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LAND-USE PLANNING BY PRIVATE VOLITION: A FRAMEWORK FOR POLICY-ORIENTED INQUIRY

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In this country there exist three distinguishable, yet interwoven, processes of land-use planning.[1] One is the public land-use planning process wherein various bodies politic employ an array of governmental techniques to control the use and development of land. Another is the judicial land-use planning process wherein the courts employ doctrines such as nuisance to "plan" the use of land retroactively, after a controversy has already arisen. The third process is land-use planning by private volition. Here individuals, private associations and governmental landowners, either through agreement or by unilateral expressions of intent, project policies concerning the use and enjoyment of land. The composite goal of these three processes is to formulate and implement a comprehensive community land-use plan that will achieve, within the confines of overriding community policies, the optimal efficient and productive, yet appropriately conserving, use of land.

It is sometimes forgotten that there is a continuing community preference for the employment of the third process, land-use planning

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1. *See* M. McDougal, *The Influence of the Metropolis on Concepts, Rules and Institutions Relating to Property*, 4 J. PUB. L. 93, 112-21 (1955).

by private volition. This preference is determined by a fundamental policy of free democratic society: to protect and effectuate individual choice, to the maximum extent compatible with overriding common interests, rather than impose the choice of others on the individual. Because both the public and judicial land-use planning processes employ community coercion in determining the permissible uses of land, private planning with its reliance on individual choice must be deemed the *preferred* process.

If this community preference for private volition is to be given the widest possible deference, the community principles relevant to these private plans should be directed toward promoting their formulation and facilitating their performance. This requires at a minimum that relevant legal doctrines be designed and applied to minimize destruction of expectations created by the formulation of such plans. Unfortunately, the existing legal doctrines do not promote—indeed, they *impede*—the employment of private plans.

The purpose of this article is to propose a framework for future inquiry that should facilitate a reshaping of the legal doctrines and community structures relevant to "rights in the land of another."[2] The framework suggested employs the type of deliberate "policy-oriented" inquiry developed by Professors Myres McDougal, Harold Lasswell, and their associates.[3] Although they have concentrated primarily on international law,[4] their analytical method is useful throughout the realm of legal doctrine.[5]

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2. The need for such a reshaping is not a new revelation. Judge Clark recognized this need almost three decades ago. *See* C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" (2d ed. 1947). His book was an attempt to do this with respect to the particular problem of succession of benefits and burdens. Although he undoubtedly made a major contribution to this area of property law, his methodology was inadequate in three major respects. First, he did not attempt to ascertain the functional role of these agreements and unilateral expressions of intent; this hindered his ability to formulate relevant goals and community policies. Second, he did not formulate goals and policies explicitly and examine the past trend of decision in terms of those goals and policies. Third, he was content to rely on the Hohfeldian concept of "operative facts" rather than identifying particular factual referents in formulating his categories.

Another early recognition of this need in more specific terms is found in M. MCDOUGAL & D. HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 475-83 (1948), containing the embryo of the ideas which the present article attempts to present.

3. For an introduction to this type of inquiry and detailed explanation of the complex "meta-language" it involves, see Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968).

4. *E.g.*, M. MCDOUGAL, H. LASSWELL & J. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967); M. MCDOUGAL, H. LASSWELL, & I. VLASIC, LAW AND PUBLIC ORDER IN SPACE (1963); M. McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configuration Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

5. Lasswell & M. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Lasswell & M. McDougal, *Jurisprudence in a Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1967); *cf.* M. McDougal, *Beware the Squid Function*, 1 LEARNING & THE LAW 16 (1974).

The reader is warned, however, that the proposed framework is not intended to be employed in the first instance to analyze or resolve a particular case. Rather, it is offered for analysis of a whole flow of decisions in the context of the comprehensive community economic and social processes. Only when the inquiries here proposed have been completed will this policy-oriented inquiry be of maximum utility for analyzing and resolving individual controversies.

Clear focus on genuine problems requires recognizing our inherited legal doctrines relating to "rights in the land of another" as obstacles to enlightenment. From a functional point of view, agreements and unilateral expressions of intent concerning the use and enjoyment of land are actually private land-use plans. These private land-use plans—and the community policies and practices relevant to them—constitute the process of land-use planning by private volition. This process is one element of the more comprehensive community land-use planning process, which in turn is a component of the larger on-going community social process.

Once a clear functional role is determined and the process identified and placed in context, further delimitation of the generic problem is possible. Of necessity, the first step requires identifying significant factual variables within the private land-use planning process. Significant facts are those that have in the past or may in the future give rise to controversies, and those that may influence the clarification and application of community policies.

From the perspective of an observer identifying with the entire community, the next step is to identify the "process of claim"—that is the means by which controversies involving the private planning process are presented to authoritative decisionmakers. An essential part of the description of the process of claim is the characterization of specific types of controversies. These may relate both to every phase of the planning process and to the peculiarities of the process of authoritative decision by which they are resolved. The final step in delimiting the problem is to describe this process of authoritative decision, for it is here that basic community policies are clarified and secured; further, any recommendations for change must be made through this process.

The profferred framework for policy-oriented inquiry, then, will outline the significant features of the process of land-use planning by private volition, the processes of claim, and the process of authoritative decision.

With these processes more clearly delimited, it becomes possible to clarify the goals relevant to the private land-use planning process.

By avoiding reference to existing legal categorizations, a much clearer perception of the relevant goals may be possible.

Both delimitation of the problem and goal clarification are presented as background for future systematic and detailed inquiry into specific types of controversies. A synoptic outline of the suggested scope and focus of future inquiry will be presented in the concluding section of the article.

THE EXISTING SEMANTIC CONFUSION

Plans formulated in the process of land-use planning by private volition traditionally have gone under such labels as "rights in the land of another" or "servitudes." According to legal dogma, the first task of a decisionmaker confronted with a dispute concerning one of these servitudes is to categorize the agreement more specifically. The decisionmaker is faced with a multitude of possible categories: easements, licenses, licenses coupled with a grant, irrevocable licenses, profits a prendre, real covenants running with the land, personal covenants, equitable servitudes, negative reciprocal easements, and agreements "in the nature of an easement." This plethora of categories would present little difficulty to the decisionmaker if they were defined and distinguished in terms of clear factual referents—but they are not. Consider the definition of an easement propounded by the *Restatement of Property*:

> An easement is an interest in land in the possession of another which
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> (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
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> (b) entitles him to protection as against third persons from interference in such use of enjoyment;
>
> (c) is not subject to the will of the possessor of the land;
>
> (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and
>
> (e) is capable of creation by conveyance.[6]

A careful reading reveals that easements are defined not in terms of fact but rather in terms of legal consequences. The definition advises the decisionmaker what course of action should be followed *once the servitude is categorized* as an easement. It offers no guidance in determining *whether it should be categorized* as an easement.

Not only are such black-letter definitions phrased in terms of legal consequences rather than fact; they are also complementary. For

6. RESTATEMENT OF THE LAW OF PROPERTY § 450 (1944).

example, compare the above definition of an "easement" with the Restatement's definition of a license:

> The term "license" . . . denotes an interest in land in the possession of another which
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> (a) entitles the owner of the interest to use of the land, and
>
> (b) arises from the consent of the one whose interest in the land used is affected thereby, and
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> (c) is not incident to an estate in the land, and
>
> (d) is not an easement.[7]

Clearly, the only useful distinction between Restatement notions of license and easement is that a license is not an easement and vice versa. Such tautological definitions are circular nonsense, worthless to a decisonmaker confronted with a particular choice of consequences about a particular servitude.

Another inadequacy of these conventional legal doctrines is that a decisionmaker must rely on his own discretion to give meaning to high level abstractions found in the above cited definitions such as "owner," "interest," "possession," "protection," "incident" and "capable."[8]

In addition, it is impossible for a decisionmaker to determine whether these doctrines purport to state past decision, predict future decisions, or state the writer's policy preference.[9] Unfortunately, existing doctrines often claim to perform all three tasks simultaneously.[10] If

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7. *Id.* § 512.

8. This should not be construed as a condemnation of high level abstractions per se. Abstraction is a necessary step in postulating general goals. *See* text accompanying note 50, *infra.* In addition, high level abstractions are often useful for concise presentation of a problem. The present article employs them to categorize a wide range of facts because detailed identification of all these facts would require an enormous book. It is anticipated, however, that the future inquiries recommended in the present framework will particularize the categories and goals in clear empirical terms.

The text condemns legal doctrines that are formulated in their *final form* in terms of high level abstractions rather than in terms that have clear empirical references. Undoubtedly attorneys, judges, and legal scholars commonly refer to various doctrines as though they were capable of empirical identification; however, an examination of them, as exemplified in the text, clearly reveals they are not. In other words, members of the legal profession have *reified* these doctrines.

9. This characteristic of traditional legal doctrine, which can be described as normative-ambiguity, is discussed in more detail in Lasswell & M. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 YALE L.J. 203, 266-69 (1943).

10. Or else they purport to perform one of the tasks when in fact they are a mishmash of all three. Volume 5 of the *Restatement of Property* exemplifies this latter situation. The introduction to the *Restatment* states the objective of the *Restatement* to be "[t]o present an orderly statement of the general common law . . . ." 1 RESTATEMENT OF THE LAW OF PROPERTY vii-ix (1944). This suggests that it is intended as a statement of past decisions. However, Judge Clark, who was familiar with the process by which volume 5 of the *Restatement* was compiled, observed:

> No authorities are cited in it, and comparative few appear in the preliminary, tentative, and final drafts of portions of the subject matter which had been previously printed. . . .
>
> . . .

the rules are supposed to be a statement of the experience embodied in past decisions, a decisionmaker needs more than simply a summation of past categorizations. He must know who made what claims, about what agreements, for what purposes, relating to what events, under what circumstances, employing what strategies, and with what outcomes, as well as what effects the decisions may have had, both on the particular parties to the controversy and on the general community. If the author of the legal doctrine is attempting to predict future decisions, he must necessarily describe the conditions under which past decisions were made and attempt to determine whether those conditions will prevail in future contexts. If the proponent of rules is simply stating his individual preference for community policy, he should so state and give the reasons for his preference. Until the proponents of legal doctrines, be they professors, advisers, advocates, or decisionmakers, begin identifying exactly what they purport to do and provide explanations pertinent to their particular task, it will be impossible to identify their frames of reference, and thus the legal doctrines they propound will remain ambiguous.

The ambiguity, confusion, and lack of empirical reference in traditional doctrines force the decisionmaker to focus upon and apply some feudalistic reification rather than attempting to ascertain and effectuate the expectations created by the private plan. Even if the decisionmaker ascertains the expectations created by the plan, traditional doctrines afford him little if any guidance in determining whether his effectuation of the expectations promote or contravene relevant community policies. Common law doctrines were developed in an unindustrialized, rural, feudalistic society[11] under conditions radically different from those of today. Since they reflect the community policies

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> Indisputably it introduces complexities into the law not known before. It was prepared in the light of . . . a deep-seated bias, freely admitted by the Reporter, against even those interests which have been accepted as worthwhile encumbrances. . . . At any rate, there can be no doubt that the Reporter succeeded in his own aim of a restrictive treatment of all these interests.

C. CLARK, *supra* note 2, at 7-8. Judge Clark's observations demonstrate that it is impossible to determine which of the three intellectual tasks a particular section of the *Restatement* is purporting to perform.

11. The conditions existing at the time many of these doctrines were developed have been summarized as:

> an unindustrialized, rural economy, exhibiting no great interdependences of land use, when land transfers and conscious attempts at land planning by private agreement were relatively less frequent; when the distinction between courts of law and equity was a living reality rather than a deadhand compulsion; when recording systems were either nonexistent or at least rudimentary; when there was prejudice, rooted in various procedural inadequacies and community notions, against the assignability of all agreements; and when the reification of concepts was an habitual mode of thinking for both judges and scholars.

M. McDougal, *supra* note 1, at 114.

appropriate to such medieval conditions, their utility for resolving contemporary controversies compatibly with modern community policy is at best extremely dubious. Of course, over the years some traditional doctrines have been modified to reflect contemporary community policies,[12] but these modifications have been scattered and partial.[13] What is needed is a *comprehensive* reshaping of legal doctrines applicable to the process of land-use planning by private volition in a way that will encourage the use of such plans and reflect relevant contemporary community policies.[14]

THE PROCESS OF LAND-USE PLANNING BY PRIVATE VOLITION

The observer applying policy oriented legal inquiry to a problem does not look to the traditional legal descriptions of the elements involved. Rather, one abandons the blinders of legal jargon and views the problem without the coloration enforced by the use of this terminology. The process must be broken down for analytical purposes into its various phases. These are the *participants* in the process, the *objectives* sought to be achieved, the *situations* in which the participants operate, the *base values* or means which the participants have available to achieve their objectives, the *strategies* employed, and the *outcomes* achieved. A complete empirical identification and description of these phases is beyond the scope of this article. However, a brief outline of some of the more significant features may enhance an understanding of the process of land-use planning by private volition.

Participants

The most direct and significant participants in the process can

12. The extent to which past decisions may in fact promote contemporary community policies is not within the purview of the present article, which proposes a framework for future detailed inquiry concerning the various community policies. Of course, some doctrines have been modified to conform with contemporary policies. Among the most notable have been: refusal to enforce plans that promote racial discrimination, Shelley v. Kraemer, 334 U.S. 1 (1948); Hurd v. Hodge, 334 U.S. 24 (1948); Barrows v. Jackson, 346 U.S. 249 (1953); enforcement of plans imposing affirmative burdens against successors in interest, 2 AMERICAN LAW OF PROPERTY § 9.36 (A.J. Casner ed. 1952); sustaining assignments in easements in gross, *id.* §§ 8.82-.83; development of the doctrine of changed circumstances which permits termination of outmoded plans, *id.* § 9.39; and extension of recording acts to apply to all private land-use plans, *see* C. CLARK, *supra* note 2, at 183-84.

13. For example, although some states have made inroads into the requirement of "privity of estate" for a covenant to run at law or an equitable servitude to run in equity, many have not. For a discussion of the various types of privity of estate applicable in law and in equity, see Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HAST. L.J. 1319, 1322-23 (1970). This article demonstrates that progress in just this one small segment of the area covered by the present framework has been fragmentary. Future study undoubtedly will reveal the same chaotic state with respect to many other doctrines.

14. *See* note 2 *supra*.

be characterized as "grantors" and "grantees." Grantors are those participants whose land is subjected to the burdens of a private land-use plan. Such a burden is imposed on land when the primary claimant of the land, the grantor, must refrain from performing certain acts on the land that he could have performed before the plan (*e.g.*, building a structure higher than one story); must permit others to perform certain acts on the land that they previously had no right to perform (*e.g.*, permit grantee to traverse or to remove gravel from the land of the grantor); or must perform certain acts in relation to the land that he need not have performed absent the plan (*e.g.*, pay an annual assessment for the maintenance of streets and parks within the subdivision in which his land is located). Grantees are those participants who are intended, either explicitly or implicitly, to receive the benefits of the plan. A benefit is deemed to have been conferred when the grantee can perform certain activities on the grantor's land (*e.g.*, traverse the grantor's land, or remove gravel from it) or when the value or enjoyment of other land claimed by the grantee is enhanced or protected (*e.g.*, grantor is unable to build a structure in excess of one story, ensuring an aesthetically pleasing view from grantee's land). With regard to a particular plan a participant may be both a grantor and a grantee. A common example of this is a private land-use plan among claimants of land within a subdivision. Each claimant agrees to use his land only as a single-family residence, thereby subjecting his land to a burden. In exchange for shouldering this burden, each claimant receives the benefit of the burden assumed by the other landholders in the subdivision. Participants in a given land-use plan may include both individuals and groups.

But it is not enough merely to identify grantors and grantees. In many instances certain provisions of the plan, or even the existence of the plan itself, may have been strongly influenced or even required by participants who are neither grantors nor grantees. This category of participants may include lending institutions which finance the acquisition and development of land; government agencies that play a role in financing land development and acquisition, such as FHA and VA; government agencies directly involved in the comprehensive land-use planning process, such as the local, regional or state planning staffs, commissions, and legislative bodies; and governmental or quasi-governmental agencies interested in the land-use planning process, such as water and air pollution control authorities and public utilities. The existence of indirect participants may be of extreme significance in ascertaining the expectations created by a private plan and in determining relevant community policies and their applicability to a particular plan.

Certain more detailed characteristics of these individual or group participants may be significant for determining expectations created and relevant community policies. Even if the participant is a group, it will be represented by individuals in the formulation and implementation of the plan. Specific characteristics of the groups' representatives may be significant. Significant characteristics of individuals may include race, nationality, sex, religion, marital status, age, mental capacity, and education. Other factors that may be of significance include profession, such as land developer or real estate broker; availability of or reliance upon legal advice; and a participant's command and understanding of the English language.

Group participants may be further identified as private associations and bodies politic. Private associations include the whole range of non-governmental groups such as partnerships, corporations and unincorporated associations. Important characteristics may include their articulated purpose or purposes, statutory authority, internal structure, size in terms of wealth and geographic areas of operation, and the detailed characteristics of their officers or members (which may be significant for such purposes as ascertaining potential or real conflicts of interest). Pertinent characteristics of bodies politic include geographic area of authority, comprehensiveness of purpose, degree of urbanization, constitutional or other authority, and internal structure.

Objectives

In the vast majority of instances the most general objective shared by the grantor and grantee will be the projection of a common policy concerning the enjoyment of land. In other words, the parties will, through negotiation, agree that the grantor will subject his land to certain burdens and that the grantee will be entitled to the benefits flowing from the imposition of these burdens. In some cases, however, a grantee may unilaterally project a policy with the expectation that the community will eventually join in effectuating this unilaterally projected policy. This may occur if the community through its authoritative decisionmakers determines that the grantee has acquired a "prescriptive" right by his actions over a period of time.

Whether the projection of policy be common or unilateral, the more detailed objectives of the participants may be analytically identified in terms of the "values" which they seek.[15] The principal "value" categories are: power, wealth, well-being, enlightenment, respect, af-

15. The term value as employed herein is "a desired event—a goal event." H. LASSWELL & A. KAPLAN, POWER AND SOCIETY—A FRAMEWORK FOR POLITICAL INQUIRY 16 (1950).

fection, skill, and rectitude.[16] The specific value or values sought by the grantor and grantee in a particular land-use plan may differ. Even when they share commitment to the same value or values, the intensity of their demands for a specific value or values may vary considerably. As the intensity of the participants' demands diminishes, the community's interest in effectuating the demands may likewise decrease.[17] In addition, the specific values demanded and the actual policy projected may vary greatly in their compatibility with overriding community policies.

Mention of some common types of land-use plans demonstrates the variety of values sought: agreements with governmental agencies that aid them in performing their functions, or that explicitly or implicitly prohibit certain governmental actions such as the construction of sewer lagoons, roads, and fire stations (power); agreements, such as subdivision restrictive covenants, designed to protect land values, or agreements permitting the removal of sand, gravel, or coal (wealth); agreements permitting water and sewer lines or prohibiting open cesspools (well-being); agreements authorizing the construction of television and radio antennas (enlightenment); agreements restricting the use and enjoyment of land to certain racial or religious groups (respect); agreements permitting family or friends to use certain lands (affection); agreements authorizing construction of irrigation ditches (skill); and agreements permitting the use of certain land by churches (rectitude).

Situations

These private land-use plans are made and performed against the background of public and judicial land-use planning processes. The

16. The following quote from Lasswell & M. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971), gives a brief description of what is included in each of these value categories:

Power: government, law, politics.
Wealth: production, distribution, consumption.
Respect: social class and caste.
Well-being: health, safety, comfort arrangements.
Affection: family, friendship circles, loyalty.
Skill: artistic, vocational, professional training and activity.
Rectitude: churches and related articulators and appliers of standards of responsible conduct.
Enlightenment: mass media, research.

Id. at 388.

17. A typical example of this is when a court describes a particular plan as a "mere license," thereby affording little community protection from interference by either the licensor or third persons. *See* C. CLARK, *supra* note 2, at 27-33. What the courts appear to be saying in these cases is that the demands of parties to these plans are of such a low intensity that they do not justify the time and expense of being afforded community protection. *See id.* at 29. Of course, if intensities of demand increase after execution of the plan, then the courts deem community intervention necessary and accomplish this end by classifying the plan as an "executed license" which means the plan is entitled to community protection. *Id.* at 59-64.

techniques, efficiency and effectiveness of these latter processes obviously will differ from community to community; this in turn will affect the necessity for private land-use plans and the expectations created by the plans. Particular state concepts and applications of nuisance doctrines also may affect the demand for and expectations created by private land-use plans.

While private land-use plans may reflect idiosyncratic private preferences for the use and enjoyment of certain land, the public land-use plans reflect broader community preferences for the use of that land. Because private preferences and community preferences may not be the same, private land-use plans may vary as to their compatability with the community land-use plan.

Other features of the situation that may be of particular relevance include spatial position, time factors, institutionalization and crisis level. Spatial positions that may be of particular significance include the location of the grantor and grantee during negotiations, which would affect the mode and effectiveness of communications employed and perhaps the base values employed in the negotiations, and the location of the grantor's land in relation to land of the grantee that is purportedly benefited by the plan. Time factors that may be of particular significance include the duration of negotiations when there is a common policy projected and the duration of the unilateral expression of intent when there is a unilateral projection of policy. The regularity of interaction between the grantor and the grantee, both generally and in respect to the process of land-use planning by private volition, or the regularity of participation in this process by the grantor or grantee may affect expectations about the plan (the expectations may have become institutionalized). The crisis level, whether it be a community crisis, such as the present energy crisis, or a personal crisis, such as imminent bankruptcy of the land developer or a pending divorce between parties, also may create demands for and expectations about private land-use plans.

Base Values

One of the primary base values at the disposal of the grantor to achieve his objectives is the land itself. In many instances this is the controlling factor because the grantor will have already projected a plan for the land and the potential grantee, regardless of the values at his disposal, will be unable to bargain for different provisions. He must acquire the land subject to the plan, or not at all. This may occur, for example, when a land developer has already recorded the plat for a subdivision and has already sold other lots subject to the plan. In

other instances any or all of the various values may be employed by the grantor and grantee in attempting to obtain their specific objectives.

The relative value positions of the potential grantor and grantee may be of utmost significance. A tremendous disparity in value positions may greatly affect the content and the participants' understanding of the plan. For example, the potential grantee may be a public utility corporation with the threat of eminent domain (power), sizeable funds available to achieve its objectives (wealth), considerable experience in land-use planning and an army of attorneys available to give legal advice (enlightenment), and highly capable negotiators (skill) at its disposal. The potential grantor may be an impecunious, uneducated individual who speaks little English and has no access to legal advice. Even in the absence of such a great disparity, the relative value positions of the grantor and grantee may affect the content and their respective understanding of the plan.

Strategies

"Strategies" are the series of signs and activities employed by the grantor and grantee to attain a common policy, or those employed by a grantee in attaining a unilateral policy, concerning the future use and enjoyment of certain land. These participants employ a wide range of signs, both verbal and non-verbal, and engage in a wide variety of different activities in seeking to attain a particular plan.[18] For example, the potential grantee may contact the potential grantor

18. This particular language is employed to suggest that a more accurate statement of facts and subsequent interpretation of those facts can be attained by incorporating the vast range of information contained in communication beyond the face content of the words used by the parties. For background in the rapidly expanding technology of communication analysis, see R. BROWN, WORDS AND THINGS (1958); G. MILLER, LANGUAGE AND COMMUNICATION (1951); C. MORRIS, SIGNS, LANGUAGE AND BEHAVIOR (1946).

Two brief quotes from M. MCDOUGAL, H. LASSWELL, & J. MILLER, *supra* note 4, should aid the reader in preliminary understanding of the terminology employed:

> To communicate is to make use of *signs*. Signs are materials or energies that are specialized to the task of mediating between the subjective events of two or more persons. The signs on which we principally rely are linguistic, the sounds comprising the words of language systems. But these are supplemented by gestures, and by such equivalents as written characters and pictures.

Id. at xii.

> In the terminology of communication analysis the subjectivities of communicator and audience are "mediated" by gestures, signals, and languages. These mediating events are not subjective events; however, they are specialized to the inducing of such events. We speak of them as "signs," such as the physical movements made in a "gesture of rejection," or the fire signal employed to indicate that the "enemy sues for peace," or the spoken sounds uttered in saying "I agree." The gesture, signal and speech pattern constitute sign systems when they call up relatively standardized symbol events, which are the subjectivities constituting the interpretation of signs.

Id. at 37.

by personal confrontation using oral communication accompanied by gestures to explain and emphasize his objectives, or contact may be made by telephone, by letter, or indirectly through his attorney or other agent. This initial contact may be followed by additional conversations (including gestures), letters, rough drafts of agreements, and visits to the land accompanied with conversation and gestures. In addition to these communications, either party may communicate his objectives indirectly or attempt to influence the other through his friends, relatives, attorney or other representatives. Whatever the signs or acts employed, they may exhibit certain characteristic infirmities that will make it difficult for a decisionmaker to ascertain the expectations created by the signs and acts employed in a particular plan. The signs employed may be ambiguous, incomplete (contain gaps), of a high level of abstraction, or contradictory. The acts performed by the parties may be incomplete, contradictory, equivocal, or ambiguous in scope. The degree of these infirmities will vary from plan to plan.

Usually these signs and activities will be persuasively employed and represent accurate facts. In some instances, however, they may be employed coercively or represent facts inaccurately. If either coercion or deceit is present, it becomes an extremely significant factual variable.

Outcomes

The outcome of this process is the projection of a policy concerning the future enjoyment of land. If the projection is of a common policy, then the outcome is encompassed in an agreement which expresses the shared expectations of common commitment to a future policy concerning the use of land. The agreement may vary in form from a complex written document to a simple utterance. If the projection is the result of a unilateral expression of intent, then the outcome is that moment when the community will effectuate the expression. Even though these outcomes are intended as a final commitment to a future policy, the characteristic infirmities of signs and acts leave the possibility that subsequent controversies may arise concerning the content of the commitment.

Certain more specific provisions of the commitment may be of particular relevance in subsequent controversies. These include expectations about the duration of the plan, the authority of the grantor unilaterally to revoke the plan, the grantee's authority to transfer the benefits, the succession by a subsequent grantee of either party to the

benefits or burdens of the plan, and future modification of the plan. In addition, the particular use to be made of the land may be relevant.

Effects—The Performance Phase

The effects phase of the process of land-use planning by private volition is the process of performance of these plans. During this performance stage many events may occur which will give rise to factual variations from the pre-outcome phases and the outcome phase; these may be of utmost importance for community policy purposes. A brief outline of some of these will be presented, echoing the phase analysis already described:

1. *Participants.* After the outcome phase, certain characteristics of the original particpants may have changed. The marital status, education, nationality, or mental capacity of individuals may alter; this may be significant whether he is acting *qua* individual or as a group representative. Private associations may have changed as to their purposes, internal structure and size. Bodies politic may have changed as to their comprehensiveness of authority, geographic area, or constitutional authority, and new political agencies with an interest in the plan may have been created.

The parties to the plan may have changed. An individual may have died, a private association may have been dissolved, one body politic may have been consolidated with another, or the original parties may have permanently or temporarily transferred their land or benefits to third parties. In any of these instances the original party would be replaced by a successor in interest.

2. *Objectives.* Ordinarily the objective of the grantee will be to enjoy the benefits of the plan (traverse the grantor's land at the agreed location, or enjoy the view over it), and the objective of the grantor will be to permit the grantee to enjoy the benefits conferred (the convenience of crossing the grantor's land or the pleasure of the view across it). In some instances, however, a participant's objectives may change. Consequently the party may attempt to avoid, modify or terminate the plan. This frequently occurs, for example, when land subjected to the burdens of a residential restriction becomes more valuable for commercial purposes as the result of changes in the surrounding area.

Because of changes in overriding community policies during the performance phase, the original objectives of the parties may no longer be compatible with the goals and needs of the community. One well-

known example of such a change in overriding community policy[19] is the invalidation of racial restrictive covenants in *Shelley v. Kraemer*[20] and its progeny.

3. *Situations.* After the plan has been put in effect by the parties, significant change may occur within the public land-use planning process that alters the parties' expectations or the plan's compatability with the public plan. For example, modification of the zoning of either the land in the plan or the surrounding area will create expectations that the land be used in a manner compatible with the permitted surrounding uses or the newly permitted uses for the particular land. Changes in the land-use patterns in the community, such as new roads, urban renewal projects and public housing projects also may affect the expectations of the parties.[21]

The actual performance of the parties, as opposed to the performance projected by the plan, may be relevant to a particular controversy. Over a period of years, uncontested non-conforming uses may spring up in a subdivision subject to a residential-only covenant. This course of performance may affect the decision in a challenge to a new non-conforming use.

Other changes that may be relevant to a specific controversy include spatial position, such as the grantee's having conveyed all his land in the vicinity of the burdened land; time factors, such as the duration of a use; institutionalization, such as performance in a regular manner over a period of time; and crisis level, such as continual flooding of the land.

4. *Base Values.* During the process of performance, the prime base value at the disposal of the grantor and grantee is the authority granted or retained in the plan. If a grantor interferes with a right

19. Although the court in Shelley v. Kraemer, 334 U.S. 1 (1948), indicated that it has not previously decided the particular question, it appears that agreements restricting sale to Negroes were common and had been enforced by the courts of various states. *See* cases cited in brief for respondents in McGhee v. Sipes (companion case to Shelley v. Kraemer), 92 L. Ed. 1168 (1947).

The court in *Shelley* did not directly strike down such agreements but rather held that such provisions could not be enforced by injunction. The remedy of damages for breach of racially restrictive covenants was subsequently made unavailable in Barrows v. Jackson, 346 U.S. 249 (1953). The end result of these cases was that these restrictive covenants were no longer enforceable by courts.

20. 334 U.S. 1 (1948).

21. *Cf.* Spur Indus., Inc. v. Del E. Webb Devel. Co., 108 Ariz. 178, 494 P.2d 700 (1972), *discussed in* Comment, *Indemnification of a Nuisance Defendant for Costs Incurred by Complying With An Injunction*, 15 ARIZ. L. REV. 1004 (1974). In *Spur* the Arizona supreme court held that development of a "new town" in a previously rural area made a preexisting cattle feedlot a nuisance, but required the developer to indemnify a cattle raiser for the cost of moving its feedlot. While *Spur* purported merely to apply traditional nuisance doctrines (albeit in a somewhat novel manner), it may also be read as a judicial affirmation of a unilateral projection of private planning policy on the grounds that the new use was most compatible with the growing community's expectations, and that the preexisting uses therefore must yield.

of passage conferred by the plan, the grantee can employ the provisions of the plan, frequently accompanied with a suggestion of court action, to deter further interference by the grantor. The grantor likewise may employ the plan to deter the grantee from passing over part of the grantor's land not designated in the plan. Beyond the authority of the plan, there may have been changes in the values demanded, the intensity of demand for particular values, and the relative value positions of the parties. These changes in value demands and the relative strength of their positions may be employed by the parties to avoid, modify or terminate the plan. For example, the grantee's financial position may have deteriorated since the formulation of the plan, enabling the grantor to "buy up" the grantee's rights for a greatly reduced sum.

5. *Strategies.* The strategies employed to avoid, modify or terminate the plan include the whole range of signs and acts that could have been employed in formulating the plan. For example, one party may seek modification or termination through a direct personal confrontation employing oral conversation and gestures, or by telephonic conversation, letter, or through a representative of the other party; or the party seeking modification or termination may rely on acts such as blocking passage permitted by the plan by erecting a fence, or building a two story building in violation of the plan; or the party seeking modification or termination may employ a combination of all these or other modes of communication. The other party may employ the same or other modes of communication in accepting or rejecting proposed changes. And, as before, signs and acts may vary as to their deceitfulness or as to the degree of coercion by which they are employed.

6. *Outcomes.* The outcome in the performance phase will be performance in varying degrees of conformity with the original plan. For example, if each lot in a subdivision is subjected to the burdens of a plan permitting only single-family residences, all of the claimants of land may use their land for nothing other than single-family residences, but one or more of the claimants may be using their land for uses incompatible with the original plan, such as duplexes, beauty parlors, churches, offices, or stores.

7. *Effects.* The effect of the performance phase will be either fulfillment or the avoidance, modification or termination of the land-use plans. Nonconforming effects may be occasioned either by agreement or apart from agreement. Modification or termination may occur in accordance with the provisions of the original agreement (subdivision plans commonly provide for modification by the agreement

of a certain percentage of claimants in the subdivision and also provide for automatic termination after the passage of a specified number of years) or by subsequent agreement. Other effects may be occasioned by unilateral revocation by the grantor ("I revoke your license") or by community intervention. The community may intervene to effectuate community demands (*e.g.*, eminent domain) or to effectuate community policies deemed relevant to certain conduct by the parties (apply the doctrine of estoppel or determine the plan has been abandoned).[22]

The Context of Conditions

Because of many changing features in the larger society, such as advancing technology and increasing size and density of population, there is an ever increasing interdependency between land uses, between land use and other resource use, and between land use and the production and sharing of all values. These growing interrelations will create demands for more efficient and effective land-use planning. These demands may be for more private land-use plans, more and better governmental planning, and improved coordination of these two processes. In other words, private plans are made and performed in the context of an ever-changing public land-use planning process which is affected by and affects the private process.

These private plans are also formulated and performed in the context of constantly changing legal prescriptions. Demands for and expectations concerning these private plans may be influenced considerably by the content of the prescriptions and the manner in which they are actually applied by authoritative decisionmakers.

THE PROCESS OF CLAIM

While the various participants in the process of land-use planning by private volition are formulating and performing specific plans, controversies concerning one or more aspects of the plan may arise between them. Those which the parties are unable to resolve are com-

22. Because of the widely varied factual circumstances that may produce the avoidance, modification or termination of a plan, it may be useful in future inquiry to identify the "effects phase" of the process of performance as the process of modification and termination and identify the factual variables in terms of participants, objectives, situations, base values, strategies, outcomes and effects.

The reader may feel at this point that he is being subjected to an infinite regression of these phase analyses. This stems from what I believe to be the general viability of the McDougal-Lasswell system of policy-oriented inquiry for analysis of any step in the legal process. *See* text & notes 3-5, *supra*. How far a given observer breaks down the constituent steps and sub-steps of the process will of course depend on his purposes, resources and time.

monly presented to authoritative decisionmakers (*e.g.*, the courts) for resolution.

The process by which participants make claims may be identified by reference to claimants, objectives, specific types of controversies, strategies, outcomes and the context of conditions which may affect the process of claims.

Claimants

The claimants in controversies arising out of the process of land planning by private volition may be the original parties to the plan, their successors in interest, their designated beneficiaries, representatives of the organized community, or complete strangers to the land-use plan. The claimants may be individuals, private associations, or bodies politic; their significant characteristics may be identified in the manner suggested in the discussion of the process of planning in relation to participants.

Objectives

The most general objective of the claimants in presenting their claims to authoritative decisionmakers is to resolve the controversy through the application of community principles. More detailed objectives can best be described in terms of the particular type of controversies that they may present.[23] These controversies may relate to any phase of the process of land-use planning by private volition, which has previously been outlined, or to the process of authoritative decision, which will be outlined below.[24] Categorizing these controversies in relation to the various phases of these two processes should enable scholars and decisionmakers to identify more clearly the relevant community policies, to examine the past trend of decision, and to analyze conditions which may have affected these decisions, in ways which will be comparable through time and across state or even national boundary lines.

Specific Types of Controversy

The following categorization of claims relating to the various phases of the private land-use planning process and to the process of authoritative decision is intended to be illustrative only.

23. The categories are presented in an attempt to categorize economically the various facts that may give rise to controversies ultimately presented to authoritative decisionmakers. Subsequent inquiry will focus on these specific claims rather than on various categories of "rights in the land of another" such as easements, licenses, covenants, etc.

24. *See* text accompanying notes 25-44 *infra*.

I. Claims Concerning Participants:
   A. Claims that a certain individual, private association, or individual is (or is not) involved in the making of a plan;
   B. Claims that an alleged principal is (or is not) involved in a plan through the actions of an authorized agent;
   C. Claims that an individual, private association or body politic is (or is not) competent by community criteria.

II. Claims Concerning Objectives:
   A. Claims concerning the relationship between particular objectives and economy in the application of community sanctions;
   B. Claims questioning the compatibility of the objectives with overriding community policies in relation to various values.

III. Claims Concerning Situations:
   A. Claims questioning the compatibility of the private plan with the community land-use plan;
   B. Claims that the situation is such that expectations have become routinized (*e.g.*, public utility, governmental entity).

IV. Claims Concerning Base Values:
   A. Claims that an agreement is unenforceable because of gross disparity in the bargaining position of the parties during negotiations.

V. Claims Concerning Strategies:
   A. Claims that a party did (or did not) employ impermissible coercion;
   B. Claims that a party did (or did not) inaccurately represent certain significant facts;
   C. Claims relating to the means of establishing the plan.

VI. Claims Concerning Outcomes:
   A. Claims that shared expectations of commitment were (or were not) in fact created;
   B. Claims that a plan is (or is not) enforceable because a use of land has continued for a specified period of time;
   C. Claims that the parties did (or did not) meet community prescribed formalities for private land-use plans;
   D. Claims that the content of a plan is (is not) of a certain described specification.

VII. Claims Concerning Effects:
   A. Claims relating to participation in the performance phase:

(1) Claims that a novation did (or did not) occur;
(2) Claims that there was (or was not) an assignment of benefits;
(3) Claims that there was (or was not) an assumption of the burdens;
(4) Claims that there was (or was not) a succession to the benefits or burdens.

B. Claims concerning objectives in the performance phase:
(1) Claims that objectives originally compatible with overriding community policies are now incompatible.

C. Claims concerning situations in the performance phase:
(1) Claims that the pattern of performance has (or has not) become so routinized that the expectations of the parties have become routinized notwithstanding the provisons of the plan.

D. Claims concerning base values in the performance phase:
(1) Claims that there is (or is not) an implied condition;
(2) Claims that a plan is (or is not) enforceable because of detrimental reliance.

E. Claims concerning strategies in the performance phase:
(1) Claims that fraud, duress, misrepresentation or mistake after the execution of the plan has (or has not) prevented performance.

F. Claims concerning outcomes in the performance phase:
(1) Claims that a plan has (or has not) been fully performed by one of the parties;
(2) Claims that certain activities are (or are not) in conformity with the provisions of the plan;
(3) Claims that a party is (or is not) entitled to protection as against non-parties.

G. Claims concerning effects in the performance phase:
(1) Claims relating to suspension, modification or termination
(i) By agreement (either initial or subsequent)
(ii) Apart from agreement;
(2) Claims that there was (or was not) a condition precedent or condition subsequent to performance;
(3) Claims that there was (or was not) a deprivation suffered from a breach.

VIII. Claims Concerning Conditions:
  A. Claims that the performance of a plan has (or has not) become impossible or frustrated.
IX. Claims Concerning the Process of Decision:
  A. Claims relating to prevention;
  B. Claims relating to deterrence;
  C. Claims relating to restoration;
  D. Claims relating to rehabilitation;
  E. Claims relating to reconstruction.

Strategies

The strategies employed in presenting these claims in the authoritative decision process comprehend the entire range of modalities commonly employed by attorneys in civil litigation, from original complaint through appellate review by courts of last resort. Also included are the modalities by which controversies may be submitted to administrative agencies, plus all the techniques employed in lobbying for legislative additions or amendments.

Outcomes

The outcome of the process of claim is either negotiated settlement or submission of the controversy to an authoritative decisionmaker for resolution through the application of relevant community principles.

The Context of Conditions

Any or all of the conditions mentioned in regard to the process of land-use planning by private volition may affect the participants' predispositions to submit their claims to authoritative decisionmakers. Other relevant conditions include the efficiency of the decision process (how long will it take to obtain an authoritative decision), the cost of presenting the claim to an authoritative decisionmaker, and the claimants' views of the impartiality and competence of the authoritative decisionmakers.

The Process of Authoritative Decision

The features of the process of authoritative decision to which controversies are submitted for resolution are most economically described in terms of decisionmakers, the objectives of the community in establishing and maintaining them, the arenas of their decisions, the bases

of power available to them in resolving and effectuating their decisions, the outcomes achieved, the effects of the outcomes and the context of conditions that may affect the process of decision. A detailed description of these various phases of the process of decision would consume volumes. For this reason, the following identifications will be synoptic except when a feature has particular relevance to controversies arising out of the process of land-use planning by private volition.

Decisionmakers

Of course the vast majority of controversies are resolved by state or federal judges. Administrators have played a relatively minor role in the past, being only indirectly involved through such devices as rejecting subdivision plats that do not incorporate certain private land-use plans or that incorporate private land-use plans deemed undesirable by the administrators.[25] In the future, however, administrators may play a much larger role in the adjudicative process.[26] With the increased inclusion of arbitration provisions in contracts generally, it is also likely that private tribunals will play an increased role in resolving these controversies, particularly where private land-use plans are applicable to enormous tracts of land.

The resolution of potential controversies, and prescription by clarification of community policies, have been largely performed by state legislators,[27] but upon occasion the federal legislature has enacted prescriptions relevant to these controversies.[28] In the future authority

25. Although many subdivision regulations require the submission of proposed private land-use plans, *see, e.g.*, TUCSON, ARIZ., CODE § 23-533(1) (1964), the number of instances in which an administrator actually requires an amendment or addition to these plans are probably few.

26. It has been suggested that a community development administration be established with jurisdiction over all matters that affect the physical environment of a community. *See* M. MCDOUGAL, MUNICIPAL LAND POLICY AND CONTROL 8-10 (1946). If such an administration were established, the scope of its authority should include controversies arising out of the private as well as the public land-use planning process.

27. State legislation dealing exclusively with private land-use planning has been rare, but there are a few instances. *See, e.g.*, CAL. CIV. CODE §§ 1460-1468 (West 1954) (requirements for a real covenant to run with the land). Some recent legislation—the Marketable Title Acts—has been concerned with extinguishing long-dormant private land-use plans. For citation to these acts and a discussion of their application to private land-use plans, see Barnett, *Marketable Title Acts—Panacea or Pandemonium*, 53 CORNELL L. REV. 45, 72-77 (1967). Of course, a tremendous amount of legislation relevant to most land transactions is also relevant to the private land-use planning process. Examples include recording acts, statutes of fraud, and statutes establishing the formalities necessary to convey or create an "interest" in land.

28. Much of the federal legislation is concerned primarily with plans concerning federal lands. *See, e.g.*, 16 U.S.C. § 5 (1970) (rights-of-way through parks for power and communications facilities); 16 U.S.C. § 420 (1970) (rights-of-way through military parks). Other federal legislation may have a broader impact. Consider, for example, the impact of certain sections of the *Civil Rights Act of 1968*, 42 U.S.C. §§ 3601-19 (1970), on private land-use plans restricting sale of land to persons of a particular religion or national origin.

with respect to certain types of controversies may be delegated to local legislatures.[29]

Basic Community Objectives

In relation to the process of land-use planning by private volition, a community's most general objective in establishing and maintaining authoritative decisionmakers is to secure efficient and effective land-use planning for the enhanced production and distribution of all values. In implementing this general objective, authoritative decisionmakers should encourage private land-use plans that aid the community in securing its general objective and discourage private plans that impede pursuit of the general objective. Private plans that should be encouraged are those which promote the efficient use and development of land, including those that appropriately conserve the use of land and are compatible with both overriding community policies and the public land-use plan. Detrimental plans include those that do not promote an efficient use of land, or are incompatible with the public land-use plan or with overriding community policies, or unduly interfere with the liquidity of land.[30]

Arenas

The prescription and application of community policies relevant to the process of land-use planning by private volition occur within the federal and state judicial, legislative and administrative systems.

There are few legal impediments to claimants seeking access to both the judicial and administrative system. Of course, practical considerations such as potential expense (court costs, attorney's fees, time lost from work, etc.) may be a major obstacle to some claimant's actually obtaining access to the judicial system. Access to the legislative system is usually much more difficult: a participant advocating a particular prescription for the resolution of future controversies must recruit the aid of one or more legislators, a political organization, a pressure group willing to lobby for the prescription, or all of these.

29. As local communities find their public land-use plans more and more thwarted by private plans, the pressure for legislative authority to regulate the making and performance of private land-use plans should increase. This increased pressure may result in legislation authorizing local legislatures to enact ordinances requiring the approval of local administrators before a private land-use plan could become effective. For a discussion of most of the instances in which private plans thwart public plans see Berger, *Conflicts between Zoning Ordinances and Restrictive Covenants: A Problem in Land Use Policy*, 43 NEB. L. REV. 449 (1964).

30. For a more detailed development of community goals that authoritative decisionmakers should attempt to achieve and common interests they should balance in decision, see text & notes 44-57, *infra*.

Base Values

In resolving controversies arising out of the process of land-use planning by private volition, authoritative decisionmakers have at their disposal compulsory jurisdiction, the federal and state constitutions, and federal and state prescriptions. A police force is available to enforce their decisions. Perhaps just as significant, they have at their disposal community expectations that they should resolve the controversies and that there should be compliance with their decisions.

Strategies

The strategies employed in resolving these controversies vary depending on the particular arena—in the judicial according to established court procedures, in the legislative according to specified parliamentary procedures, and in the administrative according to promulgated rules and regulations.

The strategies employed in enforcing decisions include the imposition of economic deprivation with the power to seize and sell a party's assets, and the issuance of orders to a party requiring or prohibiting certain activities, backed by possible fine or imprisonment.

Outcomes

The outcomes of the process of authoritative decision relevant to the process of land-use planning by private volition could be described in terms of the organic structure in which they occur, judicial, legislative, or administrative. However, a clearer perception of the effectiveness of the existing process of authoritative decision can be obtained by describing the practices by which the existing process performs the seven functions of authority. These functions of authority are intelligence, recommendation, invocation, prescription, application, appraisal and termination.[31]

1. *Intelligence.* This function relates to the gathering, evaluation, and dissemination of empirical data about the private land-use planning process. Parties to a particular controversy may gather information pertinent to its resolution. Beyond these fragmentary gatherings of information, this function of authority is simply not being performed. In most communities there has been no attempt to gather information concerning the number, type and variety of private land-

31. For the formulation and a general discussion of these functions of authority, see H. LASSWELL, THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS (1956). For their employment in another context, see M. MCDOUGAL, H. LASSWELL & I. VLASIC, *supra* note 4, at 113-27.

use plans in effect.[32] This type of data is needed for several reasons. Such information is of particular relevance in promulgating the public land-use plan for a particular community.[33] It could form the basis for empirical studies of the impact of these land-use plans on adjoining land and on the land-use patterns of the entire community. It might be of value in preventing duplicative uses of land.[34] In addition, it would be of tremendous value in appraising existing community policies and inventing alternatives relevant to the process of land-use planning by private volition.

2. *Recommendation.* This authority function consists of advocating specific policies relevant to the private planning process. Historically this function has been performed primarily by lawyers and law professors through books and law journal articles.[35] Unfortunately, most of these recommendations have been made on the basis of semantic and syntactical evaluations of traditional legal doctrines rather than in terms of relevant community policies. If these recommendations are to be of significant value, they must be stated in policy terms and be based on adequate intelligence gathered not only by lawyers, but by other disciplines such as urban planning and engineering.

3. *Prescription.* The prescribing function—the promulgation of authoritative community policies—in relation to the process of land-use planning by private volition has primarily been performed by the

32. Although some communities require the submission of certain types of private land-use plans under certain circumstances to local planning administrators, *see, e.g.*, TUCSON, ARIZ., CODE § 23-533(1) (1964), there appears to be no effort by local administrators to collect other types of private land-use plans or even to coordinate the information available in the plans they do obtain.

33. If this data were available, urban planners could reduce the number of conflicts between the two planning processes by taking private plans into account in formulating or amending public land-use plans. For example, if planners were considering zoning a certain amount of land with small lot requirements to encourage low cost housing in a particular area of the community and several locations were potentially available, the availability of information concerning existing private land-use plans in which lot sizes were specified would enable the planners to zone for such housing where either there were no private land-use plans or a private plan which coincided with the proposed public lot size restrictions. Failure to coordinate these two processes increases the number of conflicts and produces unnecessary litigation in some instances, as well as adversely affecting the community's land-use patterns. For a discussion of such conflicts and resulting litigation, *see* Berger, *supra* note 29, *passim.*

34. There may be existing sewer lines, water lines or even private rights-of-way that could be connected with or used by the public or other private individuals eliminating the need for new identical uses or reducing the length of the new uses. Of course, if private individuals were to make use of them there would probably have to be either agreement or the use of eminent domain. For a case concerned with the legal permissibility of this latter course, see Linggi v. Garovotti, 45 Cal. 2d 20, 286 P.2d 15 (1955). The extent to which this might prevent duplicative uses of land and save the unnecessary expenditure of money must remain unknown until the necessary data are compiled.

35. This is not to indicate that the courts have not upon occasion incorporated their own recommendations in their decisions. For an obvious example of this see Judge Clark's opinion in 165 Broadway Bldg., Inc. v. City Investing Co., 120 F.2d 813, 816-17 (2d Cir. 1941), *cert. denied*, 314 U.S. 682 (1942), discussing C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 72-117 (1929).

judiciary. State and federal court decisions resolving particular controversies between disputants create expectations that future controversies will be resolved in a like manner. Only a few states have codified policies relevant to a few of the specific controversies outlined in the process of claim.[36] Of course, as to some controversies constitutional prescriptions as interpreted by the courts are deemed to be controlling.[37] But for the most part, "judicial legislation" is the dominant form of prescription. As community policies become clarified in terms of the functional role of private plans, actual legislation may increase. The advantage of this approach is that community policies could be enacted quickly and comprehensively. This is far more useful to future "private planners" than the slow, piecemeal approach of the judicial method. In addition, legislatures may be more willing to shed the innumerable feudal reifications so deeply embedded in the thinking of lawyers and judges.

4. *Invocation.* Invoking—the initiation of the application function—is primarily performed by participants in the process of land-use planning by private volition. In at least one major city, Houston, Texas, it may also be performed by representatives of the city in certain instances.[38] In the future, bodies politic may play an increased role in attempting to enforce desirable private plans or to terminate private plans deemed incompatible with either overriding community policies or the community land-use plan.[39] Such an increased role by bodies politic would accompany communities' growing realization of the importance of the private process in a rational comprehensive community land-use plan.

5. *Application.* After the process of authoritative decision has been invoked, both facts giving rise to the particular controversy and community policies relevant to those facts will be explored. Then the authoritative decisionmaker will characterize the facts and select the community policies applicable to those facts. In effectuating these community policies, the decisionmaker will impose certain sanctions on one or more of the disputants. For purposes of inquiry, these sanctions may be related to their goals—prevention, deterrence, restoration, rehabilitation, or reconstruction.[40]

36. *See* note 27 *supra.*

37. The fourteenth amendment to the United States Constitution has been by far the most common constitutional prescription involved in controversies arising out of the process of land-use planning by private volition. *See* text & note 19 *supra.* Although a comparable state constitutional provision may be involved in such controversies, most state courts tend to determine a particular land-use plan as being incompatible with public policy or general common law rather than construing a state constitutional provision as applicable to the controversy. *See* cases cited in notes 46-51, *infra.*

38. *See* Siegan, *Non-Zoning in Houston,* 13 J. LAW & ECON. 71, 77-79 (1970).

39. *See* note 29, *supra.*

40. For the formulation of these sanctioning goals and a discussion of each goal

Prevention embraces a wide variety of remedies and enforcement measures designed to reduce the probability that participants in the private land-use planning process will formulate plans that impede the community in attaining its general objectives concerning land use. Examples of these remedies and enforcement measures include refusal to compel adherence to certain plans, refusal to impose damages for breach of the plan, imposition of damages for formulating proscribed types of plans, and in some instances imposition of quasi-criminal liability.[41] Although these sanctions are applied in particular controversies, their primary objective is to create expectations in potential parties to private plans that it is useless to project similar policies in future plans, because the policies will not be afforded community protection and deprivations may be imposed on parties who project such policies.

Deterrence, like prevention, is concerned with future acts, but in the context of a particular controversy. The remedial objective is to preclude certain actions or to obtain certain acts by a disputant. These remedies and enforcement measures attempt to accomplish this objective by creating expectations that severe deprivations will be imposed on the disputant against whom the sanction is imposed if the prohibited actions occur or the mandated acts are not performed. For example, a party may threaten to use the land in a manner purportedly inconsistent with the policies projected in the plan. Another party to the plan may seek a declaratory judgment that the threatened actions would violate the plan or seek an injunction against the threatened acts.

Restoration is similar to the deterrence goal except that it is concerned with deprivations which have already occurred or are presently occurring, rather than threatened future actions. In other words, restoration is concerned with terminating deprivations that are occurring, preventing the reoccurrence of deprivations that have occurred, or obtaining the performance of acts that should have been performed, but were not. Remedies frequently employed to accomplish restoration are prohibitory injunctions and specific performance.

Rehabilitation is frequently used to supplement the remedies and enforcement measures employed in restoration. It is the attempt to

see R. ARENS & H. LASSWELL, IN DEFENSE OF PUBLIC ORDER 199-203 (1961). For their employment in another context, *see* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 287-96 (1961).

41. Most of these statutes are directed toward individuals discriminating against other individuals. An individual attempting to rely on a private land-use plan to justify his discriminatory conduct will find himself in violation of these quasi-criminal statutes. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 35720 (making discrimination unlawful), 35738 (permitting imposition of $500 damages to be paid to the aggrieved party) (West 1973).

return parties to a controversy to the status quo that existed prior to the deprivation imposed by the action of one party. For example, after the deprivations have been terminated by the issuance of a prohibitory injunction (restoration), the authoritative decisionmaker may in addition award compensatory damages to the aggrieved party in an attempt to return him to his pre-deprivation position (rehabilitation).

Reconstruction is the objective of the sanctioning process which relates to the modification, organization, reorganization, or termination of prescriptions and institutions in a manner calculated to discourage private plans that are incompatible with the general land-use objective of the community and will facilitate compatible plans. If the inquiry recommended in this article is performed and the resulting recommendations are accepted and employed by authoritative decisionmakers, then a reconstruction of community prescriptions will have occurred. If an integrated community development administration is created and exercises its broad powers over the making and performance of private land-use plans as well as over the other two land-use planning processes,[42] community institutions will have been reconstructed.

6. *Appraisal.* The appraisal function involves assessing the degree to which existing community principles do in fact reflect community policies and goals pertinent to the private process of land-use planning. At present it is performed primarily by courts and legal scholars, with occasional legislative attempts. As has already been seen, the explicit formulation of relevant community policies has been rare and piecemeal.[43] If the private process is to be given the widest possible deference and if the overall community planning process is to become as efficient and effective as possible, this appraisal function must be more comprehensively performed. Furthermore, this function must be performed continuously to keep up with ever-changing conditions that may render a past community policy obsolete.

7. *Termination.* Primarily because of inadequate performance of the intelligence, recommendation and appraisal functions, the termination function—abolition of obsolete community prescriptions—has been inadequately performed. The result has been continued reliance on doctrines that are out of place in modern society. In the future, as these other functions begin to be adequately performed, rationally functioning courts and legislatures can be expected to modify or abolish obsolete prescriptions.

42. *See* note 26, *supra.*
43. *See* note 13, *supra.*

Effects

The most immediate effect of the resolution of a specific controversy is the distribution of values between the parties to the controversy. But the effect of these decisions, like legislative prescriptions, is much broader. They create expectations among the general public concerning community policies relevant to future controversies. These expectations will affect the performance of existing plans as well as the content of future plans.

The long-range effects of the outcomes of the authoritative decision process are to fashion the community principles and institutions relevant to the process of land-use planning in a particular manner. The structure of these community principles and institutions will determine the role private volition is given as an instrument of land-use planning in the various communities in this country.

The Context of Conditions

The same conditions that affect land-use planning by private volition and the claim process may affect the process of authoritative decision. Of particular significance are the perspective of the various decisionmakers concerning the process of land-use planning by private volition and their predisposition to restructure existing prescriptions and institutions in a manner that will permit communities more easily to attain their basic objectives while granting the greatest possible deference to private land-use planning.

CLARIFICATION OF GOALS AND INTERESTS

The purpose of this section is to offer a preliminary outline for clarifying the goals and interests relevant to the process of land-use planning by private volition. The primary concern is with goals and interests that are applicable in the resolution of particular controversies by decisionmakers in the adjudicative process.[44] At the outset it should be made explicit that the goals and interests are suggested here in terms of high level abstractions that must be made more particular by future systematic and disciplined inquiry in the context of specific types of controversies. These are offered with the present framework for inquiry because postulating higher level goals is a necessary pre-

44. These same goals and interests are also applicable to the legislative and administrative processes in promulgating statutes or regulations. Because of the major role the adjudicative process has played in the past formulation of community principles relevant to the private land-use planning process, and the probability that it will continue to be the predominant process in this area, the materials here presented and those suggested for future inquiry are organized and presented in a manner which focuses on the adjudicative process.

requisite to the more particular specification of goals and interests in the context of future specific inquiries.

These goals and interests are presented from the observational standpoint of one who is concerned with aggregate common interest and committed to the goals of a free democratic society: the widest possible production and distribution of all values without discrimination other than on the basis of capability and contribution.[45]

Postulated Goals

A community may be regarded as a group of people applying institutions to resources for the production of "values."[46] From this conception, it follows that if the production of values is to be maximized—a goal of a free democratic society—then the land within a community, a prime resource, must be optimally employed. Therefore, the overriding goal of the comprehensive community land-use planning process, composed of the public, judicial and private processes, should be the optimal efficient, productive and appropriately conserving use of land.

In determining the relative roles of the component planning processes in attempting to attain the optimal use of land, society's preference for private choice over public coercion must weigh heavily. Only one of the three planning processes relies primarily on individual choice; for this reason, a recommended goal ancillary to the major goal of the comprehensive community planning process is the maximum possible employment of the process of land-use planning by private volition. To maximize the employment of this preferred process, community principles and institutions must be shaped to encourage participation in the process. This can be accomplished by making participation as easy as possible (free of unnecessary legal technicalities) and by making private land-use plans efficient and effective instruments for obtaining the objectives of the parties.

But not all private land-use plans should be encouraged and effectuated. Even in a free society uncontrolled individual choice cannot be permitted; particular individual choices may be destructive of overriding community goals. In the following analysis, interests (*i.e.*, demands coupled with supporting expectations) that are incompatible with the goals of society are called *special interests*. Interests that are

45. In the international arena the goal is stated as attaining a universal order of human dignity. For a discussion of human dignity as a goal which is also relevant to the goal of a free democratic society, see M. McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1, 11-15 (1959); *cf.* McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1 (1966).

46. *See* notes 2, 15-16, *supra*.

compatible with societal goals will be denoted as *common interests.* Individual choices—including private land-use plans—which promote special interests should be rejected.

The broadest goal of a free democratic society is the widest possible production and distribution of values, humanistic as well as economic. Therefore private land-use plans that impede either the production or distribution of values should be rejected. Private land-use plans that prevent the *distribution* of values would include, for example, those that intentionally interfere with or unduly burden the proper functioning of governmental units (power);[47] create monopolies (wealth);[48] endanger the health of members of the community (well-being);[49] discourage desirable affection relationships (affection);[50] or discriminate against particular classes of persons because of their race, religion, sex, etc. (respect).[51]

Examples of private land-use plans that promote interests impeding the *production* of values include those that project irrational or functionless uses of land and those that are incompatible with public land-use plans. Irrational or functionless uses of land are those designed to secure personal gratification unrelated to any productive or efficient use of land, such as flying the Confederate flag on the land every day or singing a song on the land every Saturday night; and uses that are inefficient or outmoded, such as requiring all owners of lots in a subdivision to have elaborate Christmas lights during an energy crisis or requiring land located in the center of an urban area to be used for a stable.

Because it may not be readily apparent why private land-

47. *See, e.g.,* Smith v. Clifton Sanitation Dist., 134 Colo. 116, 300 P.2d 548 (1956) (invalidating a provision purposefully inserted in a private land-use plan to thwart a proposed public project); Anderson v. Lynch, 188 Ga. 154, 3 S.E.2d 85 (1939) (residential-only restrictive covenant could not be asserted to prevent county from using land for highway purposes, because such a covenant as to the county would be contrary to public policy).

48. *E.g.,* Shepherd v. Spurgeon, 365 Mo. 989, 291 S.W.2d 162 (1956) (a provision in a deed to a 300 acre tract stating that the land could never be used for business purposes was declared void as an attempt to create a monopoly in the grantor, who reserved a 1 acre tract on which a business was being operated). In Burdell v. Grandi, 152 Cal. 376, 92 P. 1022 (1907), a grantor placed a restriction in all deeds in town against the sale of intoxicating liquor. However, he reserved some land not subject to restriction on which he did sell intoxicating liquor. The court found the purpose of the restriction was not to limit sale of intoxicating liquors, a desirable social goal, but rather to create a monopoly. Therefore, it held the restriction void as against public policy.

49. For example, the Supreme Court of Iowa has stated, "if the discharge of the sewage constitutes a public nuisance, and this were an action to abate it as such, no agreement between the adjacent owners would be a defense to the action." Ruthven v. Farmers' Co-op. Creamery Co., 140 Iowa 570, 574, 118 N.W. 915, 916 (1908).

50. For example, a gift of the right to remove sand and gravel conditioned upon the grantee obtaining a divorce. *Cf.* Fleishman v. Bregel, 174 Md. 87, 197 A. 593 (1938).

51. *See* note 19 *supra.*

use plans incompatible with public land-use plans are deemed to project "special interest," a brief explanation of this concept is offered. In order to attain the optimal use of land for value production and distribution, there must be an integrated plan which considers the relationship of each tract of land to the uses of land in the community as a whole.[52] The private process, because it is motivated by personal demands and because it relies on individual choice, is incapable of producing an efficient, integrated and community-wide land-use plan essential to the optimal use of land. For this reason, the private process must yield to the public process, which is formulated to further community-wide goals and can employ coercion to produce an integrated plan.[53]

In sum, another recommended goal is that authoritative decisionmakers "police" private land-use plans presented to them to ensure the rejection of plans promoting special interests.[54] Rejecting private plans that are incompatible with the goals of society serves not only the negative function of preventing the implementation of special interest in a particular controversy, but also the affirmative function of creating expectations that similar plans will receive the same fate.

In most instances private land-use plans confronting a decisionmaker will promote common as opposed to special interests. As was seen when examining the process of claim, a wide variety of controversies may arise concerning private plans. The task of the decisionmaker will of course vary according to the particular controversy: it may be to ascertain if in fact shared expectations were created, or to determine the shared expectations of the parties that did arise; it may be to construe a particular statute, or to resolve conflicting judicial opinions. Whatever the particular task of the decisionmaker, he will be confronted with a flow of signs and acts relevant to the making, performance, modification, or termination of a particular plan and with a flow of signs in terms of allegedly applicable community principles.[55] These signs and acts will be subject in varying degrees to the inherent

52. Not only is an integrated plan necessary to create a rational relation of uses in terms of peoples' activities, but also to perform other essential tasks of a comprehensive community land-use plan such as protecting land-users from adverse by-products of other uses and the achievement of a rational enjoyment of resources. For a discussion of the first two of these tasks, see L. McDougal, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255, 258-67 (1973).

53. This is not to indicate that the public planning processes in the various communities in this country have produced or are producing effective integrated plans. The situation is in fact quite contrary. *See* L. McDougal, *supra* note 52, at 255-56, particularly nn.3-6.

54. For a discussion of this "policing" goal in another context, see M. MCDOUGAL, H. LASSWELL, & J. MILLER, *supra* note 4, at 41-42.

55. For a discussion of what is meant by "signs and acts," see note 18 *supra*.

infirmities of communication.[56] The problem confronting the decisionmaker is how to fill the gaps, resolve ambiguities and contradictions and give specific content to abstractions. These inherent infirmities should be cured by reference to common interests. There is no alternative, because the decisionmaker is the representative of the community and has an obligation not merely to resolve particular controversies, but to resolve them *in a manner compatible with the common interest.* The final goal, therefore, is to cure infirmities in the flow of signs and acts pertinent to controversies arising out of the private planning process be reference to common interests.

In pursuing this final goal a decisionmaker must clarify the common interests at stake in a particular controversy, accommodate conflicting and competing interests and then shape the private plan to conform with the prevailing interests. In the hope of aiding the future performance of these tasks by scholars and decisionmakers, brief and impressionistic outlines of these two tasks will now be presented.

Clarification of Common Interests

Common interests relevant to the process of land-use planning by private volition can be identified as being either "inclusive" or "exclusive" interests. *Inclusive interests* are demands coupled with expectations that have a sufficient impact on community processes to justify community intervention. *Exclusive interests* are demands and expectations whose impact falls more on particular participants than on community processes. Although these two types of common interests are identified as an either-or proposition, they are more realistically viewed as poles of a continuum. The distinction does, however, aid in clarifying common interests.

Some of the inclusive and exclusive interests that may be pertinent to the resolution of controversies arising out of the process of land-

56. As most students of the legal process are well aware, the facts of a particular case may be in varying degrees incomplete (the parties did not anticipate the particular controversy in formulating the land-use plan), contradictory (the document allegedly encompassing their commitment states one policy, yet the parties have performed in a different manner ever since its execution), or ambiguous (the document may describe itself as a license but use differing terminology in the text such as "lease," "grant exclusive right," and "grant easement," all of which apparently refer to same basic agreement), and it may contain language which is abstract (subdivision restrictions precluding anything other than a "residence"). In addition, legal authority possibly relevant to a particular controversy may contain in varying degrees gaps (if there are no cases directly in point), contradictions (two almost identical cases reaching contrary results with the more recent not explicitly overruling or even mentioning the earlier), ambiguities (consider the following quote from Standard Oil Co. v. Buchi, 72 N.J. Eq. 492, 66 A. 427, 432 (1907): "I think the present grant is something more than an easement, although undoubtedly it includes easements, and I think it is a great deal more than a license, in that it gives an irrevocable interest in the land and creates, by apt words, an estate. . . .") and high level abstractions (*see* text & note 8 *supra*).

use planning by private volition, as identified according to the various phases of that process, include:

Inclusive Interests:

I. Participation:
   A. Widest possible participation in the process;
   B. Freedom from discrimination other than on the basis of rational community standards of competence;
   C. Effectuation of parties' genuine shared expectations as to who (including non-parties) should enjoy the benefits of the plan.

II. Objectives:
   A. Maximum use and enjoyment of land with equal opportunity to shape and share all values;
   B. Protection and effectuation of nonfrivolous value demands.

III. Situations:
   A. Creation of institutions conducive to maximizing land-use planning by private volition;
   B. Compatibility of private plans with public land-use plans.

IV. Base Values:
   A. Protection of participants in an inferior bargaining position from unconscionable provisions imposed by participants in superior bargaining positions.

V. Strategies:
   A. Minimizing coercive or deceptive practices;
   B. Deemphasis of technicalities that interfere with the shared expectations of the parties.

VI. Outcomes:
   A. Minimizing the destruction of expectations created by agreement;
   B. Encouragement of any modality of establishing a private land-use plan that aids the more efficient use of land.

VII. Effects:
   A. Freedom to assign benefits conferred by private land-use plans;
   B. Protection of bona fide purchasers for value;
   C. Protection of private land-use plans that promote an efficient use of land;

D. Protection of shared expectations created during the performance phase (even if incompatible with original outcome commitment);

E. Modification or termination of private land-use plans to conform with changes in the community.

Exclusive Interests:

I. Participation:
   A. Freedom to participate in the process.

II. Objectives:
   A. Protection of the value of particular land;
   B. Enhancement of the value or enjoyment of particular land;
   C. Freedom to obtain demanded values.

III. Situations:
   A. Freedom to obtain, use and enjoy benefits of private land-use plans without community intervention.

IV. Base Values:
   A. Freedom to employ base values at the disposal of the participant without community interference.

V. Strategies:
   A. Projection of policies concerning the use and enjoyment of land free of legal technicalities.

VI. Outcomes:
   A. Freedom from destruction of expectations created by private land-use plans.

VII. Effects:
   A. Freedom to enjoy benefits obtained from private land-use plans without interference by third persons;
   B. Freedom to assign benefits obtained;
   C. Freedom from irrational, functionless burdens agreed to by a prior claimant of the land;
   D. Freedom to continue enjoyment of benefits obtained by private land-use plans regardless of changes in the community.

This clarification of inclusive and exclusive interests is intended to be only preliminary. The relevant interests will require more complete identification in future inquiry into specific types of controversies. In the context of any specific controversy there may be competing or conflicting interests that will have to be accommodated.

The Contextual Accommodation of Interests

A full exploration of principles for the accommodation of interests is beyond the confines of the present framework for inquiry. However, a few observations should be made. First, only common interests—both inclusive and exclusive—need be accommodated; special interests should be rejected in all cases. Second, the accommodation of interests must be contextual—by continual reference of the part to the whole. Only by this process can a scholar or decisionmaker clearly identify the common interests at stake and the implications and effects of balancing one interest against another. This continual reference of the part to the whole is known as the principle of contextuality[57] and is applicable to all the principles of accomodation of interests. Third, in the event of conflict between inclusive and exclusive interests, primacy should be given to inclusive interests.[58]

A final observation is that two types of principles are needed for the accommodation of interests in controversies arising out of the private land-use planning process: principles of content and principles of procedure.[59] Principles of content are those that direct the decisionmaker to *what* should be considered in resolving the controversy. These principles would include provisions designed to ensure examination of pertinent variables in the private planning process, process of claim, and process of decision as well as the context of conditions that may affect these processes. Principles of procedure are those that indicate the *order* in which and the modalities by which relevant factors should be considered. These would be designed to aid the principles of content in performing the intellectual tasks necessary to problem solving.

RECOMMENDATIONS FOR FUTURE INQUIRY

After outlining the inadequacies of our inherited legal doctrines relating to "rights in the land of another," this article defined agreements and unilateral expressions of intent projecting a policy concern-

57. *See* M. MCDOUGAL, H. LASSWELL & J. MILLER, *supra* note 4, at 50, 65.

58. The public welfare is of prime importance; and the correlative restrictions upon individual rights—either of person or of property—are incidents of the social order, considered a negligible loss compared with the resultant advantages to the community as a whole. Planning confined to the common need is inherent in the authority to create the municipality itself. It is as old as government itself; it is of the very essence of civilized society. A comprehensive scheme of physical development is requisite to community efficiency and progress.

Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 150, 198 A. 225, 229 (1938).

59. For principles of content and procedure that could be adapted and expanded for employment in the present context see M. MCDOUGAL, H. LASSWELL & J. MILLER, *supra* note 4, at 45-77.

ing the use and enjoyment of land as private land-use plans. Once this functional role was identified, it was possible to delimit further the generic problem posed by private land-use plans. This was done by identifying significant factual variables in the process of land-use planning by private volition; by describing the process of claims by which controversies arising out of the private planning process are presented to authoritative decisionmakers; and by outlining the process of authoritative decision that resolves the controversies. Having delimited the problem more clearly, this article offered preliminary outlines for clarifying the goals and interests relevant to the process of land-use planning by private volition. These undertakings were presented as background for future systematic and detailed inquiry into each of the specific types of controversies identified in the description of the process of claim.

These future inquiries should perform five intellectual tasks as to each specific type of controversy—goal clarification, examination of trends in decisions, analysis of conditions affecting decision, projection of future trends, and conception and evaluation of alternative policies.[60] A brief statement of what is involved in the performance of each of these tasks will be presented to indicate the agenda of future inquiry.

Goal Clarification

Because of the broad scope of the present inquiry, the goals and interests suggested were of necessity posited in terms of high level abstractions.[61] These suggested goals and interests must be made more particular in the context of each specific type of controversy identified in the process of claim. Future inquiries should particularize the relevant goals and interests to the extent that they have clear empirical reference.

Examination of Trends in Decision

The past trend of decision will be examined to determine the extent to which past decision approximates the recommended goals and interests, without reference to the nuances of traditional legal doctrines developed with respect to the various categories of "rights in the land of another." An examination of decisions in terms of these

60. For a more detailed discussion of these tasks, see Lasswell & M. McDougal, *supra* note 5, at 390-92; Lasswell & M. McDougal, *supra* note 5, at 507-13.

61. In addition, general characterization of goals is necessary to their specification. *See* text accompanying note 44, *supra*. The purpose of this framework has been to outline the general characterization of goals as background for the future specification of goals in subsequent inquiry.

traditional legal doctrines is of little consequence to one interested in the aggregate common interest and the goals of a free democratic society. Rather, the proper object of concern is the extent to which actual outcomes approximate recommended goals and interests. Because authoritative decisionmakers often justify their decisions in terms of these inherited, inadequate legal doctrines, it is frequently necessary to ignore their verbal justifications and focus instead on the actual outcome of the decision.[62]

Analysis of Conditions Affecting Decision

When examining the trend of decision with regard to a specific type of controversy, inquiry must be made to determine conditions that affected decision. The conditions analyzed will be both predispositional and environmental.[63] An analysis of these conditions should enhance understanding of why decision was rendered in a particular way. This understanding should also aid the inquirer in the performance of the final two tasks.

Projection of Future Trends

This task need not involve ventures into fantasyland. Examination of past trends of decision and analysis of conditions affecting those decisions should enable the inquirer to make realistic predictions of the course decisionmakers are likely to follow. Of course, where drastic changes in conditions are feasible but cannot be said to be certain, alternative projections of future trends may be necessary.[64]

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62. The court in a particular case may have resolved the matter by categorizing the agreement in a particular manner; its "analysis" thus may do nothing more than paraphrase an abstract definition. *See* text & notes 6-10, *supra*. An examination of this gloss is of little value in determining its compatibility with common interests. In another case the court may not even mention a particular fact or facts that would at least under traditional dogma produce a different result from the one the court wants to and does reach. These are but two examples of the ways courts may through their written opinions mislead a reader as to the actual bases of decisions. This is not to say that all their language should be ignored. It too must be analyzed to ascertain whether the courts are in fact promoting a recommended community policy under the cloak of a traditional doctrine. For example, it is conceivable that the courts applying the "touch and concern" requirement in cases involving the succession of covenants are actually refusing to permit succession of obsolete or functionless land uses under the cloak of "touch and concern."

63. The quotation in note 11, *supra*, reflects both of these types of factors. Predispositional conditions would include those stating a prejudice against the assignability of agreements and the habitual reification of legal concepts. Environmental conditions would include the existence of courts of law and courts of equity, and the absence of a decent recording system.

64. For example, it is not inconceivable that recording acts may be amended to permit computerization of land records and to resemble some form of a Torrens registration. On the other hand, those with vested interests in the existing system may prevent the adoption of these improvements. Policies should be developed that would achieve the desired end under both eventualities.

Conception and Evaluation of Alternative Policies

Creativity will be encouraged by the deliberate conception of alternative policies, institutional structures, and procedures that promote the recommended goals and interests to the greatest possible extent. These alternative policies, institutional structures and procedures will be evaluated in terms of conformity with the recommended goals and interests, disciplined by the knowledge obtained in the performance of the other intellectual tasks.

In the future, detailed and systematic inquiry performing these intellectual tasks should encourage authoritative decisionmakers to prescribe, construct and establish community policies, institutional structures and procedures that will give the greatest possible deference to private volition in seeking to attain the optimal, efficient, productive, yet appropriately conserving, use of land compatible with the overriding goals of society. This explicit, reasoned formulation of policy in turn will aid decisionmakers confronted with a particular controversy in deliberately weighing and delicately balancing competing common interests and ensuring their rejection of interests incompatible with the goals of a free democratic society.