

The Fundamental Right to Use One's Own Property



SUMMARY

Property rights were an essential and fundamental pillar of the American experiment, and their usurpation and violation were among the reasons listed in the Declaration of Independence that justified separation from Great Britain and the formation of a new country.

Unfortunately, governments at all levels of this country have become just as oppressive on this issue as the King once was; property rights, though widely regarded as a core aspect of good government, are routinely

subordinated to the interests of the state. They are frequently mentioned on the campaign trail, in academia, and in debates over political theory, but in actual practice, property rights are not what they were initially intended to be.

While many states constitutionally protect the right to acquire, possess, and protect property, no state recognizes one's inalienable right to *actually use* it. The need is great, and the fix is easy; Utah now has an opportunity to be a leader in restoring and protecting this right.

An oversight in constitutional protection has allowed the government to routinely violate the right of individuals to peacefully use their property as they see fit.

From the outset of this country's founding, private property rights have been a foundational tenet of public policy—indeed, many of the leading political philosophers of the time held that pre-existing property rights were the primary purpose for which people associated into governments. There is no question that America's founders considered such rights to be sacrosanct, based on the Laws of Nature and Nature's God referenced in the Declaration of Independence. These ideals are so fundamental to our American political systems that, in theory, most people do not question them; we often take them for granted, and assume they are adequately protected.

Utah is no different—both major political parties affirm the importance of property rights in their platforms, attesting to the fact that they are widely held to be fundamental. For example, the Utah Republican Party platform states, "The function of government is not to grant rights, but to protect the unalienable, God-given rights of life, liberty, property, and the pursuit of happiness." The Utah Democratic Party platform also affirms that its members "cherish the individual freedoms set forth in the Constitution of the United States and the Declaration of Independence."

Government in the United States of America—municipal, state, or federal—was intended to protect pre-existing rights, including and especially the right to use property.

The Advent of Zoning and Land-Use Ordinances

The advent of zoning and land-use ordinances led local governments to instead position themselves as



grantor of property rights, relying upon an expansive interpretation of a U.S. Supreme Court case to assert authority and claim general control over the development of property within their jurisdictions. Left unchecked, these policies have proliferated, to the detriment—and direct violation—of fundamental property rights.

Throughout the colonial era, land-use regulation was practically non-existent. This trend continued throughout the nineteenth century, with usable land passing increasingly into private ownership. Government supervision of land development was rare—a policy consistent with the prevailing laissez faire economic attitude of the time. Land division, development, and use were largely considered a private matter, of concern primarily to the owners and their successors and best left to the "invisible hand of the market."

As a result, by the turn of the twentieth century, government administration of private land had become a more or less technical regimen, regulating the surveying and mapping of subdivisions, and the laying out of utility lines and corridors. Rapid population growth and increasing urban density, however, brought this hands-off policy into question.

In 1916, New York City became the first to adopt a zoning code. It was a fairly simple document by today's standards, focusing for the most part on height and setback rules, and establishing residential districts within which land-uses that were deemed to be incompatible were forbidden. With urban development, it became obvious that some land-uses were genuinely incompatible. It was, for example, very difficult to maintain nuisance-free residences in a neighborhood suddenly home to a new meatpacking plant.²

President Warren G. Harding's Secretary of Commerce, Herbert Hoover, was an advocate of zoning. Hoover tapped the drafter of New York City's ordinance, Edward M. Bassett, to head the group preparing the Standard State Zoning Enabling Act ("SZE")—a framework of laws permitting cities to subdivide and categorize property with different regulations for each zone. Published in 1924, many states welcomed and responded with unexpected enthusiasm to the new standard. During the following year, 19 states—including Utah—adopted zoning-enabling legislation based upon the SZE. The 1926 revision was even more popular; by 1930, the Act had been adopted in whole or in part by 35 state legislatures.

From Euclid to Ephraim

It was in this atmosphere that the small town of Euclid, Ohio, found itself thrust into the national spotlight in the case of *Village of Euclid v. Ambler Realty Co.* Euclid was a tiny farming community on the outskirts of Cleveland, Ohio, whose city attorney claimed that zoning ordinances were needed to protect the "character of the community," arguing that they were a valid form of nuisance control and thus a reasonable exercise of the government's police power.

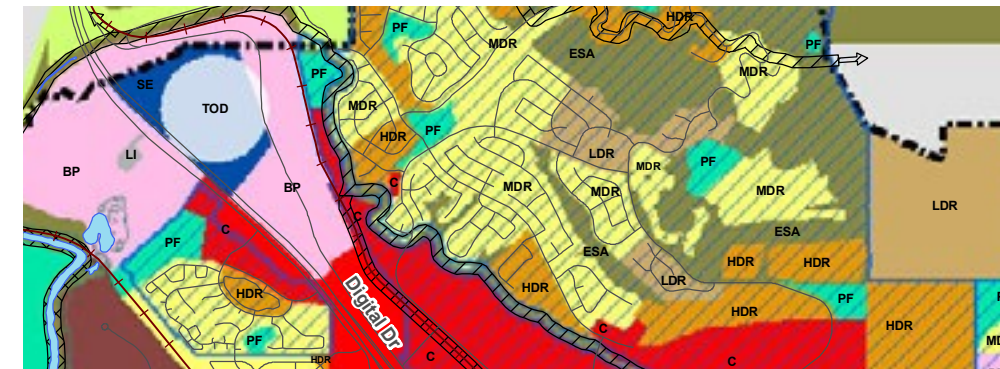
The progressive-era U.S. Supreme Court ultimately agreed, and upheld Euclid's zoning and land-use laws in 1926, thus creating a slippery slope that has resulted in constant legal tension over how far government can go to control an owner's use of property. While the Court's opinion did authorize zoning as a method of nuisance control, the subsequent expansion by city and state governments has warped into a broad assumption of power that controls land uses that have no reasonable nexus to potential nuisance concerns.

Utah's entry upon the slippery slope began with the 1943 case of *Marshall v. Salt Lake City*, in which the Utah Supreme Court opined as follows:

As to what restrictions and limitations should be imposed upon property, and what uses thereof should be permitted,

has been by the legislature, committed to the judgment and discretion of the governing body of the city [as part of its inherent police powers]. As long as that body stays within the grant, and purposes fixed by the legislature, the courts will not gainsay [its] judgment.

As a result, municipalities throughout the state began enacting increasingly more restrictive and overreaching land-use regulations. And in a series of cases since then, appellate courts in Utah have upheld such regulation primarily because they did not treat property rights and the right to use one's property as a fundamental



constitutional right, subject to the highest level of judicial scrutiny and legal protection. Utah's Constitution, of course, makes no such demand of them, and therefore the government's interests have often been upheld over those of the private property owner.

By 1998, however, the Utah Court of Appeals started to push back in *Brown vs. Sandy City Board of Adjustments*. In *Brown*, the Utah Court of Appeals said:

Essentially, Sandy takes the position that every use of property is prohibited unless

the use is specifically permitted by ordinance. That approach is diametrically opposed to the common law followed in Utah... Because zoning ordinances are in derogation of a property owner's common-law right to unrestricted use of his or her property, provisions therein restricting uses should be strictly construed, and provisions permitting property uses should be liberally constructed in favor of the property owner.

Unfortunately, in terms of protection of property rights in Utah, the *Brown* case is an exception to the general trend, under which basic property rights have been continually eroded.

Land Use in Utah

To comply with the fundamental right to own and use private property, land use ordinances must

recognize that ownership entitles a property owner with freedom to choose what to do with the property insofar as it does not infringe upon the legitimate rights of others.

Instead, what currently exists in Utah—and states throughout the nation—are cookie-cutter, one-size-fits-all land-use ordinances that essentially state, "An owner has no right to do anything whatsoever with property in this city except that which this ordinance specifically allows. Any use not specifically permitted is expressly prohibited." Most such ordinances now include

“land-use tables” which specifically list the only “permitted” uses within any given zone. According to the boilerplate language contained in one such representative ordinance, “if [a] use is not specifically [listed] then it is prohibited.”³ These ordinances and the use tables they contain are now considered to be the source of rights to do anything with one’s property within the state of Utah. Consequently, most zoning and land-use ordinances applicable to private property completely disregard the concept of natural law and inalienable property rights.

Instead of merely listing incompatible and prohibited uses, such ordinances list “permitted” uses, and grant the conditional right or entitlement (subject to first securing applicable permits) to engage in the permitted uses. These ordinances may list a number of permitted uses but not specifically include such things as “swing set,” “jungle gym,” or “solar panel,” which means that they are all prohibited. These restrictive prohibitions even apply to such simple things as installing a new furnace or changing a water heater.

City ordinances typically grant government complete control over any and all land uses. Even permitted uses often require the property owner to pay for a permit and step through several bureaucratic hoops in order to use their property in a way that is already listed as permitted. Failure to comply with these requirements, even for a permitted use, typically means that the land use or project can be forcefully terminated, along with inevitable fines being levied.

Consider the following language from one county in Utah, generally

representative of other land use ordinances:

*It shall be unlawful . . . to engage in any development, use, construction, remodeling, or other activity of any nature upon the land and improvements without the required Land Use Application approvals or Building Permit(s).*⁴

Today, this kind of regulatory approach and land-use language is commonplace. What it means is that according to the express language of such ordinances, it is unlawful to do anything with property—to engage in any use or activity of any nature upon the land—without first getting a permit from the government. In other words, a property owner is prohibited from doing anything with his or her property without first asking permission, which often will not be granted—especially if it has not been listed as a permitted use. Governmental entities believe they may require such permission because they believe they have ultimate power, and are in effect the source of any and all rights to use or do anything with property. In reality, the U.S. Supreme Court decision upon which they rely simply held that zoning is a prospective regulation of nuisance—not a grant of general, regulatory authority.

The Root of the Problem

The degree to which government has encroached upon private property rights can be primarily attributed to inadequate reference and explicit protection in federal and state constitutions. Without these protections, the government need only have a “rational” reason

to regulate or prohibit an owner’s use of property.

The right to own and use property was intrinsic to the founders’ belief system, based on the “Laws of Nature and of Nature’s God.” Sam Adams wrote that “the natural rights of the colonists are these: First a right to life, secondly to liberty, and thirdly to property. . . .”⁵ John Adams emphasized that “Property must be secured or liberty cannot exist.”⁶ George Mason similarly stated that “All men are created equally free and independent, and have certain inherent rights, of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”⁷

These and hundreds of other such quotes indicate a widely held regard for the right to obtain, own, use, and defend property. Still, it seems the Constitution’s drafters did not foresee the need to protect property rights. The original document makes no reference to property. The Fifth Amendment, later adopted after ratification, states “No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use without just compensation.”

Because the view of property rights has deteriorated to the point that they are not recognized and treated as fundamental constitutional rights, property rights are now scrutinized under a much lower “reasonable and rational” standard, rather than the “compelling interest” standard that normally applies to clear-cut fundamental rights.

Case in Point

Virgin is a small, rural town in Washington County, Utah. Home to approximately 600 residents, it is located along SR-9, the road that leads to Zion National Park. About seven years ago, Duane and Susan Munn took notice of a scenic, 80+ acre parcel of land that was available for sale. Despite not knowing how they might ultimately use it, they decided to purchase the land.

Unbeknownst to these new land owners, a group of residents, calling themselves the “Friends of Virgin,” organized themselves to change the land-use ordinances, control how others could use their property, and prevent any future commercial development. Their success has prevented this family from developing the land ever since.

As a result, nearby towns enjoy significant commercial development, while such progress has completely stagnated in Virgin. To this day, it is not possible to buy a gallon of gas or a loaf of bread within town limits—and many residents of the community intend to keep it that way.

Despite the opposition from a small group of vocal neighbors,

the Munn family navigated the zoning restrictions and permitting regulations, and applied to re-zone their land. Though the request was ultimately approved twice, there was significant opposition—including the town attorney advising the council that they could create ordinances so hostile and costly to land owners like the Munns, that they would be in effect forced to “take their ball and go home.”

With the council’s approval, the Munns prepared to develop a small, very tightly controlled RV park—“Zion Sunset Resort,” as they planned to name it. The so-called “Friends of Virgin,” however, were determined to stop any such land-uses or development in the area. They filed a referendum petition, seeking to give the entire community the right to veto the proposed new land use, and shut down the project.

This ability of a “mob” to override the rights of a property owner was recently upheld in *Krejci v. City of Saratoga Springs*, where the Utah Supreme Court held that the legislative power of the people enables them to forcefully prohibit property owners, through zoning regulation, from developing and using their land. In the absence

of any constitutionally recognized right to use property, the courts are unable to overturn this “tyranny of the mob.”

With no case law or constitutional protections to dictate another course of action, the town of Virgin was thus required to hold a special municipal referendum election on June 23, 2015, in which the “Friends of Virgin” argued that “the right to develop property is defined within the parameters of a local jurisdiction’s zoning rules.”⁸

The group succeeded in winning the election by a very narrow margin: 131 voting against rezoning the Munn’s property, and 116 voting in favor. A slim majority of residents were therefore able, through the government, to deny this family the right to use their own property as desired.

The town’s laws now effectively require the Munns to let their land sit idle, as vacant open space—in a rural community surrounded by millions of acres of “public” lands.

For more details on this story, please visit LibertasUtah.org/Virgin.

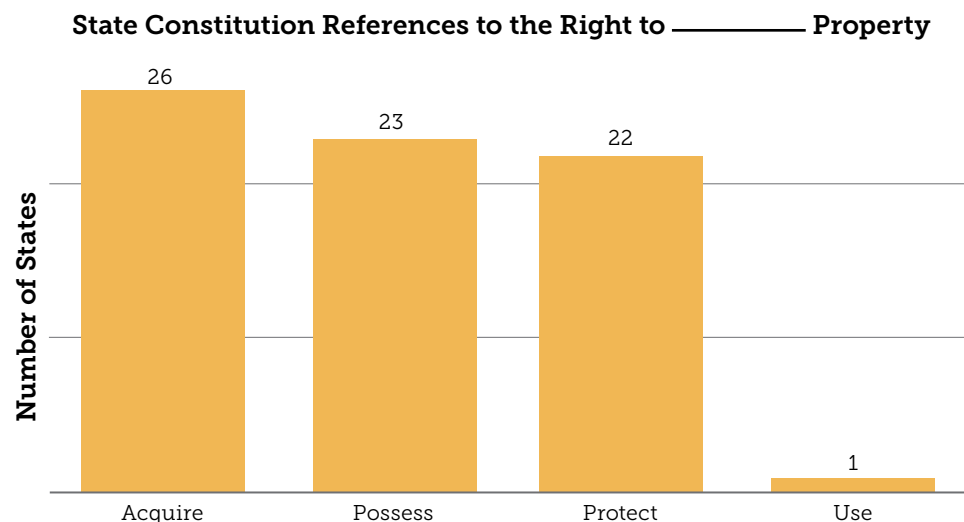


State Constitutional Protections

Under the Tenth Amendment to the Constitution, the issue of land-use regulation naturally falls to state and local governments, and as such, we might expect to see state constitutions offer clearer recognition of and protection for property rights. Unfortunately, this is only true of about half of the states—and even then, they all fall short on protecting the right to actually *use* property.

Like many states, Utah's Constitution recognizes that "All men have the inherent and inalienable right to... acquire, possess and protect property..." This language is borrowed from George Mason's Virginia Declaration of Rights—a document written in 1776 that influenced many others, including Thomas Jefferson's draft of the Declaration of Independence.

Unfortunately, since the early American colonists could not envision today's regulatory regimes, this language unintentionally falls short of elevating the peaceful use of property to a fundamental right; in the late 1700s, land owners were not required to submit detailed plans to the local town council prior to building on their property, nor was their ability to use their property hampered by complex and controlling land-use ordinances. Given the colonists' experience with the King taking property for any (or no) reason, it is not surprising that their constitutional language regarding property rights is couched in terms of ownership. They did not envision our day when property rights are chiefly—and routinely—violated in regards to *use*.



It may seem at first glance that the existing constitutional language is sufficient, but a closer look reveals that to not be the case. Affirming the right to *acquire* (obtain), *possess* (own), and *protect* (defend) property does not include the corresponding right to actually *use* the property according to one's wishes. As such, the government has historically been able to regulate or prohibit land use for any reason it desires, without needing to define a compelling state interest. An individual's right to peacefully use his or her own property has therefore been subordinated to the ever-changing, democratically-decided interests of the state.

Louisiana's Constitution is the anomaly among the several states, as it does reference the right to use property. However, the relevant provision is immediately followed by this statement: "This right is subject to reasonable statutory restrictions and the reasonable exercise of the police power." As such, the several rights listed have been pre-emptively invalidated, with the "reasonable" standard allowing city governments in that state to restrict land use without any meaningful restraint.

The property rights provisions in Louisiana's Constitution are therefore functionally meaningless.

Utah's elected officials should reflect on whether the current situation is one that comports with the intent of America's founders, the spirit of Utah's pioneer settlers, and the inalienable rights of each Utahn today. While the government may need to restrict land use—or take one's property—in certain cases, this narrow necessity does not justify a general, pre-emptive control over land use generally. The right to use property, like obtaining and owning it, predates and thus supercedes the government; Libertas Institute believes that it should be listed among the fundamental rights in Utah's Constitution.

Our proposal on the following page presents Utah with an opportunity to restore the original intent of constitutional provisions protecting property rights—and in so doing, hopefully encourage other states to follow suit, effecting widespread legal protection of this fundamental and inalienable right and improving a long-imbalanced relationship between government and property owners.

PROPOSED UTAH CONSTITUTIONAL AMENDMENT

ARTICLE I, SECTION I [Declaration of Rights]

"All men have the inherent and inalienable right to enjoy and defend their lives and liberties; to acquire, possess, **use**, and protect property; to worship according to the dictates of their consciences; to assemble peaceably, protest against wrongs, and petition for redress of grievances; to communicate freely their thoughts and opinions, being responsible for the abuse of that right."

In an effort to be proactive in correcting the inadequate approach to protection of private property rights, and help fix the problems that have been outlined, Libertas Institute proposes that the Utah Legislature should pass and submit to voters the above constitutional amendment proposal.

This amendment would include the peaceful use of one's property as a fundamental right, subject to the same compelling standards of protection as other fundamental rights. Upon passage, government may still engage in eminent domain and other regulatory takings, but its argument for doing so must meet a higher legal threshold than a mere "reasonable and rational" standard.

The Utah Legislature should also require political subdivisions using land-use ordinances to revise them as necessary such that they:

1. recognize an owner's fundamental right to property;
2. specifically list restricted or prohibited uses, rather than enumerating permitted uses (and therefore prohibiting all other uses not specifically listed); and
3. conform to the specific and unique needs and circumstances of the political subdivision (so as to avoid copying and pasting model ordinances or regulations from other cities).

This law should allow a two-year grace period to afford time for political subdivisions to research, revise, and adopt the new ordinances to be fully compliant with state law.

Endnotes

¹ R.L. Settle, *Washington Land Use and Environmental Law and Practice*, 1983.

² J. Craig Smith, "Overview and History of Utah Zoning Law," April 2014, <http://www.smithhartvigsen.com/resources/OverviewandHistoryofUtahZoningLaw.html>.

³ Section 21-7-1.2, Title 21, Kanosh Town Land Use Ordinance.

⁴ Millard County Zoning Ordinance. Title 10, Chapter 23.

⁵ Samuel Adams, *The Report of the Committee of Correspondence to the Boston Town Meeting*, Nov. 20, 1772

⁶ John Adams, "Discourses on Davila," in *The Works of John Adams* (Boston: Little, Brown, 1851), 6:280.

⁷ George Mason, "The Virginia Declaration of Rights."

⁸ "Mayor, developers tout benefits of new Virgin RV park, despite concerns," St. George News, June 15, 2015. For a detailed legal analysis of this question, see David J. Berg, "Food Choice is a Fundamental Liberty Right," *Journal of Food Law & Policy*, vol. 9, 2013, 173-221, available at: <http://www.extension.org/pages/71012/food-choice-as-a-fundamental-liberty-right>.

PUBLIC POLICY BRIEF

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FREQUENT
RECURRENCE
===== TO =====
FUNDAMENTAL
PRINCIPLES IS
ESSENTIAL
===== TO =====
THE SECURITY
===== OF =====
INDIVIDUAL
RIGHTS

UTAH CONSTITUTION
ARTICLE I, SEC 27