

Property Rights, Responsible Development, and Constrictive “Rules”

By: Donald J. Kochan, J.D.

Summary

In environmental law today there is an ongoing debate over rules versus standards. Rules are costly, stifle innovation, and can cause what they were meant to prevent. Standards preserve the environment while protecting private property rights. To those motivated by a concern for the environment, this is a no-brainer. For those motivated by a desire to control economic activity, eliminate private property rights, and curb freedom, the issue is more complicated.

Main text word count: 745

Command and control rules are more costly, stifle innovation, and constitute the one size fits all approach that limits the government’s ability to produce the results it seeks.

Conservation and environmental protection are positive goals. Too often it is believed that these goals cannot be achieved without state intervention and government regulation. Yet, sometimes government regulation and obsession with “rules” obscures our greater understanding of achieving environmental “standards.” And, our reliance on strict governmental development rules obscures the fact that respect for private property might not be inconsistent with these goals. The Vineyards Estates project in Virginia’s Albemarle County is an excellent example of rules gone awry.

The Vineyard’s Estates project is a development plan that takes 511 acres in Virginia and carefully plans its development between a select number of homes mixed with orchards, forest land, agriculture, and meadows. All this with only 28 lots averaging 5.98 acres each (and 164 acres total) devoted to residential development lots. More than two-thirds of the project is focused on protecting green, wooded, and agricultural space. Rules technically preclude this plan, yet a special use permit that would allow it to go forward has been requested.

From an environmental “standards” based approach, the Vineyard’s Estate plan sounds like responsible development. It meets the standard for environmental protection and conservation. Here, a developer is attempting to allow residency while planning for current and long term aesthetic pleasure of the environment.

Yet, local regulators and environmental groups like the Piedmont Environmental Council are using strict “rules” to oppose the plan. It’s a classic example of the use of rules as a weapon to seek zero growth where there may be balance.

Under governing Albemarle “rules”, lands within the Vineyard’s Estate project could be divided into 30 lots of 21 acres by right. The Piedmont Environmental Council and others claim that because the Vineyards Estates project fails to follow this rule, it should be denied.

The establishment of these rules may make sense as a policy default, but it should not be determinative. That is precisely why “special use”

continued

permits – like those applied for by the Vineyard Estates project – exist. When something outside of the rule is less dense and is actually more conservation-friendly, it seems it should be approved. Otherwise the rule swallows the goal.

The Vineyard’s Estates plan significantly increases the amount of green space beyond that required or allowed by the rules. It just does so in an innovative manner, focusing on the standard of environmental conservation rather than the default rules. In fact, the Vineyard’s Estate proposal would foster agricultural and forestry preservation, and allow a low-density proposal to proceed. Yet opponents use “rules” as an attempt to block an otherwise environmentally friendly proposal. Why?

The rules versus standards debate pervades much of environmental law. Whether it be air pollution, water pollution, or development, it is often better to set standards of achievement or environmental goals and allow the market to find the optimal means for reaching them. In contrast, command and control rules are more costly, stifle innovation, and constitute the one size fits all approach that limits the government’s ability to produce the results it seeks.

Governments can demand that industries develop specific technologies to combat air pollution or they can demand that industries meet a standard and allow the market to develop and find innovative ways to achieve pollution reduction. Standards requirements allow the market to find the most efficient, least costly means for achieving society’s goals. In contrast, commanding a specific rule – whether it be to use a certain filtration system or cut up lots into 21 acres – limits the ability of the market to find ways to serve both consumer preferences and community goals. In terms of land use, a standards based approach allows for innovative private development plans that allow developers to more autonomously plan the use of their own property while achieving societal goals.

Setting a standard rather than demanding a rule is also more respectful of owner autonomy and property rights. Although still restricted, property owners constrained by a demand to meet a standard can design their uses and developments in a manner that optimizes both the private property preferences and community goals.

Nonetheless, it should not be forgotten that an underlying obligation for governance should be to respect private property rights and allow owners to use what is their own as they see fit. Development restrictions, whether rules or standards based, necessarily limit private property rights. A paradigmatic shift toward standards based regulation at least moves government closer to meeting its obligation to allow private property owners to control and use what is their own.

#####

(Donald J. Kochan is an Olin Research Fellow at the University of Virginia School of Law and a member of the Board of Scholars of the Virginia Institute for Public Policy, an education and research organization headquartered in Potomac Falls. **Permission to reprint in whole or in part is hereby granted, provided the author and his affiliations are cited.**)

A standards based approach allows for innovative private development plans that allow developers to more autonomously plan the use of their own property while achieving societal goals.

Attention Editors and Producers

Virginia Viewpoint commentaries are provided for reprint in newspapers and other publications. Authors are available for print or broadcast interviews. Electronic text is available at www.VirginiaInstitute.org or on disk. Please contact:

John Taylor
Virginia Institute for Public Policy
20461 Tappahannock Place
Potomac Falls, Virginia
20165-4791

Phone: (703) 421-8635
Fax: (703) 421-8631

www.VirginiaInstitute.org
JTaylor@VirginiaInstitute.org

**Virginia
Institute**
for Public Policy