Land Use Planning: The Financial Implication

by Mike McCandless
1976

The Institute of Urban Studies

THE UNIVERSITY OF WINNIPEG

FOR INFORMATION:

The Institute of Urban Studies
The University of Winnipeg
599 Portage Avenue, Winnipeg
phone: 204.982.1140
fax: 204.943.4695
general email: ius@uwinnipeg.ca

Mailing Address:
The Institute of Urban Studies
The University of Winnipeg
515 Portage Avenue
Winnipeg, Manitoba, R3B 2E9

LAND USE PLANNING: THE FINANCIAL IMPLICATION
Published 1976 by the Institute of Urban Studies, University of Winnipeg

Note: The cover page and this information page are new replacements, 2016.

The Institute of Urban Studies is an independent research arm of the University of Winnipeg. Since 1969, the IUS has been both an academic and an applied research centre, committed to examining urban development issues in a broad, non-partisan manner. The Institute examines inner city, environmental, Aboriginal and community development issues. In addition to its ongoing involvement in research, IUS brings in visiting scholars, hosts workshops, seminars and conferences, and acts in partnership with other organizations in the community to effect positive change.

LAND USE PLANNING: THE FINANCIAL IMPLICATION

by: Mike McCandless
of the Institute of Urban Studies
University of Winnipeg

with the assistance of
Dr. Lloyd Axworthy
Institute of Urban Studies

November, 1976

For the Urban Land Symposium
Sponsored by: The Housing Committee
Canadian Council of Social Development

LAND USE PLANNING: THE FINANCIAL PROBLEM

" If planning is a necessity and an advantage to the community, as is undoubtedly the case, a means must be found for removing the conflict between private and public interest."

- Expert Committee on Compensation and Betterment, Final Report (1942, p.23)

Introduction

The common law has always recognized private restrictions on the use of land. The law of nuisance may prevent a man from using his land in such a way as to interfere with a neighbour's enjoyment of his own property. Land may be held subject to a restrictive convenant which for the benefit of adjoining property restricts its use, perhaps to that for a single family dwelling. Besides these "private" constraints, the use of land today is subject to an assortment of statutes, regulations, and by laws. There is a fundamental difference, however, between private and public restrictions.

Anyone who purchases land must be taken to be aware of the bundle of rights that he is obtaining. The buyer of a parcel located in the middle of a stable residential neighbourhood knows that he cannot build a smelter, even if there are no zoning by laws or environmental standards, because of the danger of a nuisance action. The price he pays will reflect this restriction upon use. Similarly, a parcel subject to a restrictive covenant will be discounted in value to reflect the value of the right which is not the vendor's to sell.

When a restriction on the use of land is imposed in the public interest by a statute of by-law there is no constitutional guarantee in Canada that the owner be compensated. Despite the judicial presumption that property rights may not be confiscated by the state unless the legislative intention to do so is expressed clearly,[1] the restrictions on the right to develop land do not give rise to compensation.[2] Therefore, the owner is left to bear the loss. This is the important difference between private and public restrictions: in the latter the appropriate financial

increase the value of land while the owner merely waits. Perhaps at least a portion of this unearned increment or "betterment" should be returned to the community which created it, rather than be retained by the owner at the expense of his neighbours. The recent United Nations Conference on Habitat resolved that participating countries take appropriate measures to reclaim such additions to land values.[5]

It may be argued that to oppose speculation in land is an ideological position which has nothing to do with planning as such. However not only do financial considerations play a major role in planning decisions, as we have argued above, but also the planning process is an aid to speculation itself. Obviously use restrictions diminish the supply of developable land, and so make those properties upon which more intensive development is permitted more valuable. At the same time opportunities are enhanced for the sophisticated, those with easier access to the planning process, those with an "ear" at city hall.

The fundamental problem of the affect of planning on land values and the consequent undesirable affect on planning itself was recognized in the early town planning legislation. The British statute of 1909 which empowered local authorities to adopt town planning schemes also provided for full compensation for those whose property was thereby diminished in value and allowed the local authority to claim 50% of any increases (called betterment). This provision was considered by its framers essential to the implementation of the schemes. Canadian legislation modelled on this statute contained similar sections on compensation and betterment. As we shall see below, these provisions proved unworkable, both here and in England. The English have made further attempts at resolving the conflict between the private and public interest in the use of land. We in Canada have been unconcerned with the problem, perhaps because until recently there has not been any firm resolve to enforce proper planning, as opposed to zoning to protect property values. In areas under development pressure, zoning has generally followed the market. However, the

Local councillors cannot be expected to make sound decisions with respect to development when they are subjected to the pressures of developers who stand to make huge financial gains or homeowners solely concerned with the protection of property values. What is needed is a mechanism whereby such pressures are minimized.[4] Because these factors have always operated, land uses have not been rationally allocated in spite of the fact that local authorities have had ample powers.

Even if restrictions on land use were imposed and removed purely on the basis of the larger public interest, surely it is unfair that some must pay while others reap a windfall - often simply because a line is drawn a certain way on a map. If the community wishes to use someone's land for a public work, then the community pays. But when the use of land is restricted to agriculture by a zoning by-law while the market calls for development, the owner bears the loss. The lucky owner in the same area who is permitted to build may make a huge gain while his neighbourhors make nothing. These results can put planning in a bad light. Considerations of "fairness" and "unfairness" to particular owners affect decisions, particularly these made st the local level. Thus one encroaching use if often the thin edge of the wedge.

The financial consequences of restrictions on land use constitute an assault on the restrictions themselves. Land use planning has largely been ineffectual in the face of market forces because we have not addressed the problem of who pays for its implementation. Advocates for compensation have not been vocal, simply because planning has been so accommodating to the market.

Apart from the problem of fairness between landowners is that of fairness vis-a-vis the community at large. Permitting profitable development allows the owner to cash in an asset which has appreciated in value because of community action and not because of any contribution made by the owner. The municipality may have provided the infrastructure (roads, services, etc.) Government or industry may have made significant investment decisions which create jobs in a locality. Then the community permits intensive development. These factors greatly

financial problem must now be faced squarely if we are to be successful in implementing comprehensive land use planning.

This paper discusses historical attempts to adjust the financial consequences of public decisions concerning land use. We shall begin by examining the first English provisions, their interesting 1947 experiment, and subsequent developments in that country. We shall look at the use of development agreements and dedication requirements, and also at land banking, tools which are familiar in Canada. Finally we shall recognize the growing interest in the United States in the problem of compensation and betterment by describing an innovative American response, the transfer of development rights.

The English Experience

The English have been grappling with the problem of the reallocation of land values by restrictions on use since as early as 1909. Although they have attempted several types of solutions and the matter has become bound up in the divergent policies of successive Labour and Conservative administrations, it will be instructive to outline chronologically the English approach.

In the introduction we have already mentioned the first legislation dealing with land use planning per se, the Housing, Town Planning, etc. Act of 1909. The statute empowered local authorities to prepare and adopt town planning schemes dealing with the use of land likely to be developed - essentially suburban land. Such schemes could divide an area into zones and prescribe permitted uses for each, and set standards for the space about buildings, the height of buildings, and even their "character" (perhaps allowing regulation of design or appearance). The Act addressed the financial problem by providing for claims for compensation and betterment. An owner whose land was "injuriously affected" by the making of a planning scheme or the execution of public works under the scheme could, within a specified time period make a claim on the local authority for the amount of his loss. The claim could

not be made where the restrictions imposed concerned such things as yard requirements or was akin to a public health regulation. But the confiscatory nature of severe restrictions on land use was recognized. On the other hand, where the value of land was enhanced by the making of a scheme or the execution of public works under it, the local authority within the specified time could make a claim on the owner for one-half of such increase.

The difficulties with such an approach are obvious. The major one is the necessity to establish a causal connection between the making of a scheme and changes in land use for a claim to be successful. Other factors are not to count, such as demographic changes or major investment decisions which create or diminish demand for intensive use of land in a locality. With respect to betterment, the local authority had to make its claim within the specified time against an owner who had not actually realized any gain and perhaps was not interested in disposing of his holding. Needless to say any such claim would be bitterly opposed and would not enhance the political popularity of the councillors. In fact mechanisms for claiming betterment caused by the public works met with little success in London in the 19th century.

Therefore, the system did not work as planned. The Barlow Commission reported in 1940 that the process of planning was being hindered throughout the country because of the inadequacy of the financial provisions. Local authorities were hesitant to restrict land uses because of the liability for compensation (in practice it was much easier to show that a loss of value was caused by a planning scheme). In theory, compensation was to be paid out of betterment but betterment was irrecoverable in practice. The 1932 Act had increased the portion of the enhanced value that could be claimed to three-quarters, but this adjustment had not made the claim any easier to enforce. The same Act had empowered local authorities to adopt planning schemes over any land (not just suburban), but by the early forties only 5% of the country was subject to schemes. The Barlow Commission recommended that a committee of experts be constituted to examine the questions of compensation and betterment.

The result was the Uthwatt Committee, whose report published in 1942 is an important statement on the financial problem. The Committee found that a compensation provision such as the one in the 1909 Act is inherently inflationary because of the way the market in land operates. In an area where development is expected the values of an individual parcel of land will rise because of the chance that valuable development will take place on that site. However, the most remunerative development will be permitted on only one of a few sites. Development potential can be represented by a "floating value" which will not alight on most of the potential sites, even though their value has increased because of the chance that it will. The aggregated claims of all the affected owners will be greater than the real loss occasioned by the scheme. Whether or not the doctrine or "floating value" accords with orthodox economic theory is beside the point. Awards made by tribunals and courts of compensation to be paid by expropriating bodies probably do support the thesis.

The Uthwatt Committee believed that betterment could never be made to balance compensation where the land is held be a mutiplicity of owners. They recommended that development values be secured for the community by prohibiting private development (with once and for all compensation) and by having the state acquire land to be made available for development.

The Town and Country Planning Act 1947 drew substantially on the work of the Uthwatt Committee. In effect the right to develop land was nationalized. No development could take place without permission. If permission were refused no compensation was payable. If permission were granted the owner had to pay a development charge to a Central LandBoard. This charge represented the difference between the market value of the land after the permission and its existing use value. Thus the entire portion of value which represented development potential was paid to the state. Local authorities and other public bodies could acquire land at its

existing use value. To compensate owners once and for all for loss of the right to develop, a £300 million fund was established to which owners could make claims. Compensation was payable for loss of development values which existed in 1947, but any such values created after that date belonged to the state.

The logic of the system was quite attractive. Since a person wishing to develop land was aware that he would have to pay its development value to the state, he would offer only existing use value to the seller. Presumably the original owner would be happy with his claim to the fund. But if he refused to sell at existing use value, the purchaser could apply to the Central Land Board which would expropriate the property for him.

However, in practice land continued to change hands at prices exceeding existing use value. Owners expected to receive some portion of development value, or they would not sell at all. The Central Land Board almost never used its power of expropriation. The result was that the land owner was retaining at least part of the betterment and the developer's liability to pay the development charge was in effect a tax, over and above betterment, which increased development costs.

There is much argument as to the causes of this state of affairs. Supporters of the development charge allege that owners deliberately kept their land off the market in the expectation that a Conservative administration would soon be elected which would abolish the system. Perhaps the theory and purpose of the mechanism were not adequately explained so that the market was unable to make the proper calculations. On the other hand, detractors say that the 100% charge removed all incentive to bring land forward for development. England was still subject to a post-war shortage of labour and materials, however. It may be that development was proceeding as quickly as physically possible.

In any case, Labour lost the next election and the financial provisions of the Act were abolished in 1953. However, the Act's provisions for the implementation of land use planning were not changed, and have remained substantially the same to the present day. Another principle was left intact: denial of planning permission

was not to give rise to compensation for loss of development value created after 1947.

Thus from 1953 a developer no longer had to pay the charge. The government's liability to pay claims against the £300 million fund was also abolished. An owner who had established a claim under the old provisions would now receive it only if he applied for planning permission and were refused, or if his land were expropriated.[6]

During this period of experimentation with ways of appropriating unearned increments in land values for the community there was no capital gains tax in England, as in Canada. In 1962 a "short-term gains" tax was implemented. This was a tax on speculation: gains on assets held for a short period of time. Three years later a full-scale capital gains tax was promulgated. Although such a tax is clearly a method of recapturing unearned increments, it did not satisfy the Labour Party, as it desired to treat the land question as a special case.

Rapid increases in the price of land and publicity concerning huge speculative gains became issues during the next election campaign. The resulting Labour Government enacted the Land Commission Act 1967. This Act created the Land Commission which was eventually to have wide powers of land acquisition. It would make land available for development. Thus the Uthwatt recommendation that development land pass through public ownership was to be implemented. Under this statute a 40% betterment levy was imposed. This levy was payable when development gains were realized - upon sale, lease, or physical development. It was envisaged that the levy would rise gradually, though never to 100% - a concession to the incentive argument.

This new system was shortlived, however, The Conservatives, returning to power, abolished it in 1970. Because of generous transition provisions and the fact that the Land Commission never did receive its wider powers of acqusition, it is difficult to gauge the Act's chances of success.

Obviously the land question is a highly political one in England. The position of Labour is that "positive" planning and recapture of gains in land values is only

possible through public ownership. The Conservatives of course uphold private ownership and initiative. Yet even they regard development gains as a special case. In a 1973 White Paper they proposed a development gains tax, which would treat as ordinary income for tax purposes the increase in value realized when development takes place. The Labour government implemented this proposal in 1974 as an interim measure.

In 1975 the Community Land Act was passed. If and when it is completely implemented, this statute will require local authorities to aquire all land likely to be developed within the next succeeding ten years. No development will be permitted except on land owned by local authorities or made available by them for the purpose. Ultimately the price that they will pay for such land will be existing use value. During the transitional stage local authorities have the power to acquire development land rather than the duty. They pay a reduced price: net of "development land tax", a levy collected upon disposal or actual development. This tax is now at 80% of development value[7] and is to be increased gradually.

The Conservatives have promised to repeal the Community Land Act.

The Canadian Experience

In the early part of this century the western provinces experimented with the taxation of land or site values. Site value taxation consists of a property tax using as a base only the value of the land itself, exclusive of the value of buildings or other improvements. Thus increases in land values are taxed proportionately and a part of the unearned increment is returned to the community. In theory a tax on land cannot be shifted to its occupants. Rather it is reflected in lower prices.

Site valuation had by 1914 been adopted in two-thirds of British Columbia's municipalities. In 1912 it was made mandatory in Alberta. By 1914 Sasaktchewan's municipalities were either using site values or taxing improvements at a lower percentage. Manitoba never went completely to this basis, but even today improvements are one-third exempt.

It appears that site value taxation was used in Western Canada not primarily because of its effect of recapturing unearned increments, but because ot its other alleged salutary effects. This is, it was felt that it would encourage the breaking up of large tracts of vacant land held by absentee owners, and would discourage speculation. Apparently is succeeded in the former objective, but the period of its use conincided with the most spectacular boom in land prices ever experienced in Western Canada. Sepculative profits were so great that even huge increases in property taxes were a minor consideration.

When boom went to bust and land values fell, the tax base was eroded. Five of the six B.C. municipalities which defaulted in their debts in the thirties had been using site value taxation until the early part of the decade. The instability of land values as a tax base was the factor which ended the Western Canadian experiment.

Of course, site value taxation is administered soundly in Australia and New Zealand, and land prices are not today subject to violent fluctuations. But it cannot be advanced as a desirable method of recapturing unearned increments. This is because of its accompanying undesirable effects. The property tax carries a much heavier load in Canada then in Australia and New Zealand. Not to tax improvements would mean that services were being delivered without relation to the amount of tax received. Other sourcer of revenue would be required. Exaggerated claims are made for site value taxation with respect to encouragement of redevelopment of downtown cores and slums. An examination of cities "down under" shows that change in the basis for property taxation is no panacea. It is fairly certain that one effect would be to shift part of the tax burden from suburban residential property to the city's commercial core. This fact explains why land value taxation has been chosen as a local option in New Zealand. But suburban residential land use is already heavily subsidized, and the site value basis would contribute to the destruction of inner city communities.[8]

As mentioned above, the 1909 English legislation was used as a model by

several Canadian jurisdictions, and the provisions concerning claims for compensation and betterment were faithfully copied. There is no evidence of these provisions ever having been invoked. The last to disappear was Manitoba's. That province's new Planning Act of 1975 still contained a section allowing a municipality to claim one-half of any increase in land values caused by the enactment of a zoning by-law or the execution of works under a development plan. This section was left unproclaimed and was repealed this year, apparently because it was believed to be unworkable in practice.

Some idea of the practical problems encountered in trying to make a claim for betterment upon an owner of land may be gained from the experience under Newfoundland's Housing Act and its predecessor, the Slum Clearance Act. That statute allows recovery of betterment from owners benefitted by a public housing project. One attempt was made in the early fifties and a great deal of public controversy ensued. Collections were very difficult to enforce. The authorities apparently decided that recovery of such a claim was not worth the administrative difficulty[9] and nows its practice is to acquire more land than is actually needed. There is reason to believe that a claim for betterment under the early Canaidan planning legislation would have been even more difficult to enforce. Besides having to deal with the resentment of owners, a municipality would have the difficult task of showing that a parcel of land had increased in value because of restrictions on the use of other land.

There is some experience in Canada with an unearned increment tax[10]. Such a measure is easier to enforce because it is not collected until a gain is realized. The Alberta Unearned Increment Tax Act was in force from 1913 until 1956. It levied a tax on increases in land values that accrued between transfers, at first 5% and from 1938, 10%. The value of improvements or development was deducted from the increase. It was repealed as part of a general lowering of taxes.

In 1974 Ontario enacted the Land Speculation Tax Act. The purposes of this Act were said to be to curb speculation and to recapture windfall profits. Of course if

it ended speculation then no revenue would be collected. At its original level of 50% it apparently did have a profound affect on real estate transaction, because the federal government disallowed the tax as an income tax deduction and thus the combined effect could come to over 100% of a gain. Subsequently the speculation tax was reduced to 20%. Ontario's tax is not primarily an unearned increment tax because it is aimed at speculation per se. In seeking to exempt those who are not considered speculators, a great deal of unearned increment is retained by owners. This fact is most significant for our purposes when we note that a holder of land will not be liable to tax if he builds before selling, and the first sale of serviced land will not attract tax liability. Thus many gains in development value are free of speculation tax. A true unearned increment tax would allow the deduction of the value of development undertaken, rather than an all-or-nothing exemption.

Capital gains tax is itself a form of tax on unearned increments, the major differences being that the rate of tax is related to income and capital losses may be deductible from gains. As noted before, the clamour for recapture of development gains in England took place in the absence of a capital gains tax. At present the Labour legislation seeks to replace the private market in development land. It can be argued that unless we in Canada desire to replace the market, then capital gains taxation should suffice in recouping a portion of development gains for the community. The major shortcoming of this approach is that the community that creates the gain does not benefit directly from the revenues collected. There, the Alberta Land Use Forum[11] recommends that the federal government be asked to permit the province to collect capital gains taxes on land. The province would then distribute the funds to the municipalities.

There is one kind of unearned increment which is successfully prevented in Canada. When a new subdivision is approved municipalities are able to allocate a great deal of the costs it generates to the development itself. Through the use of development agreements, the applicant may be required to donate land for parks, and highways, to construct sewers, street lights, and other facilities, or to pay

cash imposts or lot levies. Lately there has been criticism that some municipalities are asking for too much and thus driving up the cost of housing. But there is no evidence that the developer could not command as high a price if, for example, servicing standards were lowered.[12] It is certain that removing the obligation to pay a 5 or 10% fee in lieu of park dedication would not cause a corresponding decrease in prices. What these requirements for development permission do is to prevent the owner from reaping a windfall by allocating costs to his development. Abuse does exist when a subdivider is required to pay for capital improvements not necessitated wholly by the impact of his particular development. It should be pointed out that municipalities use such techniques not to prevent windfalls but to pass the burden of financing services and park acquisition to new developments.

Land banking has been advocated as an effective method of recapturing development gains for the community. Public ownership of development land seems to have worked successfully in such cities as Saskatoon and Red Deer, where funds recaptured have made the schemes self-sustaining and paid for infrastructure. One claim often made for land banking is that it lowers housing prices by eliminating windfall profits. However, if such land is disposed of to builders or homeowners at cost then no increment is recaptured by the community. Unless restrictions are placed on further disposal, the occupants will reap the windfall. Thus the objective of lowering prices must be achieved artificially, by subsidizing new occupants and preventing them from disposing of their property at market value. It is thus necessary to recognize that recapturing unearned increment and providing housing at reduced prices cannot both be achieved magically by land banking. Some lowering effect on market value is produced only where a large proportion of the local market for building lots is provided by the public land assembly.

The cost of land banking is a crucial issue. To work properly the public must pay for the land a price largely exclusive of development value. If not, the cost may be prohibitive and the objective of recapturing development values will

not be met. The English government intends eventually to allow acquisition at current use value - at present a political impossibility in this country. Therefore, public authorities in Canada must put together their land assemblies far in advance of contemplated use, before development values become too large. The successful land banking programs in western Canada began with widescale tax forfeits during the depression. The cities concerned were spared the problem of initial cost.

Public land assembly for development purposes is cheaper prior to the announcement of a project or the adoption of a development plan. Once owners in a locality are aware that an assembly is to be made, even if no development is contemplated within the next ten years, prices will tend to rise. This will become a greater problem as long-term development planning becomes more widespread. Considerations of public participation and consultation with those affected will inflate the cost of land assmebly for the public agencies and authorities.

The Available Techniques - Evaluation

In the introduction the financial problem was explained. Mitigating the conflict between the public and the private interest was seen to be a necessity if we are to be successful in implementing restrictions on use of land. At the same time some portion of the unearned increment in land values must be returned to the community which created it.

As we have seen, the English approach is to remove the conflict by ending the free market in development land. This is to be accomplished by giving local authorities the power of acquiring such land at its existing use value and prohibiting development on private land. Clearly such a policy, even if it were objectively desirable, would be a political impossibility in this country. Public ownership of land is a feasible technique in Canada within the market system, but it is useful in recapturing development gains only if the land is acquired before the gains occur. Therefore, it is not available where the land concerned is already

adjustments are not made. As we shall see, the fact that they are not presents considerable difficulties for the effective implementation of restrictions felt to be in the public interest.

Significant power to control development has been delegated by the provinces to the level of the local council. Typically the tool used has been zoning, whereby the area is divided into zones and permitted uses prescribed for each. The zoning power is often guided by a development plan, which is a statement of the community's policies for prospective land use. An alternative method for the implementation of planning is development control, which requires permission for development on a case-by-case discretionary basis. There is also a hybrid form of control, conditional zoning, where some uses may be permitted in a zone. A province may have granted a local authority the power to prevent an owner from demolishing a building, where it is felt to be of historical or architectural interest.

All of these tools seek to prevent an owner from developing his land to its most remunerative level in the name of the public interest. Invariably the owner bears the cost. At the same time, an owner who is permitted to develop his land intensively will not only realize his normal expectations but will reap a windfall because of the artificial restriction on the supply of land for comparable development. Thus the implementation of non-universal land use restrictions reallocates land values.

The policy is that the public interest is paramount and the costs and benefits should fall where they may. This policy assumes that decisions concerning development are made in a "public interest" vacuum. The reality is otherwise. Often in a rezoning decision the broad public interest fades into the background while a fight takes place between different interests motivated by financial considerations.[3] Thus the prospect of gain or loss may be an important factor in decisions concerning development, while the rationale of planning itself is the belief that such a consideration does not produce the optimal pattern of land use.

undergoing pressure for development. Unfortunately, the most crucial problems of land use occur in such areas.

If the market is to continue to operate then the recapture of windfall gains is primarily a matter of taxation. A key feature of a tax system would be the return of the proceeds to the relevant municipality. Perhaps the system already in place that taxes unearned increments, the income tax, could be adjusted to operate in this way.

Taxing unearned increments addresses only one part of the financial problem. What can be done to effectively implement restrictions on use over land which already has attached to it significant development value? There must be some measure of compensation for the affected owner. Those who benefit from the removal of competitive land from the development market could be asked to provide this compensation. Such an approach is being suggested in the United States. It involves the concept of the transfer of development rights.

Transferable Development Rights

Ownership of land can be described as possession of a bundle of rights over a particular piece of property. The right to carry out some operation or improvement on the land, that is, to development property, is normally one of the rights of ownership. This right may be disposed of by the owner or taken away by the state, but the right always pertains to that specific parcel. The concept of transferable development rights (or TDR) involves making such a right transferable to other properties on which restrictions on development exist. Enabling legislation would be required.

TDR would operate as follows. Let us say that it is in the public interest that a particular area be kept in agricultural production, while the market considers the land ripe for residential development, at a density of so many dwelling units per acre. When the land is zoned for agricultural use, owners of land are issued TDRs based on such a density. Although they are prevented from

developing their own land, they may sell the TDRs to owners in another zone where higher density development is appropriate. In the "transfer zone", owners need TDRs in order to increase the permitted density of their use.

TDR may be applied in any situation where it is necessary to preserve the existing use of land in the public interest. Thus it has application in the preservation of farm land, the protection of environmental resources, the maintenance of buffer zones, or the preservation of buildings for architectural or historical reasons or to maintain lower-cost housing. A TDR system could be used to implement comprehensive planning over a large area with many owners. Agricultural land and open space, commercial, industrial, and residential sites, and public facilities could be designated for specific locations in the planning area. Those who are left with land zoned agricultural have excess development rights. A landowner whose land is designated as industrial must buy TDRs in order to be able to build a factory. The municipality need not bow to pressure to rezone since those who own valuable property are compensated for the restriction on use by being able to sell their TDRs. Windfalls are reduced by the amount paid for the TDRs.

Thus TDR enables restrictions on land use to be imposed without creating windfalls for some and losses for others. By doing so it mitigates the pressures that serve to destroy well-laid plans. And although the burden is lifted from the owner of preserved property, the cost is not borne by the public purse.

TDR was first proposed as a method of saving "landmark" buildings in the Chicago Loop area. Owners of such buildings would be issued TDRs which represent the difference between square footage allowed by the present zoning and the square footage of the protected building. TDRs could be sold within the Loop area, enabling buyers to build their sites to greater heights. The city would be given the power to acquire TDRs and perhaps would be issued TDRs with respect to public buildings. The Chicago Plan, as it is called, has not been implemented.

The City of New York has had same experience with transfer of "air rights" as a

preservation tool. The owner of a protected building can trasnfer his air rights to other properties. However, the scheme is a voluntary one. Recently an attempt by the City to impose preservation of privately-owned parks in this way was invalidated by the New York Court of Appeals.[13] The court held that zoning the land to "public park" was an unconstitutional deprivation of property rights without due process of law. The transferable development rights that the owner was given did not amount to proper conpensation because their value depended on an uncertain market and future approvals of administrative agencies. But the court noted that such an objection could not be made to the Chicago Plan, because that scheme provided for sure compensation in that an owner could sell his rights to the city.

Several local authorities in the United States have provided for the use of TDR without the benefit of specific enabling legislation. Townships in New Jersey and Pennsylvania have enacted zoning ordinances which allow TDR to be used to preserve agricultural land. The zoning by-law of the town of Sunderland in Massachusetts seeks to preserve farmland along the Connecticut River by using TDR. The plan for Westwood Village in Los Angeles provides for TDR to preserve its character. The towns of Southampton, N.Y. adopted an ordinance using TDR to encourage housing for low and moderate income people. Collier County in Florida has applied TDR to areas of environmental sensitivity.[14]

Last year a Transferable Development Rights Bill was submitted to the New Jersey legislature. It just failed passage and has been reintroduced. This legislation would allow a municipality to implement TDR for the preservation of land of historic, environmental, and economic significance. Property-owners in the preservation zone would be issued TDRs on the basis of their property's proportion of the total assessed value of property in the zone. The municipality could set up a TDR bank which would acquire and dispose of TDRs. TDRs would be taxed as real property. Enabling legislation has also reached the bill stage in New York, Oregon, Colorado, and Connecticut.

The key to the success of a TDR scheme lies in the marketability of the development rights. There must be a demand for higher densities in the transfer zone and owners in that zone must not be permitted to build to those higher densities unless they own the requisite TDRs. If they are already permitted by zoning to build to the highest density that the market can accommodate, then the TDRs will have no exchange value. This means that the level of development without TDRs that is to be permitted in the transfer zone must be finely set. At the same time planning considerations must not be discarded inside the transfer district. Obviously, to apply TDR successfully will require a thorough analysis of conditions in the area affected.

Probably TDRs would be taxed as real property. The treatment would vary depending on the basis for taxation in each and the various exemptions employed. It should be possible to implement TDR with little net effect on the tax base.

Other implications of TDR would require some thought before its implementation. A scheme could be thwarted if developers were able to divert their activity to a nearby area which was outside the scheme. Perhaps planning on a district or regional basis would be necessary. A method of recording ownership of TDRs would be needed. Would TDR increase the cost of housing any more than would the preservation of existing uses itself? What would be the effect on mortgages?

One area where TDR appears to be particularly appropriate is that of building preservation. The present technique of saving a building of historic or architectural interest is to perform a holding action until some scheme is devised that the owner can accept or the funds are gathered to acquire it. The Ontario Heritage Act is a good example. TDR would allow the city to prohibit demolition or alteration while the owner would be compensated by selling the right to build more office space to owners in the downtown business district. In effect there would be a form of bonus zoning. Builders of office developments would be paying the cost of building preservation in return for being permitted to increase density. The owner of a

protected building would have his property tax reduced if he sold his TDRs. Still, owning such a building can be a burden and the TDR scheme should be a complement to other preservation techniques. The cost of repairs and maintenance that it would be burdensome to impose on the owner could be provided by the sale of TDRs allocated to public buildings or donated to the city.

The effective implementation of a TDR system depends on how market forces operate. At the same time adjustments will have to be made in other areas such as the property tax. In order to study how such a scheme would best operate in practice and how the necessary adjustments could be made, it would be instructive to devise a model based on an actual locality which is undergoing development pressures on an actual sites in a downtown area. Such a demonstration would examine how TDR could be used to implement perceived planning objectives, what the economic effects of TDR would be, and whether the market in TDRs would function as it is meant to do.

Conclusion

The financial problem of land use planning is most critical in areas where land values are being pushed up by development pressures. Public acquisition of such land is not an available method of appropriating the unearned increment. It is only useful if such land is already in the public domain. An unearned increment tax could return a portion of land value increases to the community. From a practical point of view, the best way of implementing such a tax is to return the present income and capital gains tax, where they have been generated by transactions in land, to the municipalities. The problem of compensation for those whose land is severely restricted in use may be amenable to solution by a system of transferable development rights. The next step is to demonstrate the feasibility of a TDR scheme.

FOOTNOTES

1. See Colonial Sugar Co. v. Melbourne (1927) A.C. 343. Some provincial planning statutes make clear the intention that compensation is not payable for restrictions on use. See, for example, Alberta's Planning Act, R.S.A. 1970, c.276, s.135.

2. See Re: Bridgman and Toronto (1951) D.R. 489 at 496, and Coleman v. McCallum and Toronto (1913), 11 D.L.R. 138 at 142.

3. The courts have recognized this fact of life in judicializing the rejoining process. A telling example is Howatson V. Assiniboine Park Community Committee, 37 DLR (3d) 584, (1973) 4 WWR 449, where a by-law was quashed because the committee made its' recommendations after having consulted with its staff, rather than at the meeting where the conflicting interests were heard.

4. Of course another factor militating against proper planning is the desire for higher assessment. The solution to this problem is beyond the scope of this paper.

5. The resolution reads: "The unearned increment resulting from the rise in land values resluting from change of use in land, from public investment or decision or due to the general growth of the community must be subject to appropriate recapture by appropriate public bodies (the community), unless the situation calls for other measures such as new patterns of ownership, the general acquisition of land by public bodies or other similar measures.

6. Public authorities thus could acquire land at a bargain price, since they only had to pay current use value plus the amount of the 1947 claim, while development value could have risen greatly since then. It was not until 1959 that full market value became the basis of compensation for expropriation. There are probably some properties in England which still carry an established 1947 claim (at 1947 prices plus one-seventh!

7. Loosely speaking. Actually the "base value" can be as high as the price paid for the land plus 10%.

8. For an excellent critique of site value taxation, see Clark, "Site Valuation as a Base for Local Taxation", Report of the 1961 Conference, Canadian Tax Foundation, p.75.

9. London's experience in the 19th century was similar.

10. The English had an unearned increment tax from 1909 until 1920.

11. A body appointed by the provincial government to inquire into land use problems.

12. Another consideration is that low initial servicing standards may mean high maintenance costs.

13. Fred F. French Investing Company, Inc. v. City of New York, No. 160, May 4, 1976. In Canada, of course, no objection could be made to a TDR scheme on constitutional grounds.

14. Consult Helb, Chavoushian, & Nieswand, Development Rights Bibliography (Rutgers U., 1976).

BIBLIOGRAPHY

General & Miscellaneous

Alberta, Municipal Affairs, Towards a New Planning Act for Alberta (1973)

Babcock, The Zoning Game (1966)

Bryant, Land, Private Property, Public Control (1972)

Ellickson, "Alternatives to Zoning", 40 U. Chi. L. Rev. 681, (1973)

Esau, Land Ownership Rights (Alberta Land Use Forum, Summary Report No. 9, 1974)

Hagman, "Windfalls for wipeouts: a preliminary report", in Scott, ed., Management and Control of Growth (1975)

Hefferon, Land-Use Planning: Supplementary Materials (1972)

Lowenberg et al., Windfalls for Wipeouts: an Annotated Bibliography (Council of Planning Librarians, 1974)

Mandelker, The Zoning Dilemma (1971)

Milner, Community Planning (1963)

Rogers, Canadian Law of Planning and Zoning (1975)

Siegan, Land Use without Zoning (1972)

England

Commission on the Distribution of the Industrial Population, Report (1940) ("Barlow")

Dobry, Stewart-Smith, & Barnes, Development Gains Tax (1975)

Expert Committee on Compensation and Betterment, Final Report (1942) ("Uthwatt")

Hall, ed., Land Values (1965)

"Land" (White Paper, 1974)

McAuslan, Land, Law and Planning (1975)

Scammell, "The development of land under the Planning Acts", (1953) Current Legal Problems 132

Telling, Planning Law and Procedure, 4th ed. (1973)

Wilkinson, "The Community Land Act 1975", 39 Modern L. Rev. 311, (1976)

Housing, Town Planning, etc. Act 1909

Finance Act 1909 - 10

Town and Country Planning Act 1947

Finance Act 1965

Land Commission Act 1967

Finance Act 1974

Community Land Act 1975

Development Land Tax Bill (Feb., 1976)

Unearned Increment: Taxes and Claims

Alberta Land Use Forum, Report and Recommendations (1976), ch. VII

Canadian Tax Foundation, Ontario Land Speculation Tax (Report of 1974 Conference)

Alberta Unearned Increment Tax Act 1913 (R.S.A. 1955, c. 349)

Manitoba Town Planning Act 1916

Manitoba Planning Act 1975

Newfoundland Housing Act 1966

Ontario Land Speculation Tax Act 1974

Property Tax & Site Values

Clark, "Site valuation as a base for local taxation", Canadian Tax Foundation, Report of 1961 Conference, p. 75

Committee on Taxation, Report, Vol. II (Ontario, 1967)

Finnis, An Introduction to Real Property Taxation (1972)

George, "Our land and land policy", 9 Works of Henry George 108 (1898)

Hagman, "The Single Tax and land-use planning", 12 UCLA L. REV. 762 (1965)

Netzer, Economics and Urban Problems (1970)

"The property tax debate", 31 Am. J. of Econ. & Soc. 113 (1972)

Rawson, Property Taxation and Urban Development (ULI Research Monograph, 1961)

Conditions of Development Approval

Committee on Taxation, Report, Vol. II (Ontario, 1967)

Jacobson & McHenry, "Exactions on development permission", in Hagman, ed., Windfalls for Wipeouts (forthcoming)

Subject to Approval (Ontario Economic Council, 1973) ("Comay")

Manitoba Planning Act 1975, ss. 48, 63, 73-5, 77.1

Ontario Planning Act 1970, ss. 29(12), 33(5), (8), 35a

Public Ownership of Land

Pearson, Land Banking: Principles and Practice (Appraisal Institute of Canada, 1975)

Ravis, Advance Land Acquisition by Local Government (1973)

Spurr, Land and Urban Development (1976)

Transferable Development Rights

Alberta, Municipal Affairs, Towards a New Planning Act for Alberta (1973), Part III

ASPO, Transferable Development Rights (Planning Advisory Service Report, 1975)

Chavooshian, Nieswand, & Norman, Growth-Management Program (Rutgers U., 1974)

Chavooshian, Norman, & Nieswand, Transfer of Development Rights (Rutgers U., 1973)

Costonis, "Development rights transfer", 83 Yale L.J. 75 (1973)

Costonis, Space Adrift (1974)

Helb, Chavooshian, & Nieswand, Development Rights Bibliography (Rutgers U., 1976)

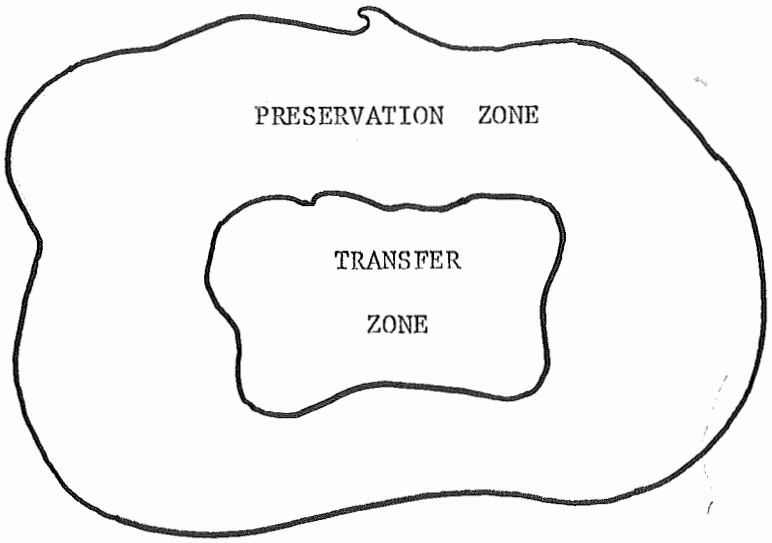
New Jersey Municipal Development Rights Act, No. 3192 (1975)

Rose, "A proposal for the separation and marketability of development rights as a technique to preserve open space", 2 Real Estate L. J. 635 (1974)

Rose, ed., The Transfer of Development Rights (1975)

ULI, Transfer of Development Rights, 34-1 Urban Land (1975)

TRANSFER OF DEVELOPMENT RIGHTS

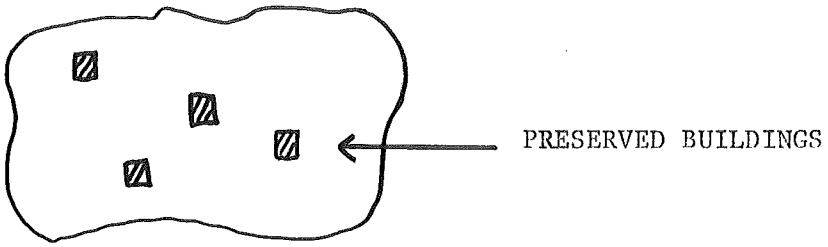


Goals: To preserve agricultural use on the town fringe, to prevent sprawl.
In the preservation zone: Land is zoned agricultural.
In the transfer zone: Land is zoned residential at a certain density.

Calculation is made of the capacity of the transfer zone to carry higher densities. The total number of TDRs created will equal the estimated final density that will be accommodated.

These TDRs are allocated to owners of land in the preservation zone. One TDR certificate would represent the right to, for example, one additional dwelling unit per acre.

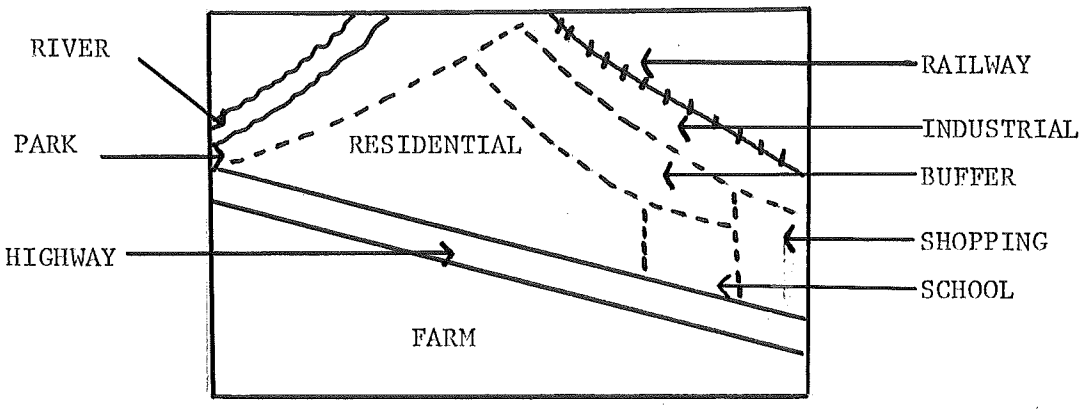
An owner of land in the transfer zone may have his site rezoned to a higher density if he buys the requisite TDRs.



Goal: Building preservation.

Designated buildings may not be demolished or altered. Their owners are issued TDRs representing the right to so many square feet of commercial space.

Owners in the surrounding business district may have their sites rezoned to a higher density if they buy the requisite TDRs.



Goal: Comprehensive planning - over developed land.

Uses are allocated in the development plan as shown above. TDRs (residential, commercial and industrial) are allocated to all owners in the area. For an owner to develop he must own the appropriate site as shown on the plan plus the requisite number and type of TDRs. These would have to be purchased from other owners.