitists who suppose they have a superior vision for the community. Our role is to analyze, demonstrate and teach, as professionals. We cannot put ourselves above the democratic process or the marketplace. We serve both.

Planning Must be Practical

Serving both requires planners, as a practical matter, to be involved not only in planning but also in implementation. A community standard developed in the abstract is only as good as the regulation used to put it in practice. This is where we can do the most good. Engineers can't do it without including numbing detail that allows no room for innovation. Lawyers can't do without the unintelligible legalese and multiple-level cross-references designed for court resolution. Politicians can do it but always addressing tomorrow's questions with yesterday's answers. Public interest groups can do it, but do so with a special interest agenda. Planners, however, can apply their practical experience in dealing with development to craft practical land use regulations.

Practical regulations are easily understood and administered. They allow for innovation and change. They are growth neutral for the community as a whole. They are limited to measures essential to health and safety or that have a tangible relationship to objective goals. They assume externalities cut both ways, that government actions can have as many unintended consequences as private ones. They incorporate incentives that use market forces in an intelligent way to achieve public good. They allow flexibility for engineered solutions that address fundamental goals. They guide growth within a community rather than restrain it or redirect it to another.

Practical land use regulations favor concise performance standards over arbitrary criteria. Rather than forbidding development of steep slopes or setting absurd lot sizes to protect them, they may limit land disturbance to preserve views and address erosion. Rather than creating a complex system of density "banks," they may simply allow for private transfers of development rights at the time of development approvals. Rather than developing a multi-tiered system of zoning districts, they may rely largely upon mixed-use districts that allow for multiple uses subject to basic standards for commercial activity wherever it takes place. Rather than specifying detailed parking regulations for every use, they build in flexibility to consider industry standards, shared parking and other factors mitigating demand.

The Limits of Planning

These and similar other measures can serve to create much more user-friendly and effective land use regulations than I'm used to seeing in communities I visit the first time. Most zoning ordinances are hopelessly out-of-date and far too thick with regulations for which no one currently involved can recall a reason. Local officials are, by nature, often reactionary in nature. Every

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new major land use issue results in a new set of supplementary standards for that use. Unfortunately, these are based on what has gone before and a desire to answer every question that came up then. There is no thought given to how things may evolve. Technology, therefore, often outpaces the regulations, making them irrelevant in rather short order. The ordinance soon becomes cluttered with contradicting standards that no one understands. It become ripe for a rewrite.

While this is a consulting opportunity for me, it never serves the public interest to pack ordinances with regulations that attempt to answer every question about every possible use. No one can do it, but far too many try. Communities would be better off to resist temptations to continually add standards for new uses. Indeed, I have often wished for sunset provisions that would automatically repeal regulations unless communities voted to reenact them. That would, at least, force someone to think about whether they're really necessary any more or if a better approach might not exist. Communities need to regularly ask themselves whether a given standard is actually necessary for health and safety purposes or only expresses the desire and opinion of the regulator. The former is warranted - the latter is not. Yet, much of what we see in zoning ordinances today is a matter of preference rather than necessity.

Limiting Intervention is the Key to Planning in a Free Society

This is an especially dangerous road for planners and local officials to travel. Once it is accepted that zoning regulations may be used to coerce others to accept the simple will of the majority, there are no limits. The majority will always want more control and seek more coercion. The rights of the minority are soon trampled, allowing for no individualism and no innovation. The rule of man begins to be substituted for the rule of law. Far better it is that we limit the role of government and let markets make the decisions wherever possible. Markets involve literally everyone in the decision. Everyone votes when they decide whether or not to offer a product or pay a particular price for a service. When we use zoning to make our decisions only the tiniest sliver of society votes and the interests of the status quo always prevail.

Streamlined land use regulations confined to health and safety objectives with a foundation in science, however, create the framework for those markets to work. If we do our job well as planners, zoning can help correct for the externalities. Our opinions may be no more important than anyone else's. Nevertheless, as professionals, we can offer the expertise needed to devise straightforward approaches to regulation that help the market function better. When we go overboard and try to replace the marketplace, we inevitably generate unintended consequences that distort its ability to deliver fair decisions. Minimal intervention and limited government are the keys. It is our responsibility, in the interest of a free society, to help deliver them.

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