

Foreign Investment in U.S. Real Estate

by Gene Wunderlich

WHO SHOULD OWN THE LAND?

The American's possessiveness of territory against outsiders has a long history. "As early as 1635 Watertown passed its order that no 'forreiner' coming into town should benefit by the commonage . . ."¹ Prior to 1639, Connecticut forbade sales to outsiders unless the town gave permission.² Even dower rights to land were denied a widow who had not joined her husband in American citizenship at the time of the Revolution.³ The existence today of 29 state laws⁴ of varying severity and effectiveness which limit land holding by aliens is evidence of the latent opposition to ownership of land by outsiders.

Despite such deliquescent discrimination against outsiders, land holding in the United States has a history of liberal settlement and sales.⁵ Questions about the legitimacy of past European claims to North America⁶ have never been a serious bar to the free marketing of America's land. Nor has concern for future patterns of land use or land ownership in the United States been of much public concern until recently. Therefore, this inquiry into the basis for differential treatment of citizens and aliens in land holding was made in the context of a tradition of relatively unrestricted possession and transfer of land. Subsurface sentiments against outsiders have generally been suppressed in favor of perceived economic advantages of an unrestricted market for land.⁷

Although the impetus of this inquiry was an examination of foreign investment practices and policies, land in these chapters has been accorded a broader base of analysis. The foreign ownership of land in the United States is part of a larger question: Who should own the land? Correlatively, what benefits and responsibilities should ownership entail? Is citizenship a basis for special benefits and special responsibilities?

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1. For this and subsequent footnotes, see "References" at end of article.

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LAND, CITIZENS, INFORMATION

Three critical features of the foreign investment issues are land, citizens, and information. Let us first examine the meaning of these features as they bear on foreign investment policy, summarize the authored sections, and then arrive at some conclusions.

Land

Land has physical, economic, and institutional qualities sufficiently unique to require separate attention in direct investment policy. We need only say about the physical quality of land that it is scarce in relation to the total potential uses. Each unit of land has but one location; it absorbs, stores, or emits energy; it defines activity; and it limits the existence of man absolutely. Without space there would be no circumstance.

Land in this report, however, is defined as a resource; its more relevant qualities are economic and institutional.

The economic value of land⁸ follows directly from physical scarcity; there are simply more wants from the land than can be supplied without cost (even if the cost is only that of deciding). If land cannot supply man his wants, then man must apply labor (work) or capital (save). From the product created by a combination of labor, capital, and land are paid wages, interest, and a remainder—rent. This elementary restatement of distribution principles is intended to distinguish land, the resource, from real estate, the paper claim to land often merged with capital.

The institutional features of land follow from the physical and economic qualities. However, the rules about land access, use, and benefit, i.e., the institution of property, are determined also by the level of sophistication of society—its capability to manage symbols.

In simple societies it is possible for an economy to function through single, unique transactions for goods or services. Complexity and size require rules for categories of things and processes. Thus, livery of seisin gave way to modern conveyancing—the volume of land trading was too much for a simple direct system.

But each degree of sophistication requires standardization and classifying—so the progress of society calls for homogenization—the physical (and to a great extent economic) qualities of land are lost to the exigencies of a classifying and refining market. The land market, still primitive by the standards of the household goods market, is moving rapidly to the point of pure manipulation of symbols.

The greater the volume of real estate transactions, the greater the need for mass marketing techniques, grades, standards, forms, regulations, and controls. "Paper" is replacing territory. One consequence is that policies are designed in terms of paper and symbols which do not fully take into account the territory and uses they represent. The nature of land as a resource in economic processes may be forgotten. Policies to affect the real estate trade may not be effective policies for land. Policies to affect international investments may not be effective policies for real estate.

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Citizens

The request by Congress for the study of alien investment implies that citizenship is a crucial ingredient in the national policy of investment. Especially must this be true about land, for citizenship is defined, in part, by land. McDougal, Lasswell, and Chen refer to "membership in a territorial community"⁹ and Bickel adopts Holmes' definition of citizenship as "a territorial club."¹⁰ The concept of exclusion at the heart of property is also the essence of citizenship.

Citizenship connotes an interest in the common property of a nation.¹¹ The cliché of owning stock in a nation is not without substance. But is owning stock in a nation to be one of the exclusive privileges of being a citizen? The question underlies investment policy. Obviously the answer must extend beyond the simple economics of resource control and international finance.

Why does a citizen of one country invest in the territory of another? Are there motivations beyond the monetary return and security of asset? Citizenship is an investment of allegiance.¹² Citizenship provides "protection against other territorial communities and of securing richer participation in the value processes of his chosen community . . ."¹³ Does investment provide some of the amenities (and burdens) of citizenship? Is equity equivalent to patriotism?

The attractive aspect of citizenship to an individual is gaining some advantage, or avoiding some disadvantage—that is, acquiring some benefit as a member of a nation.¹⁴ Presumably, then, a policy of investment in the land of a nation can be viewed in terms of the benefits of citizens vis-a-vis others. Even the 18th century liberal arguments for free trade were not based on a one-world philosophy but on the idea that free trade was good for the nation and its citizens.

Citizenship *jus soli* grows directly out of the land, and even citizenship *jus sanguinis* merely employs a blood step to territory. Citizenship may be termed land's investment in, and claim on, people. "Patriotism is the demand of the territorial club for priority . . ."¹⁵

A policy on international investment in land must at least imply some vision of the benefits and burdens of citizenship. This inquiry on international real estate investments recognizes that nations can and do discriminate on the basis of citizenship.

All of the sections of this report, one way or another, touched the issue of benefits and burdens of membership in the territorial club. We have not treated the topic of citizens, subjects, and nations exhaustively. Perhaps this inquiry into alien land ownership, however, may be a useful entry into other inquiries about the nature of man and state.

Information

The Foreign Investment Study Act of 1974 is itself a testimony to the significance of information. Congress passed the Act because it felt that information on foreign investment was inadequate. This report on investment in real estate provides an entry into some basic policy issues of the rights of citizens and governments to know, the nature of property and privacy, and the privileges and responsibilities of foreigners to supply information to members of the "territorial club."

Most recently the policy issue relating to information has been framed in terms of personal privacy¹⁶ and federal¹⁷ and other institutional¹⁸ records related to specific persons. However, the information issue goes beyond personal privacy and into commerce, industry, finance, and intergovernment relations. What are government's duties to obtain information in support of commerce, national security, and economic prosperity? What are government's duties to inform its citizens? What is a public record?

Aside from regulation or restriction of foreign holding of real estate, the major policy issue relates directly to information: Who should report what to whom about real estate transactions, holdings, and interests? What information about real estate transactions, intentions of transactions, financing, ownership, and lesser interests should be made available to other parties, to government, or to the public at large? Some of the policies relating to information may pertain to any investment, portfolio or direct; other policies may distinguish the economic and institutional qualities of land. Our principal concern is information about property in land.

The concept of information is a root of property.¹⁹ The entitlement to a property object such as land is a proclamation of interest to and against the world. To the extent the claim is honored and enforced, the world acknowledges the proclamation.

Muniments of title or registration certificates are written forms of communication essentially between the rights holder and all other persons. They are public documents; they must be public to serve their purpose. Even unwritten evidences of entitlement, such as "open and notorious possession" or pre-literate public exchanges of wealth, are communications to the world—publicity.

Public though they may be in a legal sense, the public land records are not in fact a generally accessible display of land, interests, and interest holders.²⁰ The character of public records of landholding has been shaped by requirements of parcel conveyancing.²¹ Public records are suited to assurance of individual interests on a transaction-by-transaction basis. They are generally not suitable for a cross-section display of ownership status, say, of a whole jurisdiction.

Ownership status is further obscured by trusts, nominees, and other devices which veil the beneficial owners of property.

The economic function of information is to reduce uncertainty in the processes of resource allocation or exchange.²² By reducing uncertainty in the assignment of benefits and costs to people, information also plays a role in the distributive process.²³ From a public or economic point of view the arguments for information may be summarized as strongly in favor of the maximum amount of accurate information that cost will allow. From an individual point of view, however, withholding information can provide private advantage. Much of the world's commerce is conducted on the basis of private advantage of secrecy or misinformation. A substantial portion of the real estate trade, for example, is conducted with privileged (restricted) information. Secrecy is clearly to the advantage of the traders; the advantages to the public at large are less obvious. From an economic or social standpoint of information, the

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use of a nominee to obscure beneficial ownership is a lie. Whether such lying has overriding advantages to an economy and society should be a matter of public policy discussion.

With the possible exception of the essentially untested law of Iowa,²⁴ no state has a system of record keeping that identifies the actual owner of land by his citizenship. Iowa's modest entry into ownership disclosure provides an interesting prelude to the inquiry of individual and national rights to wealth encouraged but not ventured by Alfred Marshall 85 years ago:

"Individual and national rights to wealth rest on the basis of civil and international law, or at least of custom that has the force of law. An exhaustive investigation of the economic conditions of any time and place requires therefore an inquiry into law and custom; and economics owes much to those who have worked in this direction. But its boundaries are already wide and the historical and juridical bases of the conceptions of property are vast subjects which may best be discussed in separate treatises."²⁵

AN INQUIRY INTO THE OWNERSHIP OF U.S. LAND

Recitation of facts, such as 4.9 million acres owned by foreigners and 62.8 million acres leased by foreigners,²⁶ is a sterile exercise without an understanding of the processes by which land ownership changes, the forces that have affected and will affect ownership distribution, and the effects of investments in land. This report provides the ingredients of a policy-oriented inquiry into U.S. landholdings.

In their most general form the issues can be summarized simply into one: there is lack of knowledge not only about land ownership facts but about their causes and consequences. These causes and consequences are digested and combined below under four topics: 1) the real estate institution and investor behavior within the institution, 2) impacts of foreign investment on the economy in general and on particular sectors and regions, 3) formation and administration of federal, state, and local law, and 4) needs and technology for, and limits on, the disclosure of land ownership information.

The Real Estate Institution

The author has not premised his analysis on a large volume of foreign investment in land. Nevertheless, his inquiry provides useful insights for policy if a large volume of foreign investing in U.S. land were to take place. A growing familiarity with American brokerage, financing, and transfer institutions will tend to encourage real estate investment by foreigners. Therefore according to the reasoning by Burke, Harris/Hampel, Dovring and others, even if the proportion of all real estate owned by foreigners is small now, the quantity will probably increase.

Public policy on foreign investment in U.S. real estate needs research on a continuing basis, not only to monitor the facts but to understand and project the public's intentions and interests. Timmons, in his overview of the relation between policy and research, emphasizes that data and reliable analysis are needed so that policies will not be fashioned from emotion, myths, and fragments of information.

Research questions arise as much from perspective as from situation. One perspective of foreign investment is the flow of capital over time. This flow of capital into the country began long before the United States achieved nationhood. Anderson, in his historical review reminds us that large tracts of West Virginia land were purchased by British investors to sell to immigrants. The story of European investment in U.S. land was repeated across the whole country. Much of the European investment, however, was not channeled into land exclusively. Our historical data must combine time series of total investment with fragments of information on real estate. Often the type of investment would obscure the element of land. Investments by Europeans in American railroads, for example, was a *de facto* investment in railroad lands, granted by the government and, in turn, sold to settlers.

It would be easy enough to associate the developmental capital which flowed into America in the 19th century with speculations and investments in land. As Anderson points out, rarely are capital accounts sufficiently refined in historical data to distinguish the land element.²⁷ Benefits stemming from the development of transportation, manufacturing, and construction could be mistakenly attributed to land purchase, sale, and lease. Before an accurate assessment of the economic effects of foreign investment can be made, the purposes of the investment must be known.

In the mid-20th century the locally oriented U.S. real estate market extended itself to a national trade. Then in the early 1970's the American real estate establishment internationalized its perspective. Not only are foreign buyers now undergoing an educational process, American financial organizations, brokers, finders, attorneys, and insurers are learning the international land game. Early in this inquiry we asked: Is there an international real estate institution? Burke, in his article on transnational conveyancing, concludes "yes," but it is still taking shape. The lack of uniformity in state land law combined with possibly overriding federal law creates a complex web of doctrines and rules that are difficult enough for those familiar with American conveyancing. To the foreign investor the rules are even more perplexing. Furthermore, as Brown states *infra*, laws and ordinances are not always applied equally to outsiders and locals.

The unique and complicated features of the law may account for some of the conservative approaches to real estate investing in these early stages of the internationalization of the institution. The uncertainty of investors and advisors creates a "herd instinct" and causes them to follow regional or sector patterns with which they are familiar. The lack of large-scale, smoothly functioning markets probably affords an opportunity for the one-person, small-firm finders to trade profitably in limited information.

The foreign investor is likely to have a large equity in real estate, purchased not only because of his financial capability but because he is apprehensive about the information requirements of American lending institutions. Unless the foreign investor abandons his traditional reticence about disclosing information, it is likely that effective reporting requirements would tend to discourage foreign purchases.

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tions are rooted in, and are implemented in the presence of, an equally complex collection of attitudes and beliefs of citizens about foreigners. The alien land laws are but reflections of attitudes of exclusion from the territorial club. Lack of experience, explains Summers, is no bar to expression of an attitude. Attitudes may be built from complexes of beliefs, and so the attitude toward Arab purchase of a neighboring farm may have nothing to do with a farmer's experience (or lack thereof) with Arabs. Furthermore, his attitude about farm land may differ completely from his attitude about an industrial site. An informed position on public reaction to foreign investment in real estate requires more than ascertaining surface opinions. Thus, informed public policy will require an examination of basic attitudes held by those who influence the content of the policy.

At the other end of the policy chain are the issues related to the uses of power. Ownership and control of land is a means for distributing and exercising power; the rules governing the acquisition of title, the application of regulation, the distribution of income, and the incidence of tax all are subject to the political process. Rule-making and rule enforcement are political processes, and as Loveman points out, ownership is actually defined in terms of the location of decision-making about the use of land or about the distribution of benefits and costs of land holding.

The relatively few restrictions on foreign ownership of U.S. land is a reflection of the decentralized power of numerically strong landowners and the real estate establishment—brokers, attorneys, financial institutions, and others associated with the transfer and management of real estate. This strong position is not unique to the United States. The political power of land ownership explains why there have been virtually no successful land reforms in the world that did not involve shifts of political power.

The basic political question is, according to Loveman: Do citizens in general have a right to know who owns America's land? His question recognizes directly that information is not only economically valuable but politically powerful. The answer to the question is by no means simple because it inquires into the nature of commercial security, privacy of wealth, and relationship between government and citizen. In the case of foreign ownership of land the answer extends to relationships among nations. Hopefully the answer will express more than textbook clichés on free trade.

Three papers by Paulsen, by Harris and Hampel, and by Currie, Boehlje, Harl, and Harris, examine the real estate institution from the point of view of those participating in the investment process. Paulsen's comparison of German and Iranian investors makes the simple, direct point that investment motivations differ, and these differences will be reflected not only in the type of investment but the manner in which the investment is undertaken. His observations about investment motivations are borne out, partly at least, by the study of real property transfers in Iowa reported by Currie and others. The Iowa study not only found that the number of completed sales to foreign investors was small, but also that the sales were predominately to Germans. The study confirms, to some extent, what Burke refers to as a herd instinct of investors, what Summers suggests about discriminatory attitudes, and what Paulsen says about the pref-

erences of types of foreign investors. The Iowa study incidentally indicates the difficulty of documenting sales to foreign investors.

The investment model by Harris and Hampel rigorously defines the elements of the investor's bidding potential. Their equations state the relationship between the bid prices and the characteristics of the investor, including his risk preferences, value of his portfolio, his tax rate, and his expectations about income. From the model it is possible *a priori* to indicate the sources of bidding advantages to a domestic farm operator or to a foreign investor. The biggest advantage to the domestic operator is greater income per acre. Included in other advantages are the lower transaction costs to domestic bidders. The advantage to the foreign investor is diversification of the investment portfolio so that marginal riskiness is lower than for the domestic bidder. The relative riskiness of investments due to political conditions in other countries may cause the foreign investor to be less risk averse to American property.

From all of the examinations of investor behavior, it seems that improved information could lower transaction costs and encourage better investment decisions as a whole. That is not to say, of course, that it is to the advantage of any particular investor or broker for any particular transaction to reveal anything about his investment intentions or actions.

Economic Impacts

Having examined the character of the real estate institution and the behavior of investors within that institution, we turn now to the economic impact of foreign investment in land. Doving and Gaffney seek to answer the question: Do purchase and possession of land have the same impact as other direct investments?

Notwithstanding a U.S. policy that generally encourages the inflow of capital, we should be circumspect about foreign ownership and control of land. According to Doving, the long-run benefits to the United States of foreign investment in land are doubtful. Doving argues that the society and a private entity differ in their perceived discount or interest rate. Individuals, compared to society, have a high time preference for present income. This difference is particularly significant in calculating the value of a non-depreciating asset such as land. Society can afford to accept a lower rate of return on the value of an asset.

The social account value of land to the United States as a nation is greater than the private market indicates. Therefore, transfers in the private market will not reflect this public interest. According to several authors, foreign and domestic purchasers differ in their perception of land as an investment asset. Some of these differences are attributable to tax laws of various nations. The real property tax is payable by all foreign and domestic owners, but other taxes on income from land, capital gains, or inheritance may not be the same for the foreign as the domestic owner.

Doving and others note the relatively low value of real estate in the United States compared to comparable real estate in other countries. Doving notes that long-term investors, especially institutional or governmental, can sustain relatively low current returns because of contemplated longer term capital gains. Expectations of such capital gains are supported by the experience in

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other countries and the probable policy of the U.S. government to continue programs whose effect is to enhance land values. Given the relative states of management and technology in the United States and abroad, there is small likelihood that foreign investment in land, farmland at least, will result in intensification of use or increased productivity.

In summary, Dovring sees few positive impacts resulting from foreign investment in farmland or forest land. Presumably, one could extend some of his arguments also to open land suitable for development. A similar case against foreign investment in real estate which results in construction, development, employment, formation of joint-venture capital, and transfer of technology would be less convincing.

Sales of land to foreign investors, according to Gaffney, are equivalent to borrowing abroad. The real issues are the impacts of real property investment which are conditioned in large part by domestic institutions. Presumably, therefore, problems associated with international land transactions are manageable as domestic policies.

Gaffney enumerates advantages of foreigners purchasing land, such as a transfer of capital in time of need, the stability of land sales over flights of "hot money," the economic and political stake of foreigners in the United States, the balance of U.S. investment abroad, the infusion of new management, and obviation of policing a restriction. The disadvantages include loss of control of resource use by U.S. citizens, the preference for less intensive land use associated with foreign investor preference for minimum management, loss of sovereignty associated with land, less concern of foreign investor for community well-being, loss of tax base through income and consumption taxes, loss of secondary demand because of absenteeism, and increased ownership concentration.

The net advantage or disadvantage to a nation of direct foreign investment, according to Gaffney, depends on the structure and operation of domestic institutions. In particular, he notes that the tax structure generally favors the foreign investor. The exception is the property tax; Gaffney suggests real property taxes as a way to offset disadvantages associated either with foreign investment, or with traditional preferences land and landowners have enjoyed in the economic system. He and others note that foreign investment in real estate is not in itself a problem but is, instead, a symptom of lower domestic capacity for capital accumulation.

The general analyses by Dovring and Gaffney pertain to the abstract qualities of land. However, the impacts of foreign investment will differ widely among land uses and regions. Several analyses were directed to specific uses—namely, farmland in Iowa discussed above; forest land; minerals, especially in West Virginia; recreation and other uses in Hawaii; and land ownership in Texas and Colorado.

Both Irland and Labys, in examining respectively timber and mineral resources, stress the importance to foreign investors of assuring supplies of natural resources for their homeland. They note that land ownership is only one of the ways of assuring supply. Land use and income may be controlled by

leasing, contracting, and even marketing practices. Commonly, control is obtained by a combination of ownership, leasing, and contracting—often through complex systems of subsidiaries and affiliates.

Although land prices are low and growth rates are high in the United States in relation to the rest of the world, foreign investment in timberland has been small—one third of one percent of U.S. commercial forest land. Irland explains that timberland, with its management requirements and cash flow delay, is unattractive to the foreign investor. In Alaska, forest production of interest to the Japanese is on state and federally owned land. Japanese investment, therefore, has gone into processing logs and pulp. Except for Alaska, most of the foreign investment in American timber serves the U.S. market. The economic effects of foreign investment in timberland, according to Irland, have not been negative. This may be accounted for in part by joint ventures with American investors.

Foreign investment in coal has been heaviest in coking coal; mines with foreign investment produced 16% of the U.S. coking coal. Labys estimates that West Virginia mines with foreign interests would produce 18% of the state's production by 1978, a doubling in five years. Labys judges that foreign investment in mining processes has a favorable impact on the balance payments, employment, and income. He indicates that the predominant investment is in extraction and processing rather than in mineral land ownership. He does not assign any particular economic benefit to foreign ownership of mineral rights or mineral land ownership. He points out the inadequacy of available data, and recommends "considerable further work."

Gertel, in his study of foreign, largely Japanese, investment in Hawaiian real estate, noted that ownership of nearly 40% of the hotel units in Waikiki and a substantial portion of the condominiums was of the structures while land remained in Hawaiian ownership. About one-fourth of the \$517 million of foreign real estate investment in Hawaii in 1975 was new construction, estimated to have increased income to Hawaii households by some \$178 million. Foreign real estate investment expanded the economy of Hawaii but also added to problems of congestion, traffic, the oversupply of condominiums, and high land prices. Some two-thirds of the foreign real estate investment were takeovers of existing resort facilities, sugar plantations and purchase of land tracts. The national impact of these takeovers could not be fully traced; they depend, among other uncertainties, on whether sellers invested funds received in the American economy. Gertel joins Gaffney in stressing land use and tax policies as basic defenses against adverse impacts of foreign as well as domestic real estate activities. Citing citizens' concerns he calls for authoritative information on foreign-owned real estate supported by an adequate data base.

The Colorado real estate market examined by Waples reveals a familiar problem in identifying current or prospective foreign investors. Colorado law, for example, requires assessors to file annually a list of nonresident taxpayers, but does not require that the beneficial owner be identified. Through personal interviews with real estate brokers and counselors, Waples was able to identify some urban, recreation, and development action in the real estate market. Although some farm and ranch land has been sold and many more inquiries

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have been made, the amount of land is small; Waples could verify only 1,780 acres and rumors of about 38,000 additional acres. Inquiries apparently are numerous; transactions are few.

The Colorado survey of bankers, brokers, extension agents, recorders, and assessors revealed no strong opposition to foreign investment by Coloradans. According to Waples they favorably regard the import of capital. Two reasons are given for opposing foreign investment—absentee owners have no interest in community affairs, and outside investment causes land prices to rise.

Schmedemann divides the real estate market into separate submarkets in terms of the types and objectives of buyers. He found that most foreign investment was disadvantageous to communities and agriculture. In addition to two traditional markets based on 1) production income and 2) consumption utility, he identifies 3) an inflation market for foreign and domestic buyers. Particularly under the conditions existing in Texas and the Southwest, an absentee foreign investor will have little incentive to invest in rural communities. Typical expenditures associated with foreign investment will have low multipliers and high leakages. Community consolidations and shifts of economic activities to larger centers will result not only in economic changes but changes in political outlook. Because the proportion of land changing hands is small—probably less than 2%—a relatively small number of transactions can affect land values. An increase in foreign investment in agricultural real estate will increase land prices and thus increase the cost of agricultural production. Schmedemann sees a number of reasons for an increasing trend in foreign investment in Texas and Southwest rural real estate, but little advantage of such investments to communities or to the area's agriculture.

Law of the Land

Law—its foundations, structure, and administration—will have a significant bearing on real estate as an investment. American law has a number of features, not well understood by foreigners, that could influence investor behavior. Some legal issues have yet to be completely resolved. One such issue is the strength of state laws prohibiting foreign holding in light of the treaty powers of the federal government.

Law affecting land use and development has been more prominent in urban areas. Zoning, subdivision controls, building codes, and health regulations are found in both rural and urban areas, but they are of greater significance in urban areas. Thus Brown, in his review of land law impacting foreign investment, focuses his analysis on urban land. He notes that the number, complexity, and divergency in local applications of land use regulations reduce the attractiveness of real estate as a foreign investment. For development particularly, the intricacies and inconsistencies of local land laws are a deterrent to investment.

Zoning law does not differentiate between foreign and domestic land owners. The alien investor will not be affected *per se* by his alien status. Within broad guidelines, however, there remain wide areas of discretion by local officials. Brown emphasizes that the zoning game is sometimes played with favoritism; "outsiders," foreign or domestic, are at a disadvantage. Foreign investors may be advised to joint-venture with those who are locally favored.

Subdivision regulations have increased, and subdividers have been required to accept more of the costs of installing utilities. Community management and control has expanded and, as in the case of zoning, approval and monitoring of subdivision regulations can be exercised in discriminatory ways. Housing and building codes, too, vary widely, not only in the provisions of the ordinances but in their application.

One possible source of misunderstanding is the power of eminent domain held by most levels of government. Its significance is lessened somewhat by its infrequency of use. Nevertheless, foreign investors may be unaware of the ease with which land can be condemned, not only by federal or state governments but by the delegation of this power to private entities. Of course, just compensation must be paid, but presumably courts could, even if now they do not, compensate at considerably less than market value.

Brown also reviews management and control processes exercised by property owners' associations, condominium associations, Realtors, builders, and other trade associations which impact on development either through their role under statutes and ordinances or through contracts and covenants. At the other end of the government scale are state, regional, and federal agencies. Environmental and consumer protection legislation will affect not only the ease with which real estate is marketed but the uses to which the land may be put. Alien investors could overemphasize the American constitutional protection against expropriation of private property unless they are carefully advised of the exercise of eminent domain powers or the effects of other controls and taxes.

At the other end of a legal spectrum affecting foreign investment is international law including customary law, multilateral treaties and bilateral treaties. Morse concludes that treaties, coupled with most-favored nation clauses, severely limit federal or state laws attempting to restrict alien ownership. However, a registration requirement, either of state or federal government, would not be superseded by a previous treaty or be in violation of a treaty.

With the possible exception of land under the sea neither customary law nor multinational treaties have any important bearing on foreign land holding. Bilateral treaties, however, do affect directly the alien ownership of land. Citizens of Denmark and Ireland may own land for almost all uses except agriculture and mining. Six other treaties provide most-favored nation treatment as to acquiring and possessing land. Most countries allow time for disposing of land if alien status is a bar to possession.

Most bilateral agreements are the treaties of friendship, commerce, and navigation which contain provisions granting persons or corporations specific rights to own or use land in the United States. Usually the treatment grants a level of treatment pertaining to the specific right. National treatment guarantees that the national government will not discriminate between aliens and citizens and states will afford the same treatment as citizens of other states. Most-favored nation status assures the alien that he will be treated the same as a citizen of any other foreign country. The supremacy of treaties and most-favored nation provisions severely limit state laws restricting inheritance and possession of land. Of the 43 treaties currently in force about half have granted

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national or most-favored nation treatment to aliens for ownership or lease of land for residential, industrial and commercial purposes. Agriculture and mining are excluded. This means that state laws which confine their restrictions to agricultural or mineral land are less likely to be superseded by treaty.

Morse also reviewed the laws of Yugoslavia, Mexico and Canada, three countries which have recently examined their alien ownership policies and which represent widely differing political perspectives. Yugoslavia, which permits private ownership of only residences and small plots by its citizens, does not permit any direct alien ownership of land. Its imports of capital are through joint ventures with the alien retaining title to his assets but not acquiring an interest in the enterprise. Some modifications of law relating to use are resulting from the Yugoslav desire to encourage capital investment from abroad.

An alien wishing to acquire ownership or control over Mexican land is subject to that country's Foreign Investment Law. The law prevents foreign ownership of coastal and border land. It also reserves some land uses to the Mexican government or Mexican companies, usually mining or forestry. Registration is required of alien investors with penalties for failing to register.

In Canada restrictions on alien ownership differ by provinces. Restrictions by the federal government under the Foreign Investment Review Act (1973) also will have a bearing on alien ownership but the division between federal and provincial responsibility is still not entirely clear. Purpose of the FIRA is to screen foreign investments generally and as yet has had little to do with real estate. Older authority, the British North America Act, delegates to the provinces the power to regulate, manage and sell real property to the public. In some provinces there are no important restrictions even on state owned land and in others, such as Prince Edward Island and Saskatchewan, alien ownership above a specified amount is prohibited.

In Alberta, Nova Scotia and Ontario, alien investors are required to register. The Nova Scotia Land Holdings Disclosure Act requires all non-permanent residents who acquire land holdings, and anyone acquiring on their behalf, to register. The Nova Scotia law was recently upheld in court. Ontario not only registers alien land investors but charges a 20 percent transfer tax. The Ontario Law has the effect of making up some of the disparity between private and public value of real estate.

The law of the land as it affects foreign investment in U.S. real estate extends much beyond the state restrictions on alien investment. Brown shows how zoning and subdivision law—the discriminatory manner in which it may be administered—may influence investor decisions. Morse shows that treaties and federal supremacy nullifies much of the state limitation if, in fact, it were effective. Both writers indicate the need for better information and recommend a policy of reporting or registering alien interests in land.

Information

From the outset of this inquiry the author has been perplexed by the absence of aggregative statistics on alien investment in land. The lack of land ownership information is not unique to alien investment. On any but the local level we do not know who, domestic or foreign, owns the land. Universities, pri-

vate organizations, and federal agencies are attempting to obtain better information, but a national system for data collection has yet to be developed. The final section of this report focuses on what may be the only fundamental policy issue—information. Who gets what from whom, how, when, and where.

Most of the studies in some way touched the information question, but Zumbach, Harl, and Cook made it the central focus of their investigative efforts.

The two most logical sources of land ownership data are the conveyancing and tax assessment processes; these are within the authority of the states and are administered by localities. We therefore look first to these governments. However, it appears that an adequate land ownership system will require some federal action or a coordinated federal-state-local undertaking.

From the standpoint of data on alien ownership, the most advanced state reporting procedure appears to have been designed by the 1975 Iowa General Assembly. Iowa has had restrictions on alien ownership since the 19th century but without monitoring. As described by Harl, the procedures under the new act (House File 215) call for corporations, partnerships, and nonresident aliens who own or lease agricultural land for farming to report annually to the Iowa Secretary of State. The report includes the identity of beneficial owners. County assessors are required to submit lists of names and addresses of aliens, corporations, trusts, and other entities shown on the assessment rolls. Data from the first year's reports are expected in mid-1976. Experience with the Iowa reporting law will indicate what can be done at the state level.

Zumbach and Harl review the implications of state and federal reporting, assuming certain ownership information needs. State recording acts, as presently written, do not provide a basis for adequate reporting of alien ownership because 1) alien status of the owner is not required during the recording process, 2) the holder of legal title is not necessarily the beneficial owner, and 3) although there are some risks associated with not recording title, it is not a legal requirement. The problem of beneficial ownership, as Zumbach and Harl write, is likely to be a problem in any reporting procedure, not just in title recording. Artificial entities—trusts, corporations, partnerships—may obscure the identity of owners even if there is no attempt to maintain secrecy. Artificial entities may have no idea who the holders of equity interests may be at any one time. Although collection of the information is possible, it is likely to be costly and resisted by large firms. Even if all beneficial ownership were identified the reporting system would not reveal control.

If the reporting requirements were to rest solely with the states, there would be little likelihood of consistency of concepts or procedures among them. Further, because of the full faith and credit relationships among states, a state that wanted to become an anonymity haven would probably not have to report investor information to other states. Zumbach and Harl therefore conclude the need for some federal involvement. They rely on the commerce clause for federal authority to create a reporting system. They also might have included the "general welfare" clause. Their analysis points to a need for some combination of 1) existing state and local responsibilities for real property taxation and title recordings, and 2) federal standards, coordination, and collection of data.

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Although some federal, state, and local government involvement may be assumed, professional and private associations could take an important—perhaps a primary—role. The titles of the Uniform Simplification of Land Transfers Act (USOLTA), dealing with recording for example, might be so worded as to provide suitable information reporting. Research departments of organizations such as the National Association of Realtors® or the American Land Title Association might generate aggregative data from their members.

The technical issue of information on alien land ownership is that the data sources are local, subject to avoidance and evasion, and oriented to a single transaction such as paying a tax or conveying an interest. In contrast, data needs are national or state, aggregative, and unambiguous. Any continuous monitoring procedure by the federal government will require a new program and new authorities. A single-purpose monitoring program probably would be too costly except on sample of such small a size as to be dubious reliability. A proposal for a specific system may be premature but some features of an adequate system can be identified.

The land data system should be:

- 1) Oriented to ongoing local functions such as planning, zoning, conveyancing and tax paying.
- 2) Updated regularly and frequently (no less than annually).
- 3) Comprised of data not only of alien status of land owners, but by type of owner (government, corporation, individual, and so forth) and area and value of the property.
- 4) Oriented about a universal system of identifiers.
- 5) Designed to provide adequate security for data considered to be outside the scope of public information.

Such features are being discussed by a number of professionals and organizations. The section prepared by Cook discusses a 13-year review of organized efforts in land record improvement that lead to the North American Institute for Modernization of Land Data Systems (MOLDS).

The MOLDS Institute, incorporated in the District of Columbia in 1974, is an association of 16 Canadian, Mexican, and U.S. governmental and professional organizations seeking to design compatible land data systems. The general objective of the association is the coordination of land recording functions from the national to the community level, with the view to design a national cadastre. U.S. involvement in the Institute is heavily influenced by over a decade of work by one of the committees of the American Bar Association. This committee is seeking to improve the archaic state of title records and recording. The Institute places emphasis on systems that could yield aggregative information while performing regular government functions. In concept the national cadastre could provide information on alien (or any other) ownership while satisfying the needs for conveyancing, assessing, planning, and other local and community functions. The national cadastre would eliminate duplicative data gathering, lower the system overhead, provide better security of information, and coordinate public and private land requirements. Although the cadastre may not be the only or the ideal solution to the problems of missing data on alien land ownership, it is a concept with promise.

The design of efficient information systems implies more than technical issues. Systems which provide easy, inexpensive access to ownership information also imply value issues—that is, public disclosure. Should the quantity, value, and location of real estate owned by aliens be public? Should the owners' names and characteristics be related to types, quantities, and location of land? Those supporting a negative answer to the two questions refer or allude to privacy. They associate ownership of land with personal anonymity and, therefore, disclosure is an infringement on personal rights of privacy. Ownership information is also regarded as valuable stock in trade, and to publicize is to expropriate. Another argument against disclosure is that reporting takes the time of property owners, is a nuisance, and serves no useful purpose.

Those supporting the reporting and disclosure of real estate ownership (including alien status) argue that the transactions of transfer of real estate are already a matter of public record; indeed, the act of conveyance and possession are public for the protection of the owner. Disclosure therefore is a matter of efficiency in information handling, not a change in intent or purpose. A fundamental premise of the operation of a free market is complete, accurate, and ever-present information; and in an exchange economy, what can be more basic than knowing who the exchangers are? Monopoly (whether of use or information) is inimical to the operation of a free market. Reporting of information, its assembly, and analysis require time and resources it is true, but these transaction costs are characteristic of an organized economy or society. The real issue is, how can these costs be minimized? The present system of small, duplicative, sometimes counter-productive enterprises seeking to acquire, monopolize, and market information is quite likely, in the aggregate at least, to be far more costly than a single, open system providing unlimited access to ownership information. A completely open system of ownership information would serve not only private commercial interests but also public bodies that need information on national and international capital flows, fiscal and developmental planning, and the management of government services.

The value issue must be resolved in forums other than in this report because the authors represent a very small, and by no means representative, cross section of the American society. On the basis of the analyses thus far, however, we can reach some conclusions.

CONCLUSIONS

Alien investment in U.S. real estate as a policy issue can be reduced to two questions: Should the opportunity to own U.S. land be conditioned in any way by citizenship status? Should information on the ownership of land, nominal and beneficial, be readily accessible to the public?

This report has dealt with many refinements and ramifications of the questions. We now attempt to answer them as simply and directly as possible, even with qualifications.

Ownership Restrictions and Conditions

There is an economic basis for restricting foreign ownership of at least some types of land under some economic circumstances, particularly from a long-range point of view. Under some circumstances, foreign

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investment may overcome shortages of capital brought about by an unwillingness or inability of domestic savers to invest. If capital shortages are impeding development, foreign injections may boost employment and income, and stimulate growth. An important issue, beyond the scope of this study, is how foreign investment replaces or stimulates domestic savings and investment. The purchase of raw land is purely an economic transfer, with no increase in the quantity of available resource. The exchange of money for land, of course, may have the secondary effect of providing funds to the previous owner who either 1) hoards, 2) invests, or 3) purchases consumer goods. The impact of foreign investment in raw land depends on the economic behavior of such previous owners and the follow-up behavior of the new owners.

The initial impact that foreign investment in real estate has on employment, income, and growth appears positive on net but subject to some negative effects such as increased land prices. In the long run, real estate investment yields interest or rent with a reverse effect on the balance of payments. Both the initial and long-run impacts of real estate investments are affected by general economic conditions.

Perhaps the economic issue is best stated as a converse question: If the U.S. economy is in need of foreign investment, might there be places to invest that would be more advantageous to Americans than their land?

There appear to be social, political, and legal bases for restricting foreign ownership of land. These bases exist as facts, however, and they do not necessarily provide a guide for what ought to be. Policies must be decided on examination of fundamental values. Values pertaining to foreign ownership of land are often influenced by beliefs about community, sovereignty, and independence as well as economic well-being.

In place of outright restrictions on foreign ownership of land, there are other policies applied to all owners that could lead to preferred outcomes. For example, the United States or the states could discriminate in price to foreign purchasers, perhaps by surcharges such as Ontario's 20 per cent transfer tax. Guiding land use and development, sharing of returns from land (through no-escape income and transfer taxes), and improving the structure of *ad valorem* property taxes offer greater promise as land policies.

Information on Land Ownership

From the standpoint of existing treaties and domestic law there appears to be a much stronger basis for improving reporting systems which reveal foreign ownership than for restricting foreign ownership. The bulk of land ownership information is now in public records. It fails to be of public use only because of the system's awkwardness and inability to aggregate. Relatively few changes in law, such as those in Iowa, could start to draw back the curtains of ownership secrecy.

In an economic system premised on private property and a free market, the efficient allocation of resources calls for complete information. Economically rational allocations rest on accurate assignment of benefits

and costs to owners of resources. High costs associated with the assembly of information or the monopolistic control of information tend to produce bad economic decisions.

Information assembly and organization is not without cost, however. Economic decisions often must be made without complete information because the expected benefits from the additional information are less than its cost. Nationwide data on land ownership appear collectable only from local government sources. Thus, unless there is federal involvement, data would be inconsistent and irregular. But the cost of a single-purpose data system would be excessive. Therefore, the preferred information system will be based on state authority for property assessment and title recording, operated by local governments, and standardized through the federal government.

Recommendations

Recommendations correspond to the two basic issues stated above:

Continue the current policy of limited federal restrictions on the alien ownership of land, without preemption of state restrictions, pending the completion of a comprehensive empirical study of the long-run economic, social, and political impacts of foreign real property investments.

Develop sources and procedures for the reporting of completed investment transactions to a federal agency or agencies, with regard to the extent, location, values, and uses of all real property conveyed or under contract to foreign individuals and entities, whether nominal or beneficial owners.

Encourage states to adopt legislation requiring local officials to identify alien interests in real property and to make such interests items of public record systematically reported to the state for collection and analysis by an agency or agencies of the federal government.

Promote the design of systems to collect and process information on real property more efficiently and at reduced cost. Create a commission with representation from Congress, selected federal agencies, organizations of state and local officials, professional societies, and private industry to recommend system standards.

REFERENCES

1. S. Livermore, *Early American Land Companies* (1968), p. 25.
2. *Ibid*, p. 27.
3. Discussed with other aspects of the history of citizenship in J. Kettner, "The Development of American Citizenship in the Revolutionary Era: The Idea of Volitional Allegiance," 18 *American Journal of Legal History* 230 (1974).

4. F. Morrison, "Legal Regulation of Alien Land Ownership in the United States, in U.S. Dept. Commerce, Foreign Direct Investment in the United States," Interim Report to Commerce, appendix II (1975); F. Morrison and K. Krause, "State and Federal Legal Regulation of Alien and Corporate Land Ownership and Farm Operation," Agricultural Economic Research Report 284 (May 1975); Council on International Economic Policy, Summary of State Legislation affecting Alien Investment in Land and Related Resources, prepared by Washington and Lee Law School, unpublished 1974; and Economic Research Service, Memorandum on State Legislation Affecting Alien Investment, summarizing material from Martindale-Hubbell, November 16, 1973.
5. P. Gates, *History of Public Land Law Development* (1968); A. Chandler, *Land Title Origins: A Tale of Force and Fraud* (1945).
6. See for example, M. Price, "Law and the American Indian" in *Readings and Cases* (1973); "... the Anglo-Saxon commitment to private property obviously yielded in important ways to the rapacity of the European settlers and the frontier expansionists ..." Origin and legal reasoning pertaining to European claims may be found in Chief Justice Marshall's opinion in *Johnson v. McIntosh*, 21 U.S. 98, *Wheaton's United States Supreme Court Reports* 543 (1823).
7. Land schemes appeared before the Revolution, and the annals of real estate speculators contain the names of many of the nation's founding fathers. Land promoters such as Robert Morris, Patrick Henry, and Sam Blodgett, first supervisor of the city of Washington, D.C., flourished in the early days of the Republic, and appear in America's land legends. George Washington wrote to his friend William Crawford, "Any person who neglects the present opportunity of hunting out good lands ... will never regain it ... my plan is to secure a good deal of land." See A. Chandler *supra*, p. 71. M. Harris describes real estate machinations of an earlier time: "... Andrew Craig was a dummy owner who immediately reassigned his part of the Burlington Company venture to Cooper. Also Washington's share in the Dismal Swamp venture was sold to a dummy owner in Alexandria. He immediately reconveyed it to Bushrod Washington, one of the executors." See Harris, *Origin of the Land Tenure System in the United States* (1953), p. 291.
8. The market approach to real estate shows a 1975 asset value of \$3,361.5 billion for all U.S. real estate. Another approach, more closely related to national wealth, would put the value at \$4,361.5 billion. Land represents about one-third of the value of real estate. See *Appendix I*.
9. M. McDougal, H. Lasswell, and L. Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas," 83 *Yale Law Journal* 901 (1974).
10. A. Bickel, "Citizenship in the American Constitution," 15 *Arizona Law Review* 369-387 (1973).
11. Mason Gaffney points out, however, that some citizens have a greater interest in the common property than others, and, in the extreme, some of the common property is not altogether common. Gaffney also describes the process by which beneficial citizenship is conferred on foreign nationals (casiques) through military spending. See Mason Gaffney, "Benefits of Military Spending," *Proceedings of 10th Annual Conference, Committee on Taxation Resource and Economic Development* (Madison, Wisconsin, October 25, 1971).
12. Bickel *supra*, p. 383.
13. McDougal *supra*.
14. Individual advantage is consistent with the notion of citizenship and benefit. The benefits to members of the multinational corporation are extraterritorial to a particular country. Nevertheless, national policies do influence the multinationals, hence its members; so the ultimate effect of a policy may be determined by the direction of allegiance of the "dual citizens" of a country and a multinational.
15. Bickel *supra*.
16. See for example the issue of standard universal identifier extensively treated in U.S. Department of Health, Education, and Welfare, *Records Computers and the Rights of Citizens* (July 1973).
17. *Ibid*, and the Privacy Act of 1974 (P.L. 93-579), 93rd Congress, December 31 (1974).
18. See for example: "Note, Government Access to Bank Records," 83 *Yale Law Journal* 1439 (1974); R. Block, "Of Records and Reports: Bank Secrecy Under the Fourth Amendment," 15 *Arizona Law Review* 39 (1973); and J. Rule, "Private Lives and Public Surveillance" (1974).
19. This view of property is examined in G. Wunderlich, "Property Rights and Information," 412 *The Annals* 80 (1974).

20. B. Burke, "Governmental Intervention in the Conveyancing Process," 22 *American Law Review* 240 (1973).
21. F. Leary Jr. and D. Blake, "Twentieth Century Real Estate Business and Eighteenth Century Recording," 22 *American Law Review* 275 (1973); also P. Basye, "A Uniform Land Parcel Identifier—Its Potential for All Our Land Records," 22 *American Law Review* 251 (1973); and D. Moyer and K. Fisher, "Land Parcel Identifiers for Information Systems" (1973).
22. D. Lamberton, ed., *Economics of Information and Knowledge* (1971) contains a number of now classic articles on the economics of information.
23. One form of uncertainty that has received attention of economists in recent years has been in the assignment of liability and appropriation of benefit—the so-called externalities problem—which has dominated the "economics of property rights." As a broad generality, one can say there has been a confusion by economists of an assignment of value problem with an assignment of rights problem.
24. Other states, such as Arizona and Nebraska, have made some progress toward more complete reporting by trusts and corporations, but, as of this writing, Iowa seems to have the most complete disclosure measure.
25. A. Marshall, *Principles of Economics*, p. 51 (8th ed. 1920; 1st ed. 1890).
26. For details, see *Appendix I*.
27. There are few data on private landownership, even on current status. With the exception of the Census of Agriculture of 1900 and a farmland survey in 1945, there are no national statistics on landownership in the U.S. See, for example, U.S. Bureau of Census, *Historical Statistics of the United States, Colonial Times to 1957* (Washington, D.C.: U.S. Government Printing Office, 1960). The 1900 Census of Agriculture reported, incidentally, in Table 23 that 1,097 of the 1.9 million rented farms were owned by foreign owners. The 1945 study did not identify the nationality of owners.

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APPENDIX I

Land: Something of Value

Symbols, ideas and concepts are the essence of civilized intercourse, and land investment policy has its own semantic. The importance of a concept or conception may be illustrated in the way or ways we think about the value of land.

According to the market view of "real estate," the 1975 value of private real estate as a stock asset is \$2,655.6 billion.¹ This value is the market price of privately traded real estate, representing the sum of productive returns or consumptive worth of real property less taxes. Real property taxes projected to 1975 are approximately \$52 billion annually.²

Publicly owned real estate may be similarly valued at \$705.9 billion. The total value of real estate traded in the private market plus the value of public real estate is \$3,361.5 billion in 1975.³

Is the total above a full accounting of values? We counted the value of publicly owned real estate and the market value of privately held real estate. Real property owned by private holders yields benefits (less taxes) to owners and is so capitalized. But the revenues collected through taxes also are measures of value; they simply accrue to government rather than the private owners. Thus, real property taxes represent partner government's share of "privately held" real property. If the \$52 billion annual taxes were capitalized, say, at 5%, the total value of American real estate would be increased by \$1,040 billion. This \$1,040 billion added to the private value of privately held real property plus the publicly held real property yields a total of \$4,401.5 billion.⁴

1. The estimate of 1973 real property assessed value of \$679.4 billion and the 1973 assessed value excluded from taxes of \$27.6 billion are taken from U.S. Bureau of Census, Census of Government, Property Values Subject to Local General Property Taxation in the United States, 1973 Special Studies No. 69, December 1974, pp. 10-11. The comparable values for 1975 are projections of the 22.8% change from 1971-73, multiplied by a sales/assessment ratio of 1/.327.
2. The real estate property taxes were derived from U.S. Bureau of Census, Census of Government, Governmental Finances in 1972-73, table 4, 1974, p. 20, for all property taxes. The ratio of .85 real property as a proportion of all property taxes is from Advisory Commission on Intergovernmental Relations, The Property Tax in a Changing Environment M-83, March 1974, p. 267.
3. The public land estimates are based on the ratio of values private and public in U.S. Securities and Exchange Commission, *Institutional Investor Study Report*, supp. vol. 1 (March 10, 1971), House Document 92-64, part 6, 92nd Congress, 1st session; see also Appendix 2 by Grace Milgram, and a projection of the ratios of 1952, 1960, and 1968 to 21% of total value, i.e., \$705.9 billion.
4. The estimates of real estate values, while based on the data available, are dependent on projections and interest rate assumptions, so they should be regarded as illustrative only. A further refinement in the idea of real estate could distinguish land from capital embodied in land. Land is about one-third of the value of real estate. See *Statistical Abstract* of 1973, table 564 (1973), p. 343.