

MUNICIPAL INTERVENTIONS IN THE BUILDING PROCESS

by

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(1972)

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(1974)

SUBMITTED IN PARTIAL FULFILLMENT
OF THE REQUIREMENTS FOR THE
DEGREE OF
MASTER OF ARCHITECTURE

at the

MASSACHUSETTS INSTITUTE OF TECHNOLOGY
(June, 1977)

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Submitted to the Department of Architecture

on June 1, 1977 in partial fulfillment of the requirements

for the Degree of Master of Architecture

ABSTRACT

The problems of locally-enforced building regulations are discussed. The regulations include zoning ordinances, subdivision regulations, building and housing codes, and other local land-use regulatory measures. The more commonly proposed reforms for building laws are criticized in terms of their inability to deal with the problems of building control. Finally, the author proposes that a system of voluntary controls be substituted for the governmental interventions. The voluntary system consists of strengthened "nuisance" laws and implied warranties, private covenant systems, and a series of interim measures which might make such a system politically feasible. The voluntary system would avoid many of the problems of coercive governmental controls and it could conceivably accomplish the goals of a safe, sanitary, and responsive environment for all of our citizens.

.....
Nicholas Negro Ponte, Thesis Advisor

ACKNOWLEDGMENTS

My first thanks go to Professor Nicholas Negroponte for allowing me the freedom to pursue work in a topic to which I feel committed and for avoiding even a hint of authoritarian-ness in his role as thesis advisor. Equal thanks is due to Professor Dolores Hayden who inspired me to think of architecture in terms of politics and who, despite our numerous areas of disagreement, has remained tolerant and helpful.

Many thanks are also due the readers of this thesis, both formal and informal: to Anne Vernez-Moudon for her insight into the problems of self-helpers, to Alcira Kreimer whose presence forced me to consider the socialist perspective, to James Champy who forced me to (try to) cope with the legal and political issues involved in the implementation of a non-governmental control mechanism, and to Michael O'Hare whose (sometimes barbed but always incisive) comments raised the quality of the debate.

I must also thank several libertarian friends who helped in the preparation of this thesis and who provided interesting insights into some of the problems of building control: Professor Daniel B. Kotlow and Dr. Nathan Curland.

Despite all this excellent help, errors and omissions and unresolved problems remain. The blame for these faults, as usual, rests on the shoulders of the author.

1.0 INTRODUCTORY REMARKS

It is the purpose of this paper to investigate the various problems associated with locally-imposed building laws, to criticize some of the proposals for reform which have been advocated recently, and to present an alternative to the present coercive system of environmental control. The motivation for the choosing of this topic comes from the author's anarcho-libertarian orientation: the belief that the use of force, except perhaps in self-defense, is immoral -- no matter how many good intentions cloak the issue. However, since it is recognized that few people share this philosophical position, this paper has relied on a more commonsense and empirical approach.

The anarcho-libertarian bias has one significant advantage over traditional left-wing or right-wing thought: the anarcho-libertarian is class-blind. The author is concerned only with "means," never ends. The author is neither for nor against the poor, the rich, developers, environmentalists, or any other group. Briefly, the anarcho-libertarian believes that every individual regardless of class interests, should be entitled to pursue whatever goals he or she values so long as the "means" employed do not entail an infringement on the equal rights of others. The specific goals are relatively unimportant. If the "means" used in pursuit of those goals are moral (i.e., non-harmful and noncoercive), then the "ends" are both moral and acceptable.¹ At various points in this paper, it may appear that the author favors the poor or the developer, but this is merely the result of the author's observation

1.0 INTRODUCTORY REMARKS (continued)

that coercive laws have often been used against these groups. If the laws magically were transformed to disadvantage the rich or the environmentalists, the author would be no more satisfied. This attitude is process-oriented and, as such, cannot intentionally promote any particular set of class interests or values.

Not unexpectedly, the anarcho-libertarian bias leads to moral disapproval of all government interventions in the building process: property taxes, eminent domain powers, mandatory registration of professionals and craftsmen, rent control, government-sponsored urban renewal, etc. Since these topics range too widely, the present work confines itself to the rather narrow scope of local land-use and amenity controls: zoning ordinances, building codes, subdivision controls, historical commission requirements, conservation commission requirements, and the like. These are all locally-enforced victimless crime laws.

Zoning laws control building bulk, floor area, height, setbacks, lot size, frontage length, and land use. Historical commission regulations cover many of the same items and, in addition, cover aesthetic controls (but usually only apply to strictly limited areas which some people consider to have historic or architectural significance). Conservation commission regulations allow or disallow development (but usually only apply to strictly limited areas which some people consider to have ecological significance). Subdivision controls cover the lot sizes,

1.0 INTRODUCTORY REMARKS (continued)

streets, and various common amenities which must be provided when large tracts of land are subdivided into smaller parcels for development into residential neighborhoods. Building codes cover plumbing, electrical, structural, fire-preventative, and various general construction features. Together these laws effectively dictate the what, where, when, and how of construction.

This particular set of laws was chosen because it forms a cohesive, well-defined group of interventions and because the effects of any one set of regulations tend to reinforce the others. Each of these regulations seeks some (frequently high) level of amenity; each increases costs; each mandates middle-class, middle-of-the-road standards; each decreases user options.

It is the author's belief that most of the problems caused by building laws are *inherent* in the system of government intervention. The mechanisms that operated when our first clumsy attempts at building control were enacted are identical to the mechanisms that we see operating today. The personalities change, but motivations and processes seem to be immutable. For this reason, historical anecdotes are sprinkled liberally throughout this work. Through the use of historical examples, it is hoped that the reader will be able to gain a sense of the basic, essential futility of trying to control the lives of fellow human beings.

1.0 INTRODUCTORY REMARKS (continued)

Chapter 2.0 A Taxonomy of Laws, using a priori reasoning, proves that building laws per se can have no beneficial results. For the reader who understands and believes the contents of this chapter, Chapters 3.0 through 9.0 will prove redundant. Chapter 3.0 Enactment discusses the motivations behind enactment of building laws and outlines some of the problems involved in the enactment process. Chapter 4.0 Nonenforcement shows how the intent of the law may be thwarted through substantial non-compliance. Chapter 5.0 Enforcement shows how the intent of the law may be thwarted through errors in the original enactment. Chapter 6.0 Mechanisms of Exclusion discusses several of the more important ways in which those who frame the laws acquire and maintain favored positions. The problems outlined in Chapters 3.0 through 6.0, as serious as they are, are not theoretically unsolvable. For instance, a corps of well-programmed robots might solve all nonenforcement problems. They *could* evict inhabitants of non-standard housing and demolish the offending buildings; they *could* administrate zoning and subdivision ordinances without allowing exceptions; they would be unlikely to become tempted by graft; and they would have no choice but to be objective in their duties. This solution would not be satisfactory, but it is *possible*. Chapter 7.0 Values, however, outlines the basic, necessary problems inherent in any coercive system of building laws. This chapter is at the heart of the thesis. Chapter 8.0 Reforms suggests some criteria for reform and criticizes some recent suggestions for reform in terms of those criteria. Chapter 9.0 Toward a Solution advances the skeleton of a voluntary system

1.0 INTRODUCTORY REMARKS (continued)

of building control and considers the political factors that might lead us to such a system. Appendix A -- Chapter 10.0 Myths treats some specific issues in building law that may worry the average reader. Appendix B -- Chapter 11.0 "Have Nots" and Building Law and Appendix C -- Chapter 12.0 "Haves" and Building Law enumerate the various groups of individuals who have been unjustly harmed or enriched by building legislation. These final three chapters are not necessary to the overall development of the thesis, but may prove helpful to other proponents of a voluntary approach.

(1) A further discussion of this principle can be found in Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974), pp. 30 ff.

2.0 A TAXONOMY OF LAWS

Very often the conditions to which enactors and reformers of building laws have responded have been deplorable indeed. The first major push for housing code and zoning code enactment in this country followed a disastrous fire on March 26, 1911 at the Triangle Shirt Waist Company in New York City. 146 workers, mostly young girls, were killed because of provision of inadequate fire escape routes.¹ But this sort of catastrophe is merely a result of human ignorance and carelessness. Accidents of this sort will occur with or without government decrees. Even if we grant that the owner had little regard for human life, simple self-interest would have guaranteed that he would take all the precautions that he could afford against the threat of fire -- the fire destroyed his property too. The same logic applies to his workers. All other things being equal, an aware worker will choose to work in a safe environment rather than in a fire trap. But, the lawmaker argues, people are not aware and all things are not equal. This sadly, is often true, but the enactment of laws cannot improve the situation and may actually cause a deterioration in the ability of the market to respond to the wants and needs of users.

Let us now investigate the possible permutations of the conditions cited above. In the following analysis, the word "lawmaker" refers to the framer of the law. This person may be an architect or an engineer or a city planner or a legislator or an interested layperson. This is the person with the power to force others to do his will, the regulator. The "user" is the regulatee, the one who is forced to obey the law. This

2.0 A TAXONOMY OF LAWS (continued)

person may be a builder or a landlord or an architect or an engineer or a self-helper or a tenant. He is the one without the power.

Condition A:

(1) The lawmaker doesn't recognize that a building problem exists.

(2) The user doesn't recognize that a building problem exists.

In this situation, no improvement can be made except by accident. No law could help because there is no one with enough knowledge to frame the law. This situation has certainly been the cause of many modern difficulties such as Ronan Point² or the John Hancock Tower's structural inadequacies.³ Both buildings met state-of-the-art building codes, but both were structurally inadequate because the state-of-the-art provided insufficient information about the structural capabilities of these buildings.

Condition B:

(1) The lawmaker doesn't recognize that a building problem exists.

(2) The user does recognize that a building problem exists.

As in Condition A, no law could help because there is no one with enough knowledge to frame the law. But this situation is different in that improvements can be made. Every architect or designer has been in the embarrassing position of having a contractor or owner spot a foolish error. Then, amidst rationalizations and red faces, the error is corrected and a possible problem is averted.

2.0 A TAXONOMY OF LAWS (continued)

Condition C:

(1) The lawmaker does recognize that a building problem exists.

(2) The user does recognize that a building problem exists.

This situation has two subpermutations which must be discussed separately.

Condition CI:

The user is willing to correct the problem.

In this case no law is necessary because the user recognizes and voluntarily corrects the problem. An example of this situation would be found in a law requiring all housing to have a roof. This would be a silly law and would have no benefits. This sort of law is enacted frequently however and serves to make the code books thicker and more unwieldy (see Section 5.1 Underkill).

Condition CII:

The user is unwilling to correct the building problem.

This condition has two variations also.

Condition CIIa:

The law remains unenforced.

This situation is extremely common. It happened in medieval London, turn-of-the-century New York City, and modern Texas; it is the predominant pattern in emerging nations. Needless to say, such a law carries no benefits, but may be subject to much abuse (see Chapter 4.0 Nonenforcement).

2.0 A TAXONOMY OF LAWS (continued)

Condition CIIb:

The law is enforced.

Such a law is almost always a victimless crime law. Aside from such a law being paternalistic, it will, of necessity, entail side effects that will damage people more than the original problem would have. Consider, for example, a law requiring all housing to have an automatic dishwasher to promote the health and convenience of the people. For some people, primarily the rich, this law would have no substantive effect since they would have owned an automatic dishwasher with or without a law (as in Condition CI cited above). For others, the middle class, the side effects would be moderate: because of the cost of the dishwasher, they may have to forgo a weekend trip to the mountains or the purchase of an encyclopedia. But note that their condition is worsened (at least in their own judgment) by such a law -- if that were not the case, they would have owned a dishwasher and would not have to be forced to buy one (in other words, they would have been in the category of the rich above). For the poorest people in our society, such a law is catastrophic -- they may not even be able to afford any kind of housing because of it, or they may have to forgo another necessity such as food.

Condition D:

(1) The lawmaker does recognize that a building problem exists.

(2) The user doesn't recognize that a building problem exists.

In these circumstances, it might be thought that a law would be most

2.0 A TAXONOMY OF LAWS (continued)

beneficial. This is the situation that lawmakers most frequently perceive (though often they are mistaking Condition C for this one) and this is where information really can be useful. But the question arises, "Do we need a law?" and the answer emerges, "No." All that is needed to transform Condition D into Condition C is information and education. No force of law is necessary. Of course, it is recognized that the various building laws do provide needed information to designers, but voluntary standards would serve as well as coercive laws for this purpose.

From the above analysis, we can see that, at least theoretically, a building law is never beneficial and is seldom even neutral in its effects. Of course, the examples cited above are extreme cases, but the average building law differs only in its lack of exclusivity: most laws actually fall in several of the categories discussed above and their effects vary depending on the knowledge and wealth of the people *on* whom they are imposed and on the knowledge and conscientiousness of the people *by* whom they are imposed.

In the next seven chapters, let us investigate some of these situations as they have occurred in the real world.

(1) Seymour I. Toll, *Zoned American* (New York, 1969), p. 26.

(2) Hugh Griffiths, Alfred Pugsley, and Owen Saunders, *Report of*

2.0 A TAXONOMY OF LAWS (continued)

the Inquiry into the Collapse of Flats at Ronan Point, Canning Town (London, 1968), *passim*. reports how a relatively small gas explosion caused the collapse of several bays in a high-rise residential tower. The affected bays were destroyed from roof to ground floor. Although the building conformed with the codes, no one had expected that much pressure would be put on the exterior walls from the *inside* of the building. When the explosion blew out that wall, all of the bays above it came crashing down and this unexpected weight caused the collapse of all the bays below the damaged one.

- (3) The new John Hancock Tower was designed and built in accordance with Boston building codes. As the building was nearing completion, it was discovered that the wind-bracing was inadequate. The owner thereupon paid for a massive reinforcement of the deficient members. The problem was that the framers of the Boston building code had not contemplated that a structure of that size would ever be built in Boston. In both these cases the law was not unreasonable; the problems were simply a result of normal lack of foresight on the part of the framers of the codes.

3.0 ENACTMENT

The first set of problems we will investigate concerns the circumstances that surround the enactment of building laws. Section 3.1 The There-Oughta-Be-A-Law Syndrome discusses the motivation for enactment of building laws. Not everyone who advocates such controls is as well-intentioned as the reformers we discuss here (see Appendix C -- Chapter 12.0 "Haves" and Building Law for an alternate view of this process), but, for the moment, we will ignore the base motives of some reformers and concentrate on the "do-gooders." Section 3.2 The Framers' Problems and Section 3.3 The Political Process show how, even if a "good" building control could be found, its chances of enactment into law would be negligible.

3.1 The There Oughta-Be-A-Law Syndrome

People with the advantages of wealth and education have often observed the "inadequacy of other people's housing. This has always been an easy observation to make since "adequate" is a relative term. The poorest 1/5 to 1/3 of housing has everywhere and everywhen been defined as "inadequate."¹

Seeing that people are killed in fires, in structural failures, or in plagues, reformers cry, "If only the architect had done such-and-such, these innocent people would not have died." They see filth and crime among the poor and they lament, "If only the builder or owner had done so-and-so, the poor would have comfortable fulfilling lives. And they

3.1 The There-Oughta-Be-A-Law Syndrome (continued)

start enacting laws to force architects and builders and owners to correct the inadequacies.

The reformers hopes are about as realistic as the hopes of the teetotalers before Prohibition. The There-Oughta-Be-A-Law response assumes that the law will have the desired result and no other; it assumes that the law will operate in a vacuum. This is not the case.

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- (1) As pointed out in Edward C. Banfield, *The Unheavenly City Revisited, A Revision of the Unheavenly City* (Boston and Toronto, 1974), p. 22, the lowest 1/5 to 1/3 of the population has everywhere and everywhen been defined as "below the poverty line." This reasoning easily extends to housing problems, dropout problems, police brutality, and a host of other so-called problems.

3.2 The Framers' Problems

Feiss has said that "[t]he design and redesign of cities and their maintenance at the highest possible level of human, economic, and physical value is a task of such magnitude that the validity of uninformed or amateur approaches to it is subject to question."¹ But leaving such problems in the hands of the elite few is even more questionable.

"Unfortunately for the community, in lieu of solid information, [planners] will tend to rely on their own experience and background, and this inevitably creates hardships and problems for those of different perspectives, tastes, and attitudes."² Obviously, even in a relatively

3.2 The Framers' Problems (continued)

small community, a framer cannot have all the necessary information all the time: such a claim would imply omniscience about economic, social, and aesthetic values which no human could possibly possess. Thus, the framer of the law depends on "soft" information -- his personal values, the political process, historical trends -- and, of necessity, the framers' answers will be inappropriate for many people.

First, framers run into problems of conflict of interest. If they want to keep their jobs, they must respond to what their clients want.

Since the "client" is usually a government, the framers respond to the wants of the middle-class or upper-class bureaucracy which controls the government rather than to the wants and needs of the users.³ To a large extent there is no outright dishonesty involved here: those who think that "urban" is synonymous with "chaotic and unhealthy" will gravitate towards suburbs and those who believe that suburban tracts are monotonous and unstimulating will gravitate towards cities. The problem is that whatever parochial interests control the appointment of planners and code designers, these same interests will be reinforced by the framers' decisions.

Another difficulty springs from temporal changes. Though many building codes and zoning ordinances provide for periodic (even yearly) updating, the needed changes are seldom politically or economically possible to enact. People will not tolerate changes that may rezone adjacent property

3.2 The Framers' Problems (continued)

for industry or allow a fire trap to be built next door. People grow accustomed to a certain level of protection from zoning and building codes and will not sit by idly when planners suggest any lowering of standards. And if a raising of standards is promoted (stricter building codes or rezoning from industrial to single-family residential), the property owners who are affected will object to a lowering of the value of their property (non-conforming uses and substandard buildings are worth less on the market than identical buildings which, because of less stringent regulations, comply with the law).

A third problem springs from legal difficulties. As will be shown in Section 4.1 Variances, Appeals, and Other Legal Exceptions, courts will occasionally interfere in the local processes and framers must adhere to judicial and constitutional guidelines. Although zoning and regional planning schemes have sometimes allowed a locality to "take" property without compensation,⁴ constitutional guarantees do not normally allow such thefts. This legal limitation on the power of planners has long been a source of complaint.⁵

A fourth problem that the framers of laws have encountered is their own lack of foresight (see also Section 5.2 Blunders). London planners who sought open space got slim towers built on one- and two-story podia which virtually covered lots and eliminated open space.⁶ Boston's West and North Ends were long considered to be the second worst slums in the

3.2 The Framers' Problems (continued)

United States; ⁷ this erroneous view led to the demolition of one of Boston's most cohesive and socially-satisfactory neighborhoods. ⁸ A prize-winning "dumbbell" apartment plan of 1879 was cursed only twenty years later as leading to the worst conditions. ⁹ "Model" tenements in New York City frequently became uninhabitable slums. ¹⁰ And in case the reader believes that such elementary mistakes are a thing of the past, consider the recent statement (by a planner advocating uniform building codes) that "any" model code would work anywhere! ¹¹ Anyone who believes that acceptable standards for warm, sunny Phoenix would be equally appropriate in Boston's freeze-thaw cycles, Miami's hurricanes, or Los Angeles' earthquakes is not adequately in touch with reality.

But this list of difficulties only scratches the surface: (5) planners must base laws on past experience, and this system will necessarily prove inadequate in anticipating future events ¹² -- especially in the fast-paced technological society of today; (6) planners cannot (yet) force entrepreneurs to develop a parcel -- they can only stop development -- but such a negative tool cannot hope to effect positive results; (7) the framers of laws tend to be myopic -- at a time when poor emigrants were fleeing from conditions in Europe, planners praised London and other European cities for their healthful, sanitary conditions; ¹³ (8) finally, the possibilities for graft should not be ignored -- bribing a planner to zone one's property in accordance with one's wishes is easier and less obvious than bribing the local board

3.2 The Framers' Problems (continued)

of appeals for a variance.

Thus we see that, even if the framers of the law were granted unlimited freedom to enact whatever provisions they desired, building regulations would be riddled with parochial exceptions, personal preferences, and outright blunders.

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- (1) Carl Feiss, "Planning Absorbs Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 125.
 - (2) Bernard H. Seigan, "The Case Against Land Use Planning," *Reason Magazine*, 7, 9 (January, 1976), p. 10.
 - (3) Bernard H. Seigan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 4 ff. contains an excellent discussion of the planning of a zoning ordinance. Similar pressures and circumstances surround the framing of building codes, but the process is not often so generally open to the consuming public.
 - (4) *Ibid.*, pp. 224 ff. discusses how zoning and planning schemes have sometimes been used as a cheap surrogate for eminent domain proceedings.
 - (5) Bernard H. Seigan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 82.
 - (6) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]), p. 37.
 - (7) New York slums won dubious first prizes. Lawrence Veiller, "Housing Conditions and Tenement Laws in Leading American Cities," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 136.
 - (8) Herbert J. Gans, *The Urban Villagers* (New York and London, 1962), *passim*.
 - (9) Lawrence Veiller, "Tenement House Reform in New York City, 1834-

3.2 The Framers' Problems (continued)

- 1900," *The Tenement House Problem, Volume 1*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 101.
- (10) *Ibid.*, p. 86. Veiller himself did not seem to learn from experience as witnessed by his "model" tenement of 1896, *ibid.*, pp. 107 ff.
- (11) David Falk, *Building Codes and Manufactured Housing* (Washington, D.C., 1973), p. 78.
- (12) Edmund Contoski, "Government Controls and Urban Renewal," *Reason Magazine*, 7, 1 (May, 1975), p. 26.
- (13) Robert W. DeForest and Lawrence Veiller, "The Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 58. At about the same time, British planners praised American tenements, G. Topham Forrest, *The Construction and Control of Buildings and the Development of Urban Areas in the United States of America* (Westminster, England, 1925), p. 108. This situation is known as "the grass is always greener on the other side of the Atlantic."

3.3 The Political Process

The planers' "ideal" solutions, imperfect though they are, are unlikely to be enacted and enforced in their original form. Before any zoning plan or building code is enacted, it must run the gauntlet of some political process.

"Property rights and political rights are devoid of meaning when they are subject to the variables of the popular moods and caprices."¹ The "good" cannot be ascertained by counting noses.² Local contractors, unions, D.A.R. ladies, realtors, Sierra Club members, J.C.C.ers, historical commissions,

3.3 The Political Process (continued)

Leagues of Women Voters, and other special interest local groups all vie in the political battle to get zoning and code regulations that reflect their desires.³ And whoever yells and fights hardest usually wins regardless of how parochial or devoid of merit his case may be.⁴

Admittedly, public pressure is not necessarily a bad thing. Veiller noted that public scandals regarding the construction of jerry-built tenements made those tenements unsalable -- a strong market incentive for maintaining some generally acceptable minimum standards.⁵ More recently credit card burnings and boycotts have been used to discourage unwanted development.⁶ The major differences between this (acceptable) type of public pressure and the (unacceptable) legislative variety mentioned above are twofold.

First, laws are more or less permanent. Once a law has been passed (especially a law purporting to protect some segment of the population without any apparent cost), it is extremely difficult to get it repealed -- witness the current situation with anti-marijuana or anti-gambling laws. The bureaucracy becomes entrenched and constantly fights to have its power extended. Thus even when the original supporters of a building regulation change their minds, the law remains. The non-legislative equivalent has no such drawback. If the unwanted development becomes acceptable (through changing economic, social, or aesthetic conditions) and the threat of public pressure is removed, the developer is free to

3.3 The Political Process (continued)

proceed.

Second, laws are coercive. There is little recourse for the losers in the legislative battle. An example will help here. Let us look at the increasingly popular case of the Association of Local Nature Lovers v. Cheapo Tract Homes, Inc.⁷ The nature lovers want strict building codes (this makes development expensive, thereby discouraging it, thereby leaving more land in its natural state) and zoning ordinances which mandate extensive wildlife preserves. The management of Cheapo Tract Homes, Inc. and their potential buyers from the ghetto want few or no building codes (thereby making the costs of new homes more affordable) and small-lot zoning. Political pressure in the legislative process will almost always insure that the nature lovers win and the poor will be excluded from the community entirely. This cannot be a just result. The free enterprise situation is very different. If zoning and building codes are removed from the nature lovers' repertoire, the nature lovers will compromise; typically they would have to pay the developer to leave natural spaces in the development. Either extreme -- doing nothing or bribing the developer not to build -- seems unlikely, but if either happened, it would not be unjust; it would show either (1) that the nature lovers do not love nature enough to make even a small sacrifice (i.e., they only want open space if they can get it for "free" by stealing it from someone through the legal system), in which case total development is the most just result, or (2) that the nature lovers value nature intensely

3.3 The Political Process (continued)

and thus deserve open space and no development. Note that in no case are the poor saddled with the bills -- they can only benefit from such a situation. Thus, an optimum result is obtained. Nature lovers get open space to the extent that they are willing to pay for it and the poor get affordable homes.

This example raises a third problem with the political process. There was a good reason why the Association of Local Nature Lovers won the battle for restrictive local codes: they already lived in the town and had greater influence than the poor who might have moved to the town had the project been built. Local building restrictions are intensely parochial.⁸ Many of the people who are most affected by local laws are never represented in the political process that leads to enactment of a law: non-resident businessmen, workers, landlords, and possible future residents. This situation is patently unjust.

Thus we see that even regulations that were initially perfect, equitable, and benevolent would suffer amendment and distortion in the local political arena. As long as building regulations are locally enacted and locally enforced, the local political process -- in public hearings or social events or casual conversations -- will insure that the laws protect the status quo at the expense of those who cannot or will not participate.

(1) Bernard H. Seigan, *Land Use Without Zoning* (Lexington,

3.3 The Political Process (continued)

Massachusetts, Toronto, London, 1972), p. 222.

- (2) Bernard H. Seigan, "The Case Against Land Use Planning," *Reason Magazine*, 7, 9 (January, 1976), pp. 10 ff. Bernard H. Seigan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 3 ff.
- (3) Numerous examples of the sort of compromises which result from the political process are found in S.J. Makielski, Jr., *The Politics of Zoning* (New York and London, 1966), *passim*. The political maneuvers which accompany building code enactment have not been so entertainingly documented, but that such a mechanism exists cannot be in doubt. See, for instance, Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), *passim*.
- (4) Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), p. 91, or "Land Use: Rights of the Regulated," *AREA Bulletin*, 2, 3 (May, 1976), p. 2.
- (5) Lawrence Veiller, "The Speculative Building of Tenement Houses," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 377.
- (6) Seigan, *Land Use Without Zoning*, p. 43.
- (7) Although this is a fictitious case, it is based on characterizations of zoning cases given by numerous authors. Of course, the issue is not always over ecological considerations. The tax base, the community character, and a variety of other real and spurious excuses have been used by suburban, middle-class pro-zoners to justify exclusionary practices. However, the analysis stands even when the name of the residential group is Suburbantown Taxpayers' Association or A-Maple-Tree-On-Every-Lawn Coalition.
- (8) John W. Reps, "Pomeroy Memorial Lecture: Requiem for Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 12.

4.0 NONENFORCEMENT

The first building regulations in English-speaking countries emerged in London in 1189: a "building's court" was organized "for the allaying of the contentions that at times arise between neighbors in the city touching boundaries made, or to be made, between their lands and other things...."¹ This court ruled on boundary disputes and pollution complaints and, most importantly, they issued decisions that were aimed at preventing the spread of fires. Numerous fires had periodically done extensive damage to the city of London and this court attempted to minimize such damage.²

A number of the decisions from this early court seem justified: prohibitions on erecting buildings which block sunlight from nearby buildings (probably the beginnings of "Ancient Lights" legislation in England) and prohibitions on the pollution of abutting property because of inadequate plumbing facilities (common nuisance law).³ We say these laws seem justified because they prohibited a person from doing any physical damage to his neighbor's property or person.

But other decisions shared the flaws of modern legislation: for instance, the strict fire codes which required a builder to erect a three-foot-thick fireproof party wall on the property line⁴ and which mandated tile roofs and fire-fighting apparatus.⁵ These laws, though *intended* to prevent damage to the property of others, did not prohibit acts which are harmful to others. *Not* building a fireproof wall or *not* having fire apparatus

4.0 NONENFORCEMENT (continued)

on hand cannot be construed to lead to damage necessarily (perhaps the regulated building was so fireproof that there was no danger of it contributing in any way to a fire on adjacent property).

Another basic problem with these fire laws is that if the owner complied with the law and later was responsible for a fire on his property that, in spite of the fire code, caused damage to a neighbor's property, the owner (the person who was responsible for the damage) would be held harmless (see Appendix A -- Section 10.6 Land-use Controls Protect the Environment for a more complete discussion of this point).

But these were not the only problems. A major difficulty that this legislation shares with modern building laws is that it was and they are unenforceable. Pre-Elizabethan England had no enforcement agency⁶ (though builders were sworn to abide by the law⁷). But even when there is an enforcement agency, it is often impossible to uphold building regulations. In the next five sections we describe some common mechanisms which result in nonenforcement of building laws.

(1) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 6.

(2) *Ibid.*, p. 7.

(3) *Ibid.*, p. 6.

(4) *Ibid.*

4.0 NONENFORCEMENT (continued)

(5) *Ibid.*, p. 8.

(6) *Ibid.*, p. 7.

(7) *Ibid.*, p. 8.

4.1 Variances, Appeals, and Other Legal Exceptions

One of the most common mechanisms which results in nonenforcement of building laws is the legal variance procedure. It is perhaps significant that the first recorded building law case is indicative of the fate of many later laws -- the first case is the granting of a variance. In London in 1302, a certain Mr. Bat was allowed to build a thatch (rather than tile or some other fireproof material) roof in exchange for an indemnity.¹

Modern zoning practice is the worst villain in this regard: in many cases, so many variances, rezonings, appeals, and special exceptions have been granted that the zoning law might as well not exist. "The variance procedure, conceived originally as zoning's 'safety value' [sic] to relax pressures arising from minor situations involving 'practical difficulty and unnecessary hardship,' has been much used and abused...."² "[L]arge numbers of patently illegal variances are granted every year."³ In a study done on all variances or rezonings granted in the United States, only about one quarter were rejected.⁴ But, of course, zoning is not the only villain: building codes⁵ and even statewide land-use regulations⁶

4.1 Variances, Appeals, and Other Legal Exceptions (continued)

are routinely by-passed via legal variance, appeal, and special exception procedures.

The reasons for such a plethora of approved variances are diverse. Sometimes the authorities compromise so as not to run afoul of the courts.⁷ As noted by Reps, "*Zoning is a police power measure -- it follows that the impact of zoning regulations must be reasonable and that their effect must not be so burdensome that they amount to a taking of property instead of a mere restriction in the interests of protecting or promoting the public health, safety, morals, or general welfare.*"⁸ Thus in *Nectow v. City of Cambridge*, a local zoning decision was overruled by the Supreme Court as an improper infringement of property rights.⁹

Although the courts have generally upheld land-use planning as a legitimate application of police powers,¹⁰ numerous recent cases have invalidated local statutes because of their exclusionary effects: *DeSimone v. Greater Englewood Housing Corp. No. 1*,¹¹ *Molino v. Mayor and Council of the Borough of Glassboro*,¹² *Oakwood at Madison, Inc. v. Township of Madison*,¹³ *Southern Burlington County NAACP v. Township of Mt. Laurel*,¹⁴ *National Land and Investment Co. v. Easttown Township Board of Adjustment*,¹⁵ *Appeal of Kit-Mar Builders, Inc.*,¹⁶ *Board of County Supervisors of Fairfax County v. Carper*,¹⁷ *Buchanan v. Warley*,¹⁸ *Crow v. Brown*,¹⁹ *Dailey v. City of Lawton, Oklahoma*,²⁰ and *Kennedy Park Homes Association, Inc. v. City of Lackawanna, New York*.²¹ In each of the cases

4.1 Variances, Appeals, and Other Legal Exceptions (continued)

listed above the courts have invalidated local zoning ordinances because of exclusionary provisions. It is therefore not surprising to find that many local boards prefer to grant a variance instead of having a case go to court where the entire local ordinance might be overturned.

At other times political or fiscal considerations militate in favor of a variance being granted. Doebele writes, "...we read daily in the newspapers of municipal competition for a choice light industry or shopping center. Fundamental principles of zoning and rational allocation of urban land on a metropolitan scale have been known to bend very easily when the local tax base is at stake."²² (See Appendix A -- Section 10.5 Zoning Maintains Low Property Tax Levels for a more complete discussion of "fiscal" zoning. See Appendix C -- Section 12.7 Some Politicians for a more complete discussion of "political" zoning and land-use control.)

A final factor which might enter into the granting of bona fide variances, and one which has not received wide notice is the problem of arbitrariness. Mandelker's study of the Seattle area land-use policies showed conclusively that there was no noticeable relationship between stated goals regarding apartment location and the actual variances granted.²³ Proximity to a major artery had been a stated condition, and that did seem to be a necessary (though not sufficient) condition, but a review of the denials seems to indicate that proximity to a major

4.1 Variances, Appeals, and Other Legal Exceptions (continued)

artery was also a necessary condition to a denial.²⁴ In other words, developers simply didn't apply for a rezone or variance unless they were planning to build near a major highway.²⁵ Moreover, rezoning decisions by County Commissioners also bore no relationship to the nature of surrounding development despite the planners' contentions that they made fine-grain distinctions on that basis.²⁶ If the granting of variances, rezonings, and other legal exceptions is as whimsical as Mandelker's study suggests, it is no wonder that building laws are so frequently ineffectual.

Of course, not all legal exceptions allow the developer to do whatever he wants. Many variances are compromises or partial exceptions only. But developers are aware of this propensity of local administrators to allow partial exceptions and they have learned to deal with the situation appropriately: they simply ask for much more than they actually want²⁷ or they include legal, but undesirable, features in the design which can be traded off in the bargaining procedure.

Because of the various legal exception procedures, building laws have been unable to provide the promised protection in a variety of circumstances. It might be argued at this point that the granting of exceptions merely allows the free market to influence the construction industry, but this is not true for two reasons. First, only a select few can afford to apply for variances -- the granting of variances bestows a favored position on

4.1 Variances, Appeals, and Other Legal Exceptions (continued)

some while causing harm to those who are unable to apply and to those few who are refused. This sort of legal disparity is incompatible with the free market. Second, under free market conditions (i.e., without building laws and their guarantees), people would voluntarily enter into covenant systems which would prevent much of the development that is allowed via legal exceptions.

This point is important. If the building law system serves any desirable function, it is to create some sort of certainty, some level of protection, some semblance of control to the users of buildings. If that certainty is eroded through the various mechanisms of nonenforcement, it would be better to avoid making legal guarantees and to allow people to contract with their neighbors to achieve the level of certainty that they desire.

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- (1) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 9.
 - (2) C. McKim Norton, "Elimination of Incompatible Uses and Structures," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 97.
 - (3) *Building the American City* (Washington, D.C., 1968), p. 226.
 - (4) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968), pp. 32 f.
 - (5) Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 3.
 - (6) Bernard H. Siegan, *Other People's Property* (Lexington,

4.1 Variances, Appeals, and Other Legal Exceptions (continued)

Massachusetts, Toronto, London, 1976), p. 68.

- (7) An enlightening discussion of this point and the resultant compromises is contained in Bernard H. Siegan, "The Case Against Land Use Planning," *Reason Magazine*, 7, 9 (January, 1976), p. 7.
- (8) John W. Reps, "Pomeroy Memorial Lecture: Requiem for Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 12.
- (9) 277 U.S. 183 (1928). The decision, rendered by Mr. Justice Sutherland, read in part, "The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.... That the invasion of the property of plaintiff in error was serious and highly injurious is clearly established; and, since a necessary basis for the support of that invasion is wanting, the action of the zoning authorities comes within the ban of the Fourteenth Amendment and cannot be sustained."
- (10) See R. Robert Linowes and Don T. Allensworth, *The States and Land Use Control* (New York, Washington, London, 1975), pp. 180 ff.
- (11) 56 N.J. 428, 267 A.2d 31 (1970). Subsidized housing was allowed in a residential area as a matter of public policy.
- (12) 116 N.J. Super. 195, 281 A.2d 401 (1971). A zoning ordinance which mandated luxurious conditions in multiple-family dwellings was invalidated under the equal protection provision.
- (13) 117 N.J. Super. 11, 283 A.2d 353 (1971). One-acre zoning and large home sizes, which had been adopted to retard the growth of the community, rendered the zoning ordinance void in its entirety.
- (14) 119 N.J. Super. 164, 290 A.2d 465 (1972). Using equal protection reasoning, the courts invalidated a zoning ordinance which discriminated against the poor.
- (15) 419 Pa. 504, 215 A.2d 597 (1965). The courts invalidated a four-acre minimum lot size provision.
- (16) 439 Pa. 466, 268 A.2d 765 (1970). The courts overturned two- and three-acre zoning, but felt that one-acre zoning was

4.1 Variances, Appeals, and Other Legal Exceptions (continued)

permissible under the circumstances.

- (17) 200 Va. 653, 107 S.E.2d 390 (1959). The courts invalidated a two-acre minimum lot size provision that had been imposed on two-thirds of the county because of its exclusionary effects.
- (18) 245 U.S. 60 (1917). Racially restrictive zoning was declared unconstitutional.
- (19) 332 F.Supp. 382, 457 F.2d 788 (1972). The courts overruled a locality which had refused to issue a building permit for a subsidized multifamily project.
- (20) 425 F.2d 1037 (1970). Zoning based on racial bigotry was overturned.
- (21) 436 F.2d 108, 401 U.S. 1010 (1971). Zoning based on racial bigotry was overturned.
- (22) William A. Doebele, Jr., "Key Issues in Land Use Controls," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 5.
- (23) Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), pp. 133 ff., pp. 142 ff.
- (24) *Ibid.*, p. 144, pp. 133 ff.
- (25) Whether this is due to market forces (voluntary choices to build near convenient transportation routes) or to builders' decisions not to apply for a variance unless stated policies of the zoning law were met, is unclear. Perhaps both considerations were weighed by developers.
- (26) Mandelker, p. 170.
- (27) Siegan, "The Case Against Land Use Planning," pp. 7 f.

4.2 Graft, the Personal Variety

Building laws and graft seem to be inseparable. Early English surveyors (a government position roughly equivalent to building inspector) were so

4.2 Graft, the Personal Variety (continued)

notoriously corrupt that the Royal Institute of British Architects formed, in part, in response to the situation and *Punch* did a vicious and well-known satire on them.¹ After a particularly ugly scandal in the late 1800s, this position was no longer filled by appointment, but rather by election² -- a reform which has still not been universally implemented in the United States.

Naturally, the first serious attempts at building law enforcement in this country were also rife with graft, which was a source of complaint both from the public³ and from the honest inspectors.⁴ Indicative of the extent of this problem is the curious fact that even Tammany Hall politicians were among the backers of the early New York City zoning codes.⁵

This problem continues to this day with no sign of abatement.⁶ As long as an owner or contractor can cut costs by paying a bribe rather than by obeying the law, our system of building control will foster dishonesty. This is particularly true when the law mandates the unnecessary, the redundant, or the impossible,⁷ as is frequently the case. This will also be particularly true as long as appointments to building control positions are given to political supporters or kinsmen (see Appendix C -- Section 12.2 Inspectors).

The form of personal graft discussed above is ubiquitous, but another, almost unknown variety of individual graft deserves mention here. When a

4.2 Graft, the Personal Variety (continued)

developer desires to build in such a way so as to harm a neighbor, he might consider "bribing" the neighbor to compensate him for the damage. This seems quite equitable and has actually been proposed as one system of building law reform. Much to the consternation of government officials, this form of "equitable bribery" was used extensively in London with regard to "Ancient Lights" legislation.⁸ Unhappily, our current system of government-enforced laws and codes, which emphasizes prosecution and complaint by government officials (rather than by aggrieved neighbors), has discouraged its use in favor of the less equitable (but more effective in the American context) system of bribing government officials. The developer will bribe whoever has control of prosecution. If that person is a government inspector, justice will not result. If that person is a damaged neighbor, the outcome will be equitable.

Whatever the form, personal graft is a major contributory mechanism resulting in nonenforcement of building laws.

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- (1) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), pp. 91 f.
 - (2) *Ibid.*, pp. 86 f.
 - (3) For instance, "Tenement Evils as Seen by the Tenants," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 385.
 - (4) For instance, C.A. Mohr, "Tenement Evils as Seen by an Inspector," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 421.

4.2 Graft, the Personal Variety (continued)

- (5) Seymour I. Toll, *Zoned American* (New York, 1969), p. 123.
- (6) For instance, *ibid.*, pp. 208 ff., p. 301.
- (7) Warren W. Lehman, "Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), pp. 168 f.
- (8) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]), p. 29.

4.3 Graft the Public Variety

"Technical requirements are frequently used as a lever to attain more influence over the applicant [for a building permit]. [The administrator] makes a practice on bargaining on such items as required set-backs to attain his esthetic objectives, e.g., he permits slight encroachments over building lines to achieve certain esthetic gains. [Footnote] The authorities make a practice of establishing setbacks so that the buildable area is slightly less than what is currently desired. This forces designers to ask for small encroachments over the building lines in exchange for certain municipal esthetic objectives."¹

The incentive strategy described above has been widely praised and is used worldwide. It must be noted, however, from the developer's point of view, that this public strategy is no different from the personal graft problem described in the previous section -- and the developer has justification for his point of view. If the purpose of building regulation

4.3 Graft, the Public Variety (continued)

is to provide citizens with a certain level of protection and if we wish to live up to our guarantees, laws must be clear. Laws, in order to provide some reasonable degree of certainty and objectivity, must apply a binary response (either it is legal or it is illegal) to the very intractable real world. (That this binary response is also just and workable is shown in Section 9.3 The Problem of Diseconomies.) Either an action is defined to be harmful and should be forbidden (except by consent of the "harmed" party) or an act does not harm another and should be permitted. If a local official "underzones" (the situation described in the quote above) and bargains down to the point where no damage is caused, the developer would be harmed unjustly. Either the developer would reject the incentive and would be forced to build in a suboptimal fashion (for instance, a small building when a larger building would do no harm) or he would accept the incentive and would be forced to pay for (questionable) public goods. On the other hand, if a local official zones "properly" and bargains down in exchange for public goods, neighbors would be harmed unjustly and the whole purpose of building regulation would be undermined. In every case, some private individual (either the developer or the neighbor) is forced to pay for some public benefit. Such a policy is necessarily unjust.

This form of "public graft" occurs over a wide range of statutes. The most simplistic use of this technique has been implemented in building codes. For instance, overly strict concrete codes have been promulgated

4.3 Graft, the Public Variety (continued)

with the understanding that waivers would be issued for "special cases."² The most sophisticated use of this technique is normally found in zoning regulations. For instance, New York City has allowed developers to increase their built areas by up to ten times the area of plaza, arcade, or connector-plaza if the developer builds such a public amenity.³ Aside from the questionable value of providing often-deserted public spaces, this policy necessarily leads to less light and increased densities which harm neighbors.⁴ It seems incredible that a law designed to protect neighbors' rights should lead to unavoidable damage to neighbors. However, as long as control remains in the hands of bureaucrats, such a situation will persist.

But these are not the only tools that local officials use to blackmail would-be developers. Delays in the granting of approvals, variances, and permits;⁵ threats of strict enforcement of laws;⁶ or even rejection of acceptable projects (if the official doesn't like working with the developer for one reason or another);⁷ have all been used. In fact, our building regulation system is so fraught with this sort of wheeling and dealing that it has been suggested that public relations and other "people skills" are more important to a designer/builder than architectural or technical competence.⁸

As long as local bureaucrats are allowed to say, "Do it my way or you can't do it at all," the building industry will be subject to the sort of

4.3 Graft, the Public Variety (continued)

abuse described above. Needless to say, this sort of abuse can lead to a considerable undermining of the goals of building regulation.

- (1) Sidney Cohn, *Practice of Architectural Control in Northern Europe, A Report Prepared for HUD* (Chapel Hill, North Carolina, 1968), p. 104.
- (2) G. Topham Forrest, *The Construction and Control of Buildings and the Development of Urban Areas in the United States of America* (Westminster, England, 1925), p. 34.
- (3) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]), pp. 22 f.
- (4) In the United States, we must assume that zoning bulk regulations are "reasonable," i.e., that if more bulk were to be built, neighbors would be harmed. "Underzoning" would be declared unconstitutional.
- (5) Cohn, pp. 104 f., p. 129 f. Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), p. 53. That such delays entail significant costs is verified in George Sternlieb and Lynne Sagalyn, "Zoning and Housing Costs," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), p. 135, p. 137.
- (6) This author has seen threats of strict enforcement used on a number of occasions. The folly of ignoring such threats has also been proved: many regulations that are costly and unnecessary are generally ignored.
- (7) Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), p. 130.
- (8) Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), p. 95.

4.4 Flexibility

"This point needs to be underscored, for public intervention in the land

4.4 Flexibility (continued)

development market carries heavy penalties for the losers and substantial gains for the winners. If zoning is not to result in arbitrary decision-making, it must be based on a policy which sensitively discriminates between cases of refusal and cases of approval on grounds which are supportable in matters of substance and equity. None of the variables which were isolated for study -- and which the plan selected -- in the King County rezoning process had an appreciably high explanatory value.... A zoning process caught in ambiguities such as these cannot succeed."¹

The lack of objective criteria on which to base decisions mentioned above with respect to Seattle zoning apply equally well to other local building regulations. Considerable personal discretion is vested in local building inspectors² and this power is used³ and abused.

The situation is unsatisfactory now, but many "reforms" which have recently become popular introduce even more "flexibility" (as it is euphemistically called). In particular, special permits, floating zones,⁴ contract zoning,⁵ planned unit developments, and performance standards have all come under fire. Although each of these "reforms" solves some problems, they are all subject to abuse when enforced by the thousands of local officials around the country.⁶

The zoning devices all grant the local officials excessive amounts of personal power over applicants. They do not give control to people living

4.4 Flexibility (continued)

in the neighborhood, people who might or might not be harmed by unusual developments. They do not give control to the developer, to the person who has the most to lose under the circumstances. Moreover, they tie the developer to an inflexible plan which, by law, cannot be changed to meet unexpected site or market conditions.

Performance standards, though they show promise if standards are set so as to define damage objectively, are flawed too often. They frequently actually allow *some* pollution, thus abrogating the rights of neighbors. Moreover, they are often so technical that laypeople are incapable of dealing with them. The most serious problem they present, however, is in the area of predictability. It is very difficult, and sometimes probably impossible, to predict the actual characteristics of a large development before its construction.

Thus we see that we should be very cynical of the optimistic claims of the reformers who favor these reforms. Flexibility is needed, but this freedom should be placed in the hands of the people who are most concerned, the developer and his neighbors. There should be no place for discretion by administrators and bureaucrats and inspectors.

(1) Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), pp. 167 f.

(2) See, for instance, Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London,

4.4 Flexibility (continued)

1975), pp. 39 f.

- (3) Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), pp. 39 ff., pp. 65 ff.
- (4) The floating zones system is one in which a particular zone and all of its required standards appear on the books, but no specific land area is set aside for such a zone. If and when a project is proposed that would be built in such a zone, rezoning is considered individually and rejected or approved on whatever arbitrary grounds seem important to the local administrators.
- (5) Contract zoning is a system in which a rezoning is granted, but special conditions are placed on the parcel -- generally by placing a covenant on the land. For instance, a parcel might be rezoned for industrial use, but a covenant would be placed on the land restricting its use for a scientific research facility. As with floating zones, planned unit developments, and special permits, this system encourages graft, favoritism, and arbitrariness.
- (6) Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), pp. 6 ff., p. 91. Edmund Contoski, "Government Controls and Urban Development," *Reason Magazine*, 7, 1 (May, 1975), p. 26. Bernard H. Seigan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972) pp. 64 f.

4.5 Beneficent Nonenforcement

"Norms practiced or legally required by organized public and private sectors, but impractical for the mass of the people, are simply ignored. For example, if building land is restricted by private commercial speculation, it will be taken out of the commercial market through organized invasion if no other land is available, or if poor people cannot pressure the political authorities into expropriation on their

4.5 Beneficent Nonenforcement (continued)

behalf."¹

Turner would find it extremely difficult to find the example he cites above in a completely free market -- even in the notoriously oligarchic land market of Hawaii, strict statewide controls have been adopted. However, he makes an excellent point: whenever enforcement of a building regulation would cause extreme damage to the majority of people, it will be (justifiably) ignored.²

Medieval England was plagued with this problem. The "building court" had promulgated some very sensible fire rules, however, the fire hazard in London was such that the richer people had already switched to fire-proof construction so the law had no effect on them,³ and the poorer people could not afford stone homes without starving so they ignored the law and the law had no effect on them.⁴ By the early 1500s England still had not learned this lesson. A heavy influx of continental emigres combined with an expanding economy created an enormous pressure to increase density in London. Queen Elizabeth I, justifiably worried about the plague, issued a law forbidding the construction of any new homes in London and allowing a maximum of one family per residence.⁵ In 1589 this law was reaffirmed and a four-acre minimum lot size was established for all England.⁶ The emigres, faced with the choice between starving in their homeland and disobeying a building regulation in England, sensibly chose the latter. And, much to their credit, the "surveyors" studiously

4.5 Beneficent Nonenforcement (continued)

ignored Elizabeth's edicts. Developers prefabricated homes and erected them at night to avoid being obvious in the flouting of the law. And Elizabeth angrily castigated both the "surveyors" and the "covetous and insatiable" businessmen⁷ but, happily for the poor, the building laws remained unenforced. In the reign of King James (1603-1624), another spate of building regulations was issued. Authorizations of demolitions were conferred on the seventeenth century British planners which gave them more authority than modern American planners have; architectural controls and class-conscious residency controls were established; a reaffirmation of the "no new housing" law and fireproof construction code was issued; and most onerously, a law against the habitation of cellars was enacted.⁸ Predictably, these laws were also disobeyed.⁹

Beneficent nonenforcement also accompanied building laws in the United States. The first housing code was issued in New York City in 1867 and other major cities quickly followed suit but these laws, directed against deplorable tenement conditions, were disobeyed often enough to be the rule.¹⁰ The recent emigrants crowded into downtown Manhattan slums and erected squatter settlements in the suburban boroughs.¹¹ Incredible though it seemed to middle-class reformers, these conditions were better than could be found in Europe (as witnessed by the continuing waves of starving emigrants), and mercifully the tenement codes were ignored.

Modern building codes have often suffered the same fate for the same

4.5 Beneficent Nonenforcement (continued)

reasons: *most* housing in Laredo, Texas would be condemned if minimum housing standards were to be enforced¹² and in 1955 it was estimated that a million people would be left homeless in New York City if the multiple-dwelling code were to be enforced strictly.¹³

Of course, motivations for beneficent nonenforcement are sometimes not very beneficent. Some localities have noticed that code enforcement can lead to abandonment of the building by the owner and, since cities seldom have sufficient demolition funds to cope with the problem, they have opted for non-enforcement.¹⁴ Other localities have found that homeowners resent the invasion of privacy that accompanies inspections and have thus found it impossible to enforce the code.¹⁵ Finally, in some areas, the inspectors, recognizing their inability to deal competently with complicated industrial projects, have given up the pretense of inspection.¹⁶

In all of the instances cited above, nonenforcement of building laws, even though it undermined the stated goals of the law, was preferable to enforcement -- the position of the poor was not worsened, urban blight and additional taxes were avoided, the civil right to privacy was maintained, and incompetent harassment of developers was avoided. Beneficent nonenforcement, as laudable as it is, entails at least three real difficulties however.

4.5 Beneficent Nonenforcement (continued)

First, beneficent nonenforcement is a perfect breeding ground for graft and discretionary enforcement. In one case that this writer knows of, a contractor was forced to pay over \$7000 to the municipal authorities on a \$250,000 contract because he had refused to bribe a local inspector. The inspector hauled out every unused building regulation he could find and charged the contractor with every legal (but normally unenforced) fine and fee on the books. This was rank injustice, but the contractor had no legal recourse. As long as unenforced laws remain on the books, building regulation will foster dishonesty and corruption.

Second, beneficent nonenforcement, along with all the other nonenforcement mechanisms, insures that the promises and guarantees that we make about the environment will be broken. Houses are not always safe, sanitary, and sound; neighborhoods are not always protected from the invasion of undesirable projects; our environment is not always free from pollution. Since we are unable to fulfill our promises, we should not lie to people so glibly. Better to live with an honest caveat emptor than with a dishonest government.

Finally, beneficent nonenforcement breeds a general contempt for law. Those laws which actually do prevent harm may be disobeyed along with the others making the enforcement of "good" laws much more difficult.

(1) John F.C. Turner, "Housing as a Verb," *Freedom to Build*, eds. John

4.5 Beneficent Nonenforcement (continued)

F.C. Turner and Robert Fichter (New York, 1972), p. 171.

- (2) Some reformers have denied the validity of this reasoning. William G. Grigsby, *Housing Markets and Public Policy* (Philadelphia, 1963), pp. 305 ff. denies the possibility of wholesale abandonment and suggests that "[s]imply compelling cities to do what the law already demands would be a big step forward." Such an opinion seems naive in light of New York City's abandonment rate. Grigsby also overestimates the ability of enforcers to compel obedience to an unpopular law.
- (3) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), pp. 6 f.
- (4) *Ibid.*, p. 7.
- (5) *Ibid.*, p. 12.
- (6) *Ibid.*, p. 14. Certain rural industries and, of course, the upper classes were exempted.
- (7) *Ibid.*, p. 15.
- (8) *Ibid.*, pp. 18 ff.
- (9) *Ibid.*, p. 71.
- (10) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. vii. Lawrence Veiller, "Non-enforcement of the Tenement House Laws in New Buildings," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 257.
- (11) Kate Holladay Claghorn, "Foreign Immigration and the Tenement House in New York City," *The Tenement House Problem, Volume II*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), pp. 72 f.
- (12) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 29 ff.
- (13) Edward C. Banfield, *The Unheavenly City Revisited, A Revision of the Unheavenly City* (Boston and Toronto, 1974), p. 51.
- (14) Parratt, p. 13.

4.5 Beneficent Nonenforcement (continued)

(15) *Ibid.*, p. 11.

(16) Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), pp. 65 ff.

5.0 ENFORCEMENT

At the turn of the century, DeForest claimed that the tenement problem in New York City was solved, that even prostitution (an "evil" long associated with tenements) was fast disappearing.¹ DeForest was optimistic because the reformers had managed to enact the housing law that they had advocated and the reformers themselves were in charge of enforcement.² DeForest's claims seem incredible in light of today's facts: the worst housing for the poorest people in New York City is no better today than it was 75 years ago and even prostitution in New York City has not yet been completely eradicated. It is sadly all too easy to poke fun at DeForest's sanguine expectations.

Zoning laws have fared no better than housing codes. "Like the assumptions of Prohibition, those of the European planning movement fell very wide of the American cultural reality. One of the contributions of the twenties was a mass of urban evidence which showed just how wide the gap was between the original planning theory of zoning and its actual applications in the nation's towns and cities."³

Given the contents of the previous chapter, we may safely lay much of the blame at the doorstep of nonenforcement. Economic conditions, birthrate, social values, and a variety of other given circumstances have had more effect on urban form than any legislation. However, enforcement of building laws brings with it some different, and perhaps more serious problems. This chapter discusses two problems which have seriously

5.0 ENFORCEMENT (continued)

undermined the goals of building law although, superficially at least, the letter of the law may have been obeyed.

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- (1) Robert W. DeForest, "Introduction, Tenement Reform in New York since 1901," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), pp. xx f.
 - (2) *Ibid.*, pp. xiii f.
 - (3) Seymour I. Toll, *Zoned American* (New York, 1969), p. 203.

5.1 Underkill

There do seem to be some localities which have been "successful" in enforcing their regulations. These are areas where there are building regulations, where the regulations are enforced, and where no apparent hardship results. This situation is usually the result of one very special set of circumstances: the regulations are so unexacting that there exists virtually no constraint on developer behavior.

Perhaps the most well-known case of underkill is Los Angeles' zoning. Whenever planners gather to discuss the trouble with zoning, someone is bound to compare Los Angeles (which has had zoning for 50 years) to Houston (which has never had zoning) and conclude that there is no appreciable difference between the urban forms of these two cities.¹ This draws sighs from planners because this observation seems true. But

5.1 Underkill (continued)

this fact is not surprising since Los Angeles along with many other cities and towns has indulged in "overzoning."² This practice insures that the zoning codes will have no substantive effect on the form of the city.

The underkill problem is slippery since the exact provisions which constitute underkill may vary from site to site and from time to time. For instance, economic conditions in one year may be such that developers consider obedience of building regulations to be an outrageous luxury. The following year these same developers may willingly adopt high standards knowing that this strategy will insure speedy approvals and amicable inspections and knowing that the buying public will be willing to afford the additional costs.³ In fact, in light of the modest building proposals made in New York City in recent years,⁴ it may be that that citadel of strict building regulation is moving toward an "underkill" position.

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- (1) This example is taken from Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), p. 251. Babcock believes that differences do exist in the fine-grain structure of the city, but offers us no proof.
 - (2) Seymour I. Toll, *Zoned American* (New York, 1969), pp. 204 ff. "Overzoning" is the practice of allotting too much land area to a given use. If too much land were to be set aside for commercial or industrial uses under cumulative-use zoning practices, the zoning ordinance would have no substantive effect on developer behavior. This practice was widely indulged in southern California.
 - (3) Some apartment developers such as Flatley in the Boston area and some manufactured home builders make a regular policy of

5.1 Underkill (continued)

overdesigning. These builders aim for a wealthier market than would normally be expected. It seems that in at least some instances, this overdesign strategy is calculated to overcome difficulties with building laws. See, for instance, Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), p. 77.

- (4) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]), p. 21.

5.2 Blunders

Throughout the ages catastrophes have been associated with building problems. Often the disasters occurred because the building laws had not been enforced. This was undoubtedly the case with the great plagues in London in the 1300s which killed one-third of the population and which occurred despite refuse laws,¹ or the Plague of 1665 which killed one-quarter of the population (about 100,000 people).² It was also probably true of the Great London Fire of 1666 which was not completely extinguished for four months,³ and with the numerous smaller fires and structural collapses of the nineteenth century.⁴ But as we saw in Section 4.5 Beneficent Nonenforcement, the laws could not have been obeyed under the social and economic conditions extant at the time. We must face up to reality and accept the fact that these horrible, death-dealing catastrophes were inevitable; no mere law could have averted them.

In another category, we find laws which have been enforced but which,

5.2 Blunders (continued)

mostly because of lack of foresight or knowledge on the part of the framers, did not alleviate the problems they were designed to solve. Thus we find that London's stringent fire codes did not stop the fires resulting from the Fire Blitz of December 29, 1940.⁵ This was certainly not the planners' faults -- no one could reasonably have planned for bombing. But the fact remains that even the most intelligent plans cannot foresee all contingencies. Thus we find that the 1916 New York City zoning laws which were motivated by the merchants' desire to protect Fifth Avenue and by public uproar against skyscrapers such as the Equitable Building and the Woolworth Building,⁶ did not prevent airlines and banks from taking over the once-fashionable shopping district⁷ and did not prevent even more objectionable buildings from being erected in Manhattan.⁸ Nor did the suburban residential zoning provisions which allowed for small "Mom and Pop" groceries for neighborhood convenience prevent traffic-provoking 24-hour mini-supermarkets from proliferating in otherwise quiet neighborhoods.⁹

The most painful type of building law, however, is the law that actually mandates a building problem feature. The early New York City building codes required that each habitable room be open to the outside air.¹⁰ This law caused developers to build narrow "air shafts" in order to conform with the law without pricing the buildings beyond the means of the poor. Not only did virtually everyone hate these air shafts (tenants frequently boarded them up) -- they cost money, they collected filth,

5.2 Blunders (continued)

they made privacy impossible, and they transmitted noises and odors -- but they were cited as a major factor in the spread of tenement fires: 26% of the fires studied in Veiller's magnum opus were spread through these light and air shafts.¹¹

In more recent years, a similar situation has developed with sanitary waste disposal laws. Although there exist several modern, ecologically sensible systems which might benefit both owners and neighbors, our building codes continue to mandate traditional (often pollution-prone) plumbing systems.

The examples cited above are hardly conclusive evidence of the inability of legal restrictions to deal with building-related problems, but they should serve to prove to us that it is possible that some of our laws actually work to undermine our benevolent goals.

(1) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 10.

(2) *Ibid.*, p. 28.

(3) *Ibid.*

(4) *Ibid.*, pp. 78 ff.

(5) *Ibid.*, pp. 122 ff.

(6) The bulk legislation would have prohibited these two buildings but would have had little or no effect on most construction. Seymour I. Toll, *Zoned American* (New York, 1969), pp. 163 f.

5.2 Blunders (continued)

- (7) *Ibid.*, p. 290.
- (8) *Ibid.*, pp. 291 ff.
- (9) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 10.
- (10) Robert W. DeForest and Lawrence Veiller, "The Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 18.
- (11) Hugh Bonner and Lawrence Veiller, "Tenement House Fires in New York," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 264.

6.0 MECHANISMS OF EXCLUSION

"In more metropolitan areas than one cares to count, it is virtually impossible today to build a suburban house on less than a one-half-acre lot. We are told by the home builders that all Americans prefer the single-family isolated house. The fact of the matter is ... an American family building or buying a house today very often has little *legal* choice in the matter. The aged, the single, the childless, and most important, the less affluent of our population, are being systematically excluded from more and more parts of our metropolitan areas."¹

This chapter deals with the single most controversial aspect of building law, exclusion. When the result of law is to create a preferred position for some, while ignoring the needs and aspirations of others, there is basic inequality before the law. Building laws, and to some lesser extent other municipal strategies, have created just such an imbalance.

(1) William A. Doebele, Jr., "Key Issues in Land Use Controls," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), pp. 4 f.

6.1 Costs

"The fundamental point is that controls and regulation, even where well intended and apart from the fact that they mainly produce shortages and increases in price, more importantly diminish freedom.... This

6.1 Costs (continued)

increase will favor the affluent and disproportionately burden the poor. The large urban centers have suffered the most, and the deterioration they have experienced can be traced directly to these controls."¹

The fact that compliance with building law increases costs without any concomitant increase in user desirability is indisputable. The fact that cost increases caused by building regulation result in a reduction of housing opportunities for the poor is self-evidently true and has been mentioned by most critics of such regulation.

There are three ways in which costs are increased via building regulation. First and most obvious, are the direct costs of mandated features (e.g., minimum lot sizes, prohibitions on the use of plastic pipe). These costs are easily documented in the following subsections. Second, there are indirect costs which result from decreased supplies. The most obvious case in zoning law occurs when the locality zones very little land for apartments; this results in an artificially constricted supply facing a high demand and prices of such land are necessarily driven higher than they would be without zoning. The most obvious case in building codes occurs when the law requires a builder to use a scarce resource, for instance, a licensed electrician; this type of law increases demand artificially (while other laws keep supplies in check) thus necessarily increasing building costs as in the example above on zoning. These indirect costs have never been documented.

6.1 Costs (continued)

The third way in which local building laws increase costs is very indirect: the cost of enactment and enforcement. \$300 million is spent annually by local governments (this figure does not include regional, state, and federal costs or the massive amounts of voluntary time which are donated on the local level) on local land and building regulation.² Although this cost is only about .6% of the construction costs affected by the legislation,³ it is questionable whether society should afford even this small cost for enforcing laws of such dubious value.

In the following two subsections we will discuss the cost issue as it relates to zoning and building codes respectively.

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- (1) Norman Karlin speaking at a conference entitled "Land Use: Rights of the Regulated," as reported in an article of the same name, *AREA Bulletin*, 2, 1 (January, 1976), p. 1.
 - (2) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968), p. 2.
 - (3) *Ibid.*

6.1.1 Zoning and Land-use Controls

Most writers who have been concerned with zoning have noted that zoning and urban renewal works have both increased costs directly¹ and indirectly through reducing supply² or encouraging speculation.³

"Acreage zoning, reflected in low population density, is the most

6.1.1 Zoning and Land-use Controls (continued)

significant factor (correlation coefficient = .60) in comparing recent increases in house sales prices in various parts of the country."⁴

Obviously, high costs necessarily lead to exclusion of the poor. Justice Westenhaver of the lower court in the famed *Ambler Realty Co. v. Village of Euclid* case was among the first to note the exclusionary effects of zoning⁵ and his observation has been eloquently echoed by many others: "Exclusionary zoning is actually a redundancy. All zoning is exclusionary, and is expected to be exclusionary; that is its purpose and intent."⁶

The most widely discussed supply-restricting feature of zoning is the minimum lot size. 93.8% of all local governments with zoning⁷ have a minimum lot size requirement and 23% of them have a minimum of 1/4-acre or more for any type of building.⁸ 25% of those municipalities inside Standard Metropolitan Statistical Areas (SMSAs) have 1/4-acre minima -- in other words, urban areas are actually slightly more exclusionary than exurban areas!⁹ Of those localities with a zoning ordinance, 8.8% had 2-acre zoning in at least some of their area.¹⁰ The SMSAs were also more exclusionary in this respect with 10.8% of those localities zoning for 2-acres or more on some of the land included in the township.¹¹ Some SMSAs are notably more exclusionary than the average however.

It is said that 50% of the land within 50 miles of Times Square is zoned for a one-acre minimum lot size.¹² A study of Westchester County exclusionary zoning practices¹³ is particularly enlightening. In 1952 the

6.1.1 Zoning and Land-use Controls (continued)

zoned capacity of this county was 3,209,100 people; by 1957 it had been reduced to 2,274,300 people; and by 1969 it was down to 1,763,600 people -- a 40% reduction in under two decades.¹⁴ About 1/3 of Westchester County is zoned for a density of less than one person per acre -- a surprising statistic considering that some of the most densely populated land in the United States is only a few miles distant.¹⁵ This same study proved that exclusion exists in Westchester County: by the early 1970s more people were working in this "bedroom" county than were living there.¹⁶ An opposite result would not have proved a lack of exclusionary effect (some suburban communities are *quite* exclusionary: they outlaw both the poor and industry too), but when workers must commute to "bedroom suburbs" to go to *work*, one knows that exclusionary practices are rampant. On the other side of New York City, similar results have been found. 77.0% of the single-family residential land in a study done in northeastern New Jersey was zoned for more than one acre.¹⁷

Floor area minima have also added considerably to the burden. 36.9% of all housing which falls under a statute with minimum floor areas requires 600 square feet or more.¹⁸ The SMSAs were again more exclusionary. 43.9% of the metropolitan housing which falls under minimum floor area requirements must occupy 600 square feet or more.¹⁹ Again, in some areas, this sort of provision is much more restrictive: in one four-county area in northern New Jersey, 77.6% of the single-family residential-zoned land required 1200 square feet or more as the minimum building size.²⁰

6.1.1 Zoning and Land-use Controls (continued)

Of course, other local land-use regulations can have a significant effect too (one of the reasons why the simple elimination of zoning would probably not be completely effective in ridding ourselves of exclusionary practices). Zoning's little sister, subdivision controls, which often mandate road building, expensive drainage schemes, and various other improvements, can also prove quite exclusionary.²¹ Conservation commissions and their counterparts have also been known to decrease the supply of buildable land significantly: Orange County, California; Moulton Ranch; and El Toro have set aside 50% of their land for open space; South Laguna Beach has declared 75% (17,000 of 26,000 acres) to be off limits to developers.²² The researcher reporting these figures accurately notes, "What advocates of open space don't tell you is that the cost of the unused, unproductive land is slapped on the cost of new homes." Minimum frontage requirements have also been shown to be a significant provision in the exclusionary codes. In the study in northeastern New Jersey, 68.4% of the land covered by single-family residential zoning had a 150 foot minimum frontage requirement.²³

Whether the costs are direct in the form of costly requirements or indirect in the form of decreasing necessary supplies, zoning and other land-use controls are unavoidably exclusionary.

(1) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968), p. 3. R. Robert Linowes and Don T. Allensworth, *The*

6.1.1 Zoning and Land-use Controls (continued)

States and Land-Use Control (New York, Washington, London, 1975), p. 162. Edward M. Bergman, *Eliminating Exclusionary Zoning: Reconciling Workplace and Residence in Suburban Areas* (Cambridge, Massachusetts, 1974), p. 6.

- (2) Linowes and Allensworth, p. 162. Bergman, p. 6. Edward C. Banfield, *The Unheavenly City Revisited, A Revision of the Unheavenly City* (Boston and Toronto, 1974), p. 16. Gil Ferguson speaking at a conference entitled "Land Use: Rights of the Regulated," as reported in an article of the same name, *AREA Bulletin*, 2, 1 (January, 1976), p. 1. Or consider the eloquent example cited in Fred Bosselman, "Can the Town of Ramapo Pass a Law to Bind the Rights of the Entire World?" *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), p. 254. The only state to adopt and implement comprehensive state zoning, Hawaii, had a median value of owner occupied housing of \$35,100 in 1970. This compares with the national median of \$17,000 in the same year. This example provides us with an estimate of what indirect costs might be if zoning were conscientiously applied everywhere.
- (3) Bergman, p. 3.
- (4) Chris Kristensen, John Levy, and Tamar Savir, *The Suburban Lock-out Effect* (White Plains, New York, 1971), p. 8.
- (5) 297 Fed. 307, 316 (N.D. Ohio 1924), reversed 272 U.S. 365 (1926). Westenhaver's decision was, of course, overturned by the Supreme Court, but the lower court's findings were surprisingly prophetic.
- (6) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 88.
- (7) 90.1% of all governments with 5,000 or more people have zoning ordinances. Manvel, p. 31. It can be assumed that some reasonable proportion of the remaining communities are covered by county zoning codes.
- (8) *Ibid.*, p. 32.
- (9) *Ibid.*
- (10) *Ibid.*
- (11) *Ibid.*

6.1.1 Zoning and Land-use Controls (continued)

- (12) Siegan, p. 91.
- (13) Kristensen, Levy, and Savir.
- (14) *Ibid.*, p. 3.
- (15) *Ibid.*, p. 7.
- (16) *Ibid.*, p. 11.
- (17) Norman Williams, Jr. and Thomas Norman, "Exclusionary Land Use Controls: The Case of North-eastern New Jersey," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), p. 114.
- (18) Manvel, p. 32.
- (19) *Ibid.*
- (20) Williams and Norman, p. 114.
- (21) Kristensen, Levy, and Savir, p. 5, for instance.
- (22) Ferguson, p. 1.
- (23) Williams and Norman, p. 114. A complete analysis of housing prices is found in George Sternlieb and Lynne B. Sagalyn, "Zoning and Housing Costs," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 131 ff.

6.1.2 Building Codes and Amenity Controls

"In 1921 the Senate Committee on Reconstruction and Production issued a report in which it was pointed out that building-code requirements varied widely and were one source of unnecessarily high construction costs. Since that time various writers and speakers have repeated these charges and have also referred to lack of flexibility in dealing with new materials

6.1.2 Building Codes and Amenity Controls (continued)

and new methods of construction. Much of this criticism is justified."¹ As with zoning, codes have often been used to exclude the poor -- though this effect appears to be unintentional. As with zoning, many commentators have noted the direct costs² and indirect costs: prohibiting of new (cheaper) means and materials,³ altering manufacturing processes,⁴ discouraging new construction⁵ or renovation,⁶ requiring the use of scarce resources,⁷ raising rents,⁸ and even making high-rise development prohibitively expensive.⁹

There are actually two sources of this increased cost due to building codes. The first is the cost associated with the diversity amongst codes in various localities. This cost, though considerable, applies primarily to producers and consumers of buildings with wide regional markets such as manufactured housing and are further discussed in Appendix B -- Section 11.6 Producers and Consumers of Mobile and Manufactured Homes. The second is the cost associated with a particular code. This sort of cost increases expenses associated with housing without providing increased user fitness. Both costs are considered in this subsection.

Studies documenting the actual costs of building codes estimate typical costs running between 3% and 30% of construction costs.¹⁰ 10% of construction costs seems to be the consensus figure.¹¹ In dollars the most conservative estimate runs about one billion dollars,¹² but using the consensus percentage figure, five billion dollars is not an

6.1.2 Building Codes and Amenity Controls (continued)

unbelievable figure.

How could these costs get so high? A Douglas report¹³ investigated the problem. Only 43.9% of all localities having building codes based their plumbing codes on the National Plumbing Codes (and those towns likely made various modifications which involved more restrictive provisions).¹⁴ The remaining towns presumably concocted an ad hoc set of provisions which were very likely influenced by local plumbers looking for guaranteed work. Fire regulations were likewise diverse. On the average 24.4% of the localities prohibited fire-retardant wood in fire-resistive buildings.¹⁵ 42.2% of the municipalities required parapets on row housing and 34.6% of them set the minimum distance to fire exits at 25 feet or under in multifamily dwellings.¹⁶ As was usual with zoning, urban areas were always more restrictive than the average.

The same study asked about fourteen specific provisions all of which had been approved by all or most model codes. The results of this section of the study show so clearly that local codes are unnecessarily restrictive, that we reprint it here.¹⁷ As we have seen in this section, the monetary costs of local building regulation are considerable. These codes, when enforced, place an onerous burden on the poor and even the working and middle class. Considering the fact that housing conditions are usually not improved (and may actually be worsened) by such regulations, one must wonder what we are paying for.

6.1.2 Building Codes and Amenity Controls (continued)

Table 10. Proportions of Local Building Codes That Entirely Prohibit Various Features in Residential Construction: 1968 (Based on Data for municipalities and New England-type Townships of 5,000-plus)

Construction Feature	% of gov'ts with building codes (1)		% of building code gov'ts specifically reporting (2)	
	All (3)	M.C. (4)	All (3)	M.C. (4)
Plastic pipe in drainage system.....	62.6	61.7	68.9	67.6
2" by 4" studs 24" on center in non-load-bearing interior partitions.....	47.3	43.5	50.6	46.1
Preassembled electrical wiring harness at electrical service entrance.....	45.7	44.8	51.2	49.1
Preassembled combination drain, waste, and vent plumbing system for bathroom installation.....	42.2	39.6	46.8	43.2
2" by 3" studs in non-load-bearing interior partitions.....	35.8	34.7	38.3	36.9
Party walls without continuous airspace.....	26.8	27.4	30.6	30.7
Single top and bottom plates in non-load-bearing interior partitions.....	24.5	23.5	26.2	24.8
Wood frame exterior for multifamily structures 3 stories or less (5).....	24.1	22.0	26.7	23.5
1/2" sheathing in lieu of corner bracing in wood frame construction.....	20.4	21.1	22.0	22.3
Prefabricated metal chimneys.....	19.1	16.9	20.5	18.0
Nonmetallic sheathed electric cable.....	13.0	13.0	14.5	14.4
Wood roof trusses 24" on center.....	10.0	10.3	10.7	11.1
Copper pipe in drainage systems.....	8.6	9.4	9.3	10.0
Bathroom ducts in lieu of operable windows.....	6.0	5.3	6.4	5.6

(1) Units so reporting as a percent of all building code governments in each group (including those that did not specifically report "yes" or "no" for particular construction features).

(2) Units so reporting as a percent of those reporting either "yes" or "no" (i.e., excluding those not giving this information for particular

6.1.2 Building Codes and Amenity Controls (continued)

construction features).

(3) These data pertain to the 3,273 municipalities and New England-type townships of 5,000-plus that have building codes.

(4) These data pertain to the 2,199 units (of the 3,273 total) that have building codes reportedly based primarily upon one of the four national or regional model codes.

(5) Calculation excludes governments that entirely prohibit frame residential construction (77 altogether, including 59 "model code" governments).

- (1) George N. Thompson, "Preparation and Revision of Building Codes," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 133.
- (2) For instance, Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), pp. 97 ff.
- (3) *Ibid.*, pp. 79 ff. See also George Sternlieb and Lynne B. Sagalyn, "Zoning and Housing Costs," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), p. 135.
- (4) Thompson, p. 136.
- (5) *Ibid.*
- (6) Warren W. Lehman, "Building Codes, Housing Codes and the Conservation of Chicago's Housing Supply," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 171.
- (7) Field and Rivkin, p. 4.
- (8) Thompson, p. 136.
- (9) Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), p. 123.
- (10) Field and Rivkin, p. 76.
- (11) *Ibid.*, p. 79. Arnold Kronstadt, "How Code-Enforced Waste Can Make

6.1.2 Building Codes and Amenity Controls (continued)

a \$1,500 Difference in the Sales Price of Two Identical Houses," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 148 f.

(12) Field and Rivkin, p. 5.

(13) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968).

(14) *Ibid.*, p. 33.

(15) *Ibid.*, p. 35.

(16) *Ibid.*

(17) *Ibid.*, p. 36.

6.2 Judicial Reinforcement

As was noted earlier, recent court decisions have sometimes overturned local zoning ordinances when these ordinances were found to be exclusionary or confiscatory (Section 4.1 Variances, Appeals, and Other Legal Exceptions). However, the vast majority of court cases have reaffirmed the localities' rights to enforce land-use regulation. To many readers of these cases, there is no substantive difference between the facts of the cases which upheld zoning and the facts of the cases which overturned zoning.

*Village of Euclid v. Ambler Realty Co.*¹ is the landmark case in which the Supreme Court declared zoning to be constitutional. Despite proof that Ambler's land had been devalued by zoning and despite the lower

6.2 Judicial Reinforcement (continued)

court's opinion that zoning was exclusionary by nature, the Supreme Court, led by long-time conservative Taft, upheld zoning as a justified use of police power.² In explanation of the apparent contradiction, it must be remembered that zoning was touted to be a protection for property values. In other words, it was probably *upheld* precisely *because* it was exclusionary.

The courts have usually followed this landmark case. The courts have also refused to investigate the legislative process or its intent except in cases of flagrant confiscation, segregation, or exclusion. They have also refused to consider the rights of potential residents (i.e., slum dwellers who might move into a suburban community if developers were allowed to build cheaper housing). If a developer is willing to build inexpensive housing and to sell it to slum dwellers, and if such action causes no objective damage to others or their property, the potential residents have a right to buy the property and move into town. Zoning (and other building laws), by disallowing inexpensive housing, clearly interferes with the basic rights of both developers and potential residents under these circumstances.

These policies cause the court battle to be one between many suburban homeowners trying to protect their neighborhoods, their rural or semi-rural life-style, their pocketbooks, and their open spaces, and one selfish, money-hungry, capitalist developer. In such a battle the

6.2 Judicial Reinforcement (continued)

outcome is seldom in question. Thus the New Jersey courts have upheld minimum unit sizes in *Lionshead Lake, Inc. v. Township of Wayne*³ and prohibitions of trailer parks in *Vickers v. Township Committee of Glouster Township*⁴ and minimum frontages in *Bilbar Construction Co. v. Board of Adjustment*.⁵ And in *Village of Belle Terre et al. v. Bruce Boraas et al.*,⁶ the Supreme Court (with but a few misgivings) upheld a provision of that town's zoning code which effectively prohibited non-kinship-based communes and even multiple-apartmentmate situations. This decision should strike fear into the hearts of all alternate life-style proponents and all of us who value personal freedom and privacy.

Judicial reinforcement of restrictive and confiscatory zoning is certainly deplorable, but sadder still is the situation of some developers and property owners who do manage to win in the courts, but who find that judicial relief is not very effective. Such a case is the *Appeal of Girsh*.⁷ The courts agreed with Girsh that the local zoning provision was exclusionary because it had made no land available for apartment development. But this was a hollow victory. The town promptly zoned four different unsuitable sites for apartments, none of which included Girsh's property.⁸

This anecdote is significant because it hints at the strategy that the exclusionary town might adopt when faced with reform. If the courts were to change their traditional stand, if zoning and if building codes were

6.2 Judicial Reinforcement (continued)

reformed to correct the most flagrant abuses, the exclusionary town would merely shift the burden to some other set of local controls, perhaps property taxes or historical commissions or conservation commissions or subdivision controls. Even locally-provided services could be manipulated to keep out the "riffraff."

The fact of the matter is that some people want to exclude others and no law on earth is likely to change that desire. As long as that desire exists, people will find a way to circumvent the intent of legislation. The problem for the reformer who wishes to eliminate exclusion is then two-fold. First, for the long range, education and understanding will be the only effective tools against exclusion. A good reform system would be educational in that people who excluded on irrational grounds should be forced to pay for exclusion (rather than have a free or a subsidized exclusionary system as we have now). Second, for the short range, we should adopt a system which allows for some exclusion (remember too, that some exclusion may be justified), but which also allows the poor some opportunities. We should discover an avenue of escape for the excluders which does a minimum of damage to the excludees.

(1) 272 U.S. 365 (1926).

(2) Seymour I. Toll, *Zoned American* (New York, 1969), pp. 245 ff.

(3) 10 N.J. 165, 89 A.2d 693 (1952) which also upheld a five-acre

6.2 Judicial Reinforcement (continued)

minimum lot size.

- (4) 37 N.J. 232, 252, 181 A.2d 129, 140 (1962).
- (5) 393 Pa. 62, 141 A.2d 851 (1958).
- (6) N. 73-191, April 1, 1974.
- (7) 437 Pa. 237, 263 A.2d 395 (1970).
- (8) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 214.

6.3 Convenience

Pushing up costs, invoking regressive property taxes, or appealing to the courts has not necessarily kept all the "unwanted" out of town. And many towns have (usually inadvertantly) stumbled upon another strategy: reducing convenience. This strategy can be implemented with at least three tactics: reduction of public services, prohibition of convenience features, and enactment of regulations which cause convenience features to be unfeasible economically.

The reduction of public services tactic can normally only be invoked in the most exclusive communities, those communities where residents, because of the availability of servants and/or leisure time, can afford to forgo some public amenities. Examples of this sort might be lack of provision of garbage collection or provision of inferior public schools. This tactic has several advantages. First, it may make the

6.3 Convenience (continued)

town a distasteful place to live for the very poor. Such a town could conceivably do away with exclusionary zoning and building code practices without attracting an influx of the less affluent. But even if such an influx were to occur, the costs of having the poor in town would be greatly diminished. Second, this tactic results in a low property tax rate, an advantage which is not unnoticed by the residents of such communities.

The second tactic, outright prohibition of convenience features, is most usually a by-product of those building law provisions which assume a middle-class life-style. For instance, separation of residences from workplaces and commercial facilities is not much of an inconvenience for a two-car suburban family. But the poor no-car or even the relatively poor one-car family often finds that the advantages of use separation are not worth the trouble.¹ Commuting to work, shopping, or visiting a cinema or friends may be costly in money, in time, and in family harmony. And if zoning prohibits home industry, commuting becomes essential, thus depriving many people of a convenient workplace.

Finally a town may reduce convenience by making convenient features prohibitively expensive. Such happens when zoning limits density to the point where convenience shops such as shoe repair stores, cleaners, and variety stores cannot support themselves. Such businesses need reasonably high densities in the neighborhood to be assured of a market.²

6.3 Convenience (continued)

The same result is obtained more directly if the building code imposes overly strict requirements for commercial and industrial structures.

In this chapter we have discussed the mechanisms by which some people manage to exclude other people from their neighborhoods. If the reader is more interested in the various characters in the drama, he or she is advised to read Appendix B -- Chapter 11.0 "Have Nots" and Building Law and Appendix C -- Chapter 12.0 "Haves" and Building Law where these issues and others relating to the difficulties inherent in building law are discussed with more specificity.

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- (1) Bernard H. Siegan, "The New Approach to Planning: Nonzoning," *Reason Magazine*, 4, 12 (April, 1973), p. 7.
 - (2) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 125 f. mentions this point in a slightly different context.

7.0 VALUES

"We wondered whether the zoning system was as much an innocent regulator of potentially harmful activity as it seemed, and we have concluded that any zoning system which seeks real limitation of freedom of choice must carry well-delineated and value-laden policies with it.... We are simply not sure of the values we wish to implement in our urban policies. Until we are, we can continue to expect the planning and zoning process to be deeply troubled by ambiguity and ambivalence."¹

What has been said about zoning above, can also be extended to housing and building codes. "If governments cannot, or will not, make up the difference between what housing laws require and what the effective demand can purchase, then why do they create these problems? Why is the common sense solution of allowing and encouraging people to make the best use of what they have treated as subversive nonsense by the technocratic and bureaucratic authorities? Why do these authorities and the institutions they control refuse to let people live and move between the extremes of neglected, dangerous slums and residences suitable for middle-class Joneses? Why, in other words, are the 'problems' so universally defined in terms of what people *ought* to have (in the view of the problem-staters) instead of in realistic terms of what people *could* have?"²

Implicit in each building regulation is some goal, some objective. These goals are chosen by some "problem stater" who has values and biases of his

7.0 VALUES (continued)

own which do not necessarily correspond to the values of and biases of the regulatees. As Grenell has so aptly stated it, "In an effort to achieve targets and to increase production, the nature of housing needs is assumed a priori by government policies and programs. People in general, and poor people in particular, become invisible to officialdom; their needs are reduced to the barren and abstract specifications of codes and standards, however well-intentioned. They are either prevented from exercising real control over one of the basic elements of existence, or are continually harassed by governments bent on preventing haphazard or substandard development."³

Essentially, there are two prevalent assumptions that have allowed this situation to exist. The first is the notion that planning is somehow objective or scientific. In fact, there is no objective way to determine the "best" use of land, or to choose between pro-growth or no-growth proposals, or even to decide what is safe, healthy, or moral.⁴ And planners are thus forced to use their own values when formulating legislation.

The second assumption can best be described by a proponent: "There is frequently a conflict between the values of a society at large and the ambitions of individuals, or groups within it. In the context of the built form, it can be shown that uncontrolled growth of building bulk may prejudice the functioning of adjacent buildings and constrain the form

7.0 VALUES (continued)

which development might take on adjacent sites. Furthermore, the performance of transport and other servicing systems may be affected. The existence of these conflicts establishes the right of society to control the activities of individuals."⁵ There are at least three flaws in this line of reasoning. The first is that "controlled growth" somehow constrains development any less than "uncontrolled growth." The second is the notion that "society at large" is something other than the individuals within it, and therefore has some "rights" above and beyond those possessed by individuals. This is a philosophically debatable question, and too complicated to discuss in a treatise on building regulation, but the fault of this assumption does not rest on philosophical theorizing only. The third flaw is that this reasoning presupposes that the framers of legislation will be able to represent the values of "society at large." Not only is it impossible for the framers to shed their own personal values, but it is also impossible for the framers to adopt the values of "society at large." People have very diverse tastes and goals, and any attempt to homogenize these values will result necessarily in mediocrity and in official blindness to the wants and needs of the least powerful segment of society.

In the remainder of this chapter we will study this problem more closely.

(1) Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), p. 188.

7.0 VALUES (continued)

- (2) John F.C. Turner, "Housing as a Verb," *Freedom to Build*, eds. John F.C. Turner and Robert Fichter (New York, 1972), pp. 149 ff.
- (3) Peter Grenell, "Planning for Invisible People," *Freedom to Build*, eds. John F.C. Turner and Robert Fichter (New York, 1972), pp. 97 f.
- (4) Nice discussions of this point are contained in Mandelker, pp. 14 f.; and in Bernard H. Siegan, "The Case Against Land Use Planning," *Reason Magazine*, 7, 9 (January, 1976), p. 10.

7.1 Economics

Local regulations often have both architectural and economic consequences. Local economic decisions (tax laws) have most certainly had an impact on architectural form: witness the use of mansard and gambrel roofs to avoid paying taxes on the upper story, or the paucity of windows when England assessed property taxes by window count from 1798-1851.¹ But we are more concerned here with the opposite side of the issue: the economic impact of building regulations.

"A city is a heterogeneous collection of people, structures, and neighborhoods. Trying to superimpose escalating convenience and maintenance requirements over an entire population is both unrealistic and a disservice to those who wish to pay -- and can only pay -- for minimum standards and amenities."² This statement is clearly true for the very poorest people (i.e., those people with virtually no disposable income), but the vast majority of people *can* pay something. Here, we

7.1 Economics (continued)

argue that even under these conditions, it is wrong and futile to force the relatively poor to pay for the aesthetics, convenience, or even safety of structures.

The most telling example discovered in this research is related by Grenell: at Bhubaneswar, India "[e]ventually the government built some very modest quarters for the rickshaw pullers next to their shacks [in response to the squatter problem]. The rickshaw pullers quickly sublet these new quarters for extra income and stayed in their shacks, indicating clearly what their priorities were."³

If the reader recognizes the There-Oughta-Be-A-Law Syndrome in this scene, he should not be surprised. Turner goes on to say a few pages later: "The most common objection to changes in public policy which would increase the user's control in housing at the expense of central institutions is that standards would be lowered as a result. The standards which the objectors have in mind, however, are not something which *can* be achieved with available resources but, rather, represent the objector's own notion of what housing *ought* to be."⁴ Again, we hear the minor error that the poor cannot afford standard housing. When true, the situation is indeed deplorable, but it is seldom true. The choice is more often between aesthetics and money or convenience.⁵

For instance, "poor" immigrants living in impossible slums at the turn of

7.1 Economics (continued)

the century seemed to have had enough money to return to Europe when economic conditions in New York City were poor.⁶ And current-day slum dwellers in New York City often visit home -- Puerto Rico or some small rural town. They indicate their priorities just as clearly as the Indian rickshaw pullers did.⁷

If the middle-class reader thinks that this argument sounds implausible, some statistics given by Banfield should be considered. In slum areas, 40% of the white male-headed families and 25% of the black male-headed families paid less than 10% of their income for housing.⁸ And in a study done in 1964 in the Washington Park Boston Renewal Administration project, only 13% of the displaced families actually left ghetto conditions although most could have afforded standard housing (the median rent at \$85 averaged 12% of the income in this group). The displaced families showed a decided preference for cheap rents (presumably so they would have more money to spend on higher-valued goods).⁹

This argument is understandably difficult for building professionals to believe. Housing and other environmental concerns are very high on our list of priorities; this is true else we would not have chosen architecture or city planning as a career. But the fact is that some people do not share our values; some people really do prefer a new car, a vacation, an education, or financial security (to name just a few possibilities) to middle-class "minimum acceptable" housing. It is wrong and futile to

7.1 Economics (continued)

try to supplant their values with ours.

- (1) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 95.
- (2) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. 6.
- (3) Peter Grenell, "Planning for Invisible People," *Freedom to Build*, eds. John F.C. Turner and Robert Fichter (New York, 1972), p. 113.
- (4) John F.C. Turner, "Housing as a Verb," *Freedom to Build*, eds. John F.C. Turner and Robert Fichter (New York, 1972), pp. 149 ff.
- (5) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 43 f.
- (6) Kate Holladay Claghorn, "Foreign Immigration and the Tenement House in New York City," *The Tenement House Problem, Volume II*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), pp. 82 f.
- (7) Edward C. Banfield, *The Unheavenly City Revisited, A Revision of the Unheavenly City* (Boston and Toronto, 1974), pp. 127 contains an enlightening discussion of the lack of real poverty (as judged by any objective standards) in the United States today.
- (8) *Ibid.*, p. 11.
- (9) *Ibid.*, pp. 92 f.

7.2 Aesthetics

"People differ greatly in their perceptions and concepts of beauty, and this makes it most unfair and perilous to progress to allow any one person or group to impose aesthetic controls. History readily bears out that society will be enriched by being subjected to a great variety of

7.2 Aesthetics (continued)

artistic or visual experiences; modern culture is enormously indebted to creations that were highly unpopular and virtually subversive in the past.... 'Snob zoning' creates also 'snob aesthetics.'"¹

In theory, most people would agree (at least in the United States), but the problem is that local building regulations necessarily affect aesthetic concepts.

On occasion, aesthetic controls have been a direct goal of building law. Examples of this abound in Europe, but even in the United States, it happens. Observe the case in which the California Coastal Commission demanded the removal of the trees at Sea Ranch in order to preserve the view from the road (thus ignoring the internal aesthetics of the project as well as privacy considerations).² Or witness the court in Washington, D.C. stating that legislation can be enacted to make the capital "beautiful as well as sanitary."³ Or, closer to home, observe the numerous "anti-billboard" regulations⁴ or the frequent extralegal imposition of aesthetics controls placed on developers seeking project approval from local boards.⁵ And once in a while, a planner actually proposes to use building legislation to achieve aesthetic objectives.⁶

More often, however, local laws which are designed to protect the public health, safety, morals, or economic position have aesthetic side effects. In the early 1700s in England, fire codes virtually

7.2 Aesthetics (continued)

outlawed Queen Anne style architecture.⁷ Other laws controlled window shape⁸ and story height;⁹ mandated parapets¹⁰ and 4" window and door reveals;¹¹ and prohibited projecting gables.¹² These laws combined with "Ancient Lights" requirements (controlling the buildings' masses), materials limitations, and even interior decor laws¹³ to limit the British architectural-aesthetic expression.

Similar (but often less stringent) laws were enacted early in our history of building regulation. Rugs, wallpaper, and other fabrics were said to aid contagion of tuberculosis and were thus prohibited in multiple-dwellings.¹⁴ Ventilation and light were considered "musts" and laws were enacted which promoted the ubiquitous transom and mandated windows in w.c.s and required periodic painting and whitewashing.¹⁵ And modern architects seem forever confronted with problems resulting from fire-exit rules, platform construction regulations, and other fire and health laws which seem to bear no reasonable relationship to the aesthetic wishes or needs of users.

The biggest villains in this section, however, are not building codes and fire regulations, as annoying as they may be. The real villain is zoning. Despite the obvious observation that the aesthetic problem is not the fatal disease which afflicts our country,¹⁶ zoning law continues to enforce the middle-class aesthetic, continues to preserve "the ideas of beauty official entertained."¹⁷ In the following subsections, we will discuss the

7.2 Aesthetics (continued)

role of zoning in mandating a particular aesthetic ideal.

- (1) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 143.
- (2) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 117 f.
- (3) *Berman v. Parker*, 348 U.S. 26 (1954).
- (4) Billboard regulation was first instituted in London in 1891, C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 89, but has been invoked frequently in this country in the name of public morals (immoral acts are supposed to take place behind them), safety, etc. A number of critics of this sort of legislation have arisen including Robert Venturi and some of Rice's architectural faculty (Siegan, *Land Use Without Zoning*, p. 72.) who argue the matter on either aesthetic or economic grounds. Both arguments are sound. If a poor man can rent out advertising space on his property (as is frequent in Houston), he should be allowed to make the extra money or the objecting few should pay him not to allow the advertising to be erected. I say "objecting few" because of the aesthetic argument. Billboards are at least acceptable to the majority of Americans; if they weren't, advertisers would alienate more customers than they would attract. Since advertisers find billboards to be good advertising, it follows that most Americans are at least neutral on the subject.
- (5) Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), p. 56. Or see Section 4.3 Graft, the Public Variety. This sort of situation is quite frequent when seeking zoning variances or approvals from historical commissions, however, this author knows of instances when it was encountered in seeking approvals from building inspectors for underground oil tank installations and rooftop mechanical installations.
- (6) J.J. Dukeminier, Jr., "Zoning for Aesthetic Objectives: A Reappraisal," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), pp. 83 ff.
- (7) Knowles and Pitt, pp. 37 f.

7.2 Aesthetics (continued)

- (8) *Ibid.*, p. 19.
- (9) *Ibid.*, pp. 19 f.
- (10) *Ibid.*, p. 37.
- (11) *Ibid.*, p. 41.
- (12) *Ibid.*
- (13) Such as those cited in G. Topham Forrest, *The Construction and Control of Buildings and the Development of Urban Areas in the United States of America* (Westminster, England, 1925), p. 29.
- (14) Herman M. Biggs, M.D., "Tuberculosis and the Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 454 and Lawrence Veiller "Tenement House Reform in New York City, 1834-1900," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 106.
- (15) Robert W. DeForest and Lawrence Veiller, "The Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 25.
- (16) Edward C. Banfield, *The Unheavenly City Revisited, A Revision of the Unheavenly City* (Boston and Toronto, 1974), pp. 5 f.
- (17) Part of Ambler's argument in the trial, *Village of Euclid v. Ambler Realty Co.*

7.2.1 Incompatibilities

Modern day planners have granted that incompatibilities in uses are fewer and farther between than their predecessors had believed, but they do believe that they exist,¹ though they also admit that zoning has not done an exemplary job of eliminating them.²

7.2.1 Incompatibilities (continued)

The term "incompatible uses" has, unfortunately, become a catchall term which is used to help rationalize a particular person's aesthetic judgments.³ Some commonly accepted "incompatibilities" include housing and airports, housing and commercial or business uses, churches and factories. Incompatible? Yes, under some circumstances -- but not all. Housing built near an airport might prove a blessing to the deaf; land would be cheap due to noise pollution and the deaf family could have a better home without any accompanying cost. Housing built near workplaces are a boon to anyone who hates commuting. Housing built in a 24-hour-a-day commercial area can serve both the worker with an erratic swing-shift and an older person who feels more secure when people are on the street. Churches in an industrial park can take advantage of the Sunday silence and the vast underutilized parking lots.

The fact is that "incompatible" is as subjective as "beautiful." Only the user can say what is incompatible and, then, he can only speak for himself. What is incompatible to one user may be gloriously inspiring to another.

Thus we see that one of zoning's major tactics, use segregation, is not a universal blessing. The "pig in the parlor" may provide desired companionship.

(1) C. McKim Norton, "Elimination of Incompatible Uses and

7.2.1 Incompatibilities (continued)

Structures," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), pp. 92 ff.

- (2) Carl Feiss, "Planning Absorbs Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 125.
- (3) What attracted this writer's attention to this problem was a small magazine article about an oil well and a restaurant ("'Incompatible' Land Uses? Who Sez?," *AREA Bulletin*, 2, 4 (July, 1976), p. 5.). Offhand one could not think of two more "incompatible" uses and yet the owner of the land had come up with a bright idea: he painted his working oil well bright green, built his MacDonal'd's right around it, and made his oil well a minor tourist attraction!

7.2.2 Monotony, Mediocrity, and the Tract House

Despite the previous subsection, it is true that most people do not want to live next door to an abattoir. Our current legislative system has appropriately responded to this widespread desire (the problem, of course, is that the wants and needs of minorities and other non-powerful groups have been submerged in the preferences of the majority), and the will of the middle class has been imposed on everyone. These people have promoted use segregation through zoning. And they have declared maximum densities and minimum setbacks to preserve the "residential quality" of all residential neighborhoods. This writer would not presume to say that these efforts have been a failure -- many hundreds of thousands of Americans live in suburban Leavittowns and are blissfully happy with their homes and neighborhoods. In this paper we only note that zoning has been the major factor which allowed and encouraged monotonous, mediocre tract

7.2.2 Monotony, Mediocrity, and the Tract House (continued)

developments to proliferate.¹

The mechanism by which this all happened is not very difficult to explain. The "minimum" established by local laws was higher (more expensive) than most buyers actually wanted. But buyers did want their single-family bungalow so they scraped together the extra money (above what they wanted to pay) and bought the minimum house. The lot size was as small as zoning would allow; frontages were uniform and minimum; the homes were built to the limit of the envelope (ordained by required setbacks and maximum heights); and thus emerged the monotonous appearance and rhythm on the suburban street.

We mentioned above that the buyers had to scrape together some extra money, but we did not mention whence that money came. Of course, it may be that the buyers simply didn't buy a TV or put off the purchase of some other consumer good, but it is likely that that money came from the housing budget, that some preferred housing amenity was forgone in order to afford the minimum house.² Perhaps the childless artist was forced to buy a backyard instead of a northern skylight; other families were forced to buy side yards instead of the big kitchen they had wanted; still others gave up the services of an architect. And thus mediocrity became the norm on the suburban street.³

Before we leave this topic, it must be noted that the building codes are

7.2.2 Monotony, Mediocrity, and the Tract House (continued)

not totally innocent in this regard. Not only do they also increase the costs of building, thereby adding to the problems mentioned above, but they also have some special effects of their own. For the most part, they encourage and even mandate standard construction techniques using familiar materials. Radical or innovative designs are discouraged or even rejected.⁴

Building codes have also had a similar effect on manufactured housing. Since virtually every model change requires a new round of code approvals, manufacturers have been loathe to market more than a handful of different designs. Obviously, this breeds monotony.⁵

(1) For instance, see Seymour I. Toll, *Zoned American* (New York, 1969), p. 258.

(2) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 6 f.

(3) It is probably true that some people want conformity. But it is also undoubtedly true that other people would prefer some diversity, but not the lack of control that can exist in uncontrolled environments. These people have therefore accepted the homogeneity of residential zoning although it is not optimal for them.

(4) To dramatize the truth of this statement, Jan Wampler's anecdote about his strategy for finding unusual owner-built structures is appropriate. As he traveled across the country looking for innovative designs, he learned that the easiest way to locate interesting structures was to visit the local fire inspector and the local building inspector and to ask them about the most hazardous structures in town. This technique led Mr. Wampler to the unselfconsciously beautiful structures which illustrate his forthcoming book.

7.2.2 Monotony, Mediocrity, and the Tract House (continued)

- (5) David Falk, *Building Codes and Manufactured Housing* (Washington, D.C., 1973), pp. 41 ff.

7.2.3 Urban Sprawl or Garden City

One of the most serious value problems with which zoning has been unable to deal is the problem of density. During the '20s and '30s, the Ebenezer Howard Garden City ideal had finally filtered down into the minds of planners in the suburban villages across the United States (albeit in a very distorted form). Although some of the first and most successful American Garden Cities had been built without benefit of zoning,¹ other suburban communities tried to copy their results using the force of law. Each town, particularly the towns nearest to the urban centers, "conserved" open spaces and required grassy lawns and family-style bungalows. The land that remained near downtowns became too expensive for development (in part because of the artificially decreased densities that were required), so developers "leapfrogged" over the most restrictive intown suburbs and built in the more hospitable exurbs.²

This does not disprove the theories of traditional wisdom: federal highway programs, tax laws, technological transportation innovations, federal programs encouraging single-family residences, personal preferences, and a score of other considerations have all played a

7.2.3 Urban Sprawl or Garden City (continued)

role. Here we only point out that existing land use regulations encourage urban sprawl rather than curb it.³

The basic problem with the zoning scheme is that densities were preordained by law. This meant that development could not respond to the wants of people who did not share the values which had been petrified into law. It is not only that laws are inflexible. If zoning changes were allowed on an hourly basis, the results would not be very much different. The problem is that people already living in town in established neighborhoods were allowed by law to control, not only their own neighborhoods, but also undeveloped land in the town. These people valued open space and low density, so that is what was demanded by the law. If the laws were to be based on wider participation (i.e., regionalization), densities would likely be lowered so that the majority of people in the region could afford homes, but the minority who were very poor and individuals with significantly different environmental values would still be excluded.

Whenever the law mandates a particular value, those who do not share that value are unjustly harmed. In this particular instance, we have been looking at the value of "low density," but the phenomenon occurs across a wide range of values: "proper" sanitary facilities, segregation of "incompatible" uses, "safe" (read traditional) structures, "uncongested" (or in the case of Jacobs, "congested") city streets,

7.2.3 Urban Sprawl or Garden City (continued)

and all other "values" that building codes and zoning ordinances promote.

- (1) Sunnyside was built on land zoned for industry and Radburn was built with covenants for protection. A discussion of the Garden City ideal and its effect on suburban zoning schemes is contained in Seymour I. Toll, *Zoned American* (New York, 1969), pp. 284 ff.
- (2) This phenomenon has been noted by several authors: Edmund Contoski, "Government Controls and Urban Renewal," *Reason Magazine*, 7, 1 (May, 1975), p. 23, Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 5 f., and Carl Feiss, "Planning Absorbs Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 124, among others.
- (3) A mechanism with the same results operates with building codes. If density is artificially decreased in a slum area (through condemnation, demolition, or forced evictions of illegal tenants), the displaced persons will simply move to another area, thus worsening conditions for even more people.

7.3 The Problem with Coercion

The wrongness of building laws, and of so many other laws, is that such laws force people to act in a manner contrary to what they consider to be their own best interests. Planners will necessarily propose regulations that accord with their own personal values; political interests will necessarily distort even these value-laden regulations (at least as long as there is any semblance of democracy in this country); and everyone's right to pursue happiness in a manner consistent with the equal rights of others will be abridged.

7.3 The Problem with Coercion (continued)

Certainly, the results of our building laws are not necessarily always as unreasonable as those cited in this chapter. Laws with very low standards will affect fewer people; laws which are not enforced also avoid most of the problems outlined in this chapter. However, to the extent that laws do change the voluntary decisions of the people involved in the building process, and to the extent that these coercive laws are enforced, a disservice is done to those who would act otherwise.

8.0 REFORMS

In the previous several chapters we have discussed the problems with building laws. From this discussion, we have extracted ten criteria for reform.

1. Responsiveness. The most important criteria should be responsiveness.

In order to assure that the controls are responsive, enforcement and enactment should be in the hands of the people who must live with the controls. Each individual should have control over his own environment; control should not be given to bureaucrats, administrators, planners, or parochial business interests.

2. Exclusion. Closely connected with responsiveness is the criteria of exclusion. Some degree of exclusion must be allowed -- a "no exclusion" environment is incompatible with responsiveness. However, we must not allow excluders to raise costs and influence convenience beyond their immediate neighborhoods.

3. Flexibility. Also connected with responsiveness is the criteria of flexibility. Changes both over time and between neighborhoods must be allowed in order to insure responsiveness. The diversity that exists among people should be allowed to be expressed through diversity in the environment. However, again we must note that this flexibility should not be given to bureaucrats, but rather to the people who are most interested, the people living in the environment in question.

8.0 REFORMS (continued)

4. Objectivity. Whatever controls exist should bear a strong relation to the goals of the people who live under those controls. Furthermore, they should be clear and non-discretionary.

5. Graft. Strongly associated with objectivity is graft. Reforms should minimize both opportunities and motivations for graft. However, the sort of equitable graft that allows a developer to pay a neighbor for damages should be allowed.

6. Enforceability. In order for controls to be effective, they must be enforceable. Of course, if all other criteria are met, it is probable that enforcement would not be a problem, but reforms should seek a system that does not require an extensive administrative bureaucracy.

7. Hardship. Enforcement should not create hardship for the poor.

8. Blunder-impact. As we have already seen, no matter what controls are used, errors will necessarily be made. Our reforms should aim at minimizing the impact of such errors.

9. Liability. Controls should not be used to limit the liability of developers, architects, engineers, etc., for the damage that they might do to non-consenting neighbors.

8.0 REFORMS (continued)

10. Feasibility. Even if a particular scheme met all of the above characteristics, if it were politically unfeasible or unconstitutional, consideration of that scheme would be a waste of time.

Over the years, a large number of reforms for the building law system have been recommended. Space does not permit us to treat each suggestion in detail. However, most proposals fall into one or more broad strategy categories. The remainder of this chapter examines the present system and compares the major reform categories in terms of the criteria we have enumerated above.

8.1 The Current System

The current system is far from perfect, however, it is not completely unworkable. It does respond well to the needs of millions of middle-class, white, suburban homeowners and it is about as flexible and objective and exclusive as those people want it to be. The problem is that there are also millions of other Americans who do not share the values that predominate in their own communities. Although graft is rampant in our larger cities, many suburbs are virtually free from this problem and although the codes and ordinances are often quite unenforceable, this insures that hardships will be minimized.

The only criterion in which the current system fails completely is

8.1 The Current System (continued)

liability. Current laws allow high levels of nuisance activity and no citizen can gain relief; current laws also allow many architectural and engineering errors to be made without giving owners an opportunity to gain relief. However, even in this area, although the damage done can be quite considerable, relatively few people are affected by it, and thus the present system is not as awful as a building law system could be.

The current system has two real assets, however: it is eminently feasible and "balkanization" of jurisdictions insures that the impact of any real blunders will be kept quite low.

Let us see how some suggested reforms rate in comparison.

8.2 Sticks

The saddest and most easily rebutted group of reforms are the ones that propose more of the same. They call for localities to be given more discretion and flexibility;¹ licensing of contractors, inspectors, and landlords;² zoned building codes;³ and even stricter regulations and tighter enforcement.⁴ Much of any analysis of these programs would depend on the precise implementation that would be enacted, but all of them have some necessary flaws.

If towns are given increased discretion and flexibility, user-responsiveness

8.2 Sticks (continued)

may be increased, but it is much more likely that these reforms will merely serve to entrench further the powers that already control building laws, thereby reducing user-responsiveness, user-flexibility, and objectivity. Moreover, the most-discussed problem with building laws, exclusion, will most certainly be worsened. This sort of "solution" will probably be of no value in any critical area of concern: it will only amplify existing difficulties.

Licensing of various special interests may improve quality, but it is much more likely to prove to be unenforceable,⁵ graft-ridden, and non-objective. In every area where licensing has been tried (doctors, lawyers, architects, engineers, beauty parlor operators, etc.), this system has led to greater costs and monopolies and has never led to any real guarantee of competence or ability. This writer sees no reason to expect that the current proposals would work to public benefit any more than previous ones. Licensing generally leads to a reduction of user options and should therefore be rejected.

Zoned building codes, on the other hand do promise some improvements: the number of hardship cases would be materially reduced and decreased controls would allow users to exercise more control. The drawbacks however, heavily outweigh these possible advantages. Like zoned land-use regulations, zoned building codes will undoubtedly be drawn up to reinforce segregation and to underline the differences between economic

8.2 Sticks (continued)

and social groupings. Furthermore, such a system entails increased motivation for graft: if it costs less to bribe an official to downzone one's own property than it costs to repair the property, and if that difference cannot be covered by increased rental income, bribery will surely result. This system might be able to offer users more flexibility, but since bureaucrats and administrators will be in charge of both contents and enforcement, it is unlikely that this reform would be a substantial improvement over the current system.

Stricter regulations and tighter enforcement is the worst reform proposed and yet it is a very common proposal. By the ten criteria we have enumerated, this proposal is acceptable on only one count: it is feasible. Because this "reform" gives more control to government officials and to those groups who already benefit from building laws, it will necessarily decrease user-responsiveness, user-flexibility, and objectivity (since current legislation is frequently non-objective). The housing that survives may be better quality, but the number of hardship cases would be increased dramatically. This "reform" will worsen nearly every problem mentioned in this paper. In short, we don't need more regulation, we need less of it.

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- (1) Jan Krasnowiecki, "Legal Aspects of Planned Unit Development in Theory and Practice," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 185 ff. Robert Freilich, "Interim Development Controls: Essential Tools for Implementing Flexible Planning and

8.2 Sticks (continued)

Zoning," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 213 ff. Jerome Rose, "From the Legislatures: Proposed Development Rights Legislation Can Change the Name of the Land Investment Game," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 273 ff. R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), Chapter 7. Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. 18, p. 131.

- (2) Parratt, p. 54, pp. 150 f. Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 5.
- (3) For instance, Parratt, p. 7.
- (4) Nearly every housing or building code reform contains such a proposal. See for instance, Delaware State Planning Office, *Codes and Their Effect on Delaware's Housing, An Analysis of Housing Related Codes* (Dover, Delaware, 1970), *passim*. for a particularly naive statement of this sort.
- (5) Between exceptions; graft-promoted approvals; and problems with trying to define exactly what constitutes being a contractor or a landlord (not to mention trying to define what constitutes being a "competent" contractor or a "responsible" landlord); such schemes have little chance of enforcement.

8.3 Carrots

More sophisticated reformers have avoided the There-Oughta-Be-A-Law Syndrome. They have recommended that we use carrots instead of -- or sometimes in conjunction with -- sticks, incentives to encourage good trends instead of disincentives to discourage bad trends. Abrams¹ suggests that we use the tax structure to provide incentives: by placing high taxes on undeveloped land and on slum properties we can encourage

8.3 Carrots (continued)

development and renewal. Woodruff² also suggests that we use the property tax system, but does not make any specific proposals. Rybeck³ advocates a Georgist scheme of property taxation: under such a scheme only the land is taxed, never the structures or other improvements. Babcock,⁴ Mandelker,⁵ and Linowes and Allensworth⁶ recommend that we use municipal blackmail or federal funds to provide the desired incentives. Bergman⁷ recommends that we eliminate the fiscal incentives for exclusion.

These solutions are very deceptive. They go: if you want to eliminate exclusion, eliminate the incentives to exclude; if you want to encourage good housing, motivate people to build and maintain good housing. They are very attractive because they use the forces of the market, the forces of self-interest to provide public goods.

The more specific proposals have some obvious flaws. Abrams' solution may lead to higher rents for the poor and more urban sprawl. Georgist tax schemes make open spaces in central cities a fiscal impossibility and impose unfair taxes on rural areas which happen to be adjacent to development. Bergman's solution seems reasonable, but not truly feasible (it involves giving up local control of schools and other public services in order to insure that bringing poorer people into town will not necessitate higher taxes). But even the non-specific proposals have a very serious flaw.

8.3 Carrots (continued)

We don't know what the "good" is. What shall we encourage? Garden City or Urban Sprawl? Growth to accommodate the poor or no-growth to accommodate the environment? Safe housing or costly housing? This is the most basic flaw in all building regulations. Since the incentives and disincentives are designed by *some* people, they will necessarily encourage or discourage development in accordance with the values of the designers of the law.

In terms of the criteria for reform which we have already discussed, we would expect that the use of incentives would make laws more enforceable and would therefore cut down on graft, but in other respects there would be no major improvement. Unless there is an essential change in the people who frame the laws or unless there is an essential change in the values of the people who frame the laws, we can hardly expect any real improvement over the present system.

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- (1) Charles Abrams, "Opportunities in Taxation for Achieving Planning Purposes," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), pp. 222 ff.
 - (2) Archibald M. Woodruff, "Strengths and Weaknesses of the Property Tax," *Property Tax Reform, The Role of the Property Tax in the Nation's Revenue System* (Chicago, 1973), p. 112.
 - (3) Walter Rybeck, "Making the Property Tax Work for Urban Development," *Property Tax Reform, The Role of the Property Tax in the Nation's Revenue System* (Chicago, 1973), pp. 125 ff.
 - (4) Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), *passim*.

8.3 Carrots (continued)

- (5) Daniel R. Mandelker, "The Basic Philosophy of Zoning: Incentive or Restraint," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974) pp. 203 ff.
- (6) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), p. 174.
- (7) Edward M. Bergman, *Eliminating Exclusionary Zoning: Reconciling Workplace and Residence in Suburban Areas* (Cambridge, Massachusetts, 1974), pp. 15 f.

8.4 Subsidies

Noting that tenants themselves are a major cause of poor housing,¹ some authors have recommended that the rich subsidize the poor.²

This proposal has a number of real advantages. If we give the poor enough money, they will be able to afford housing that meets our standards. The need for housing and building codes could be eliminated entirely and even zoning and subdivision regulations might prove unnecessary.³ This proposal also has the advantage of allowing the poor a maximum amount of freedom in finding an environment suitable for themselves.

In terms of our criteria, this proposal is nearly ideal. Since building laws would be eliminated, enforcement and graft would disappear.

Obviously no hardship cases would be possible under such a scheme and responsiveness and user-flexibility would be maximized. If a user didn't like something, he could afford to change it. Some exclusion might still

8.4 Subsidies (continued)

exist, but it would be no more than people actually wanted. The elimination of codes would also insure that blunder-impact would be minimized and even objectivity would prove to be but an academic issue. Of course, liability laws would probably remain as they are now, but if everyone had enough money to pay for the architect's and neighbor's mistakes without hardship, liability would not be an important issue.

There are problems with this proposal, however. Aside from any philosophical convictions one may have about the immorality of taxing some people in order to confer benefits on other people, there is the problem of feasibility. The government would have to give the poor enough money to satisfy all their desires that rank higher than "decent" housing if we wanted to insure that everyone had "decent" housing. Thus we would not only incur prohibitive costs (even for the most liberal of income-redistribution proponents), but we might well find ourselves subsidizing new cars, vacations, television, heroin, and a variety of other highly questionable goods.

If we subsidized to a lesser degree, we would have the problem of the Indian rickshaw pullers. No feasible level of subsidy could correct housing problems because large numbers of poor people simply do not value "decent" housing very much. If we subsidized with the proviso that the money be used only for housing, we encounter a different, but equally intractable, set of problems. First, we must enforce our proviso: for

8.4 Subsidies (continued)

people who do not value housing very highly, the motivation to circumvent the proviso is strong enough so that we can safely assume that enforcement would be difficult and costly.⁴ Second, and more important, our proviso destroys the possible freedoms that subsidy promised. In our paternalism, we would destroy the independence, the values, and the dreams of those we had wanted to help.

Overall, it can be seen that, although subsidies may be the best solution in specific individual instances, they will not be able to provide us with a comprehensive solution to building problems.

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- (1) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), pp. 31 ff.
 - (2) *Ibid.*, pp. 55 ff., for instance.
 - (3) If the logic seems hazy, consider the situation of an individual with "enough" money. If the slightest inconvenience or health hazard exists, he simply pays to have it corrected or, if he is a tenant, he moves to perfect (for him) housing. If a noxious use threatens to move in next door, he buys the property or bribes the owner not to build the unwanted development or moves. If he thinks a particular building has historical significance or if he wants extensive open space, again, money can buy these things. Thus we can see that if everyone had "enough" money, the need for building laws would be eliminated.
 - (4) Subsidized housing projects are one possibility under this strategy; their dismal failure to provide safe, sanitary environmental conditions should debunk forever the subsidy-cum-proviso strategy. The other tactic of giving the money to the people directly but requiring that the money be spent on housing, has resulted in government subsidies to slum-lords, a result which has been widely criticized.

8.5 Regionalization to Federalization

"The main argument for state planning is that local planning is not working. The idea is that the local nature of the current decision-making process produces parochial decisions, and that when only the interests of small areas are involved, land-use decisions do not reflect the needs of the broader universe. The contention is that since the wider public is not included in the process, its wishes are therefore excluded. Sometimes it is suggested that local governing bodies are no match for developers and that only the state can handle them."¹

The most popular reform schemes seem to suggest that the problem with local building laws is that they are local. Numerous reformers have called for regional, state, and/or federal control of various aspects of zoning and building code regulation.²

Certainly this sort of reform would solve or at least alleviate many problems for many people. Diversity of regulations and parochialness of decisions would be eliminated -- especially in suburban towns. This would reduce costs and exclusion would be somewhat alleviated. However, suburban communities could be expected to retaliate by using other local powers to offset high-level government schemes -- in all, perhaps a reasonable balance could be struck between the pro-poor and the pro-environment groups, but it is doubted considering Hawaii's experience. Higher levels of government could be expected to do a better job of enforcement, but that would likely cause greater numbers of hardship

8.5 Regionalization to Federalization (continued)

cases unless standards are drastically reduced. Since lower standards in both zoning and building code regulations will probably prove necessary, middle-class suburbs will be unable to maintain the high amenity and security levels to which they have become accustomed. Enforcement would not be eliminated as a problem for other reasons as well: first, civil service and other problems with poor administration would surely result in hardship (as any individual who has ever dealt with the Social Security, V.A., or even state-house bureaucracies can readily testify), and second, the possibilities for graft and corruption at higher levels of government are becoming well known.

This brings us to the essential problem with higher-level government solutions: responsiveness. The federal government, like the local government, will respond to the wants of whatever group happens to have the most influence with it. When this mechanism operates on a local level a certain level of responsiveness and diversity results: some towns are exclusive, others are business-oriented, some urban areas seek order and rationality, others seem bent on total chaos. This provides a large number of people with some options. But if higher levels of government take control, even this small amount of diversity will be destroyed. This writer would not venture to say what group or groups would be most influential in controlling the laws of higher levels of government, but one thing is clear: the very poor and the very individualistic will not be among the influential -- they are too few

8.5 Regionalization to Federalization (continued)

or too disorganized. The end result will be that standards will be changed, but we will be left with essentially the same problems that we started with.

Higher-level government solutions would carry another serious disadvantage also. When a blunder is made, it would have wider impact. Our present balkanization prevents errors from harming large numbers of people. A more unified system could cause serious hardship to vast numbers of people. Because of this, higher level governments can be expected to be quite conservative and inflexible. The possibilities for local, low-penalty experiments in architecture and land-use planning will largely be lost.

Where statewide building law has been tried, it has drawn criticism from nearly everyone.³ Pro-growth (or pro-poor) proponents point to red tape, rising costs, and reduced supplies; no-growth proponents claim conflicts of interest, nonenforcement, and lack of professionalism.⁴ Pro-freedom proponents see such "takeovers" as removing control from the hands of those who are most affected by the regulations.⁵ And pro-poor proponents say that there's still too much exclusion.⁶ To a large extent, these goals are mutually incompatible when applied to the same land area. There is no reason to expect that government bureaucrats will be able to solve these problems justly whether the decisions are made on a local or federal level. In general, it can be expected that higher-level government controls will merely enlarge the scope of the problems by

8.5 Regionalization to Federalization (continued)

insuring that they will have regional, statewide, or federal impact.

- (1) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), p. 112.
- (2) For instances: Herbert M. Franklin, *Land Use Controls as a Barrier to Housing Assistance* (Springfield, Virginia, 1973), *passim.*, Fred Bosselman, "Can the Town of Ramapo Pass a Law to Bind the Rights of the Entire World?," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 241 ff., Paul Davidoff and Neil N. Gold, "The Supply and Availability of Land for Housing for Low- and Moderate-Income Families," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 279 ff., Richard Babcock, "Comments on Model Land Development Code," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 321 ff. Babcock advocates the American Law Institute Model Land Development Code which grants substantial powers to the states. Some specific problems with this code include: (1) it allows states virtually complete control over all development in a number of western states (Section 7-201), (2) the powers it allows states are so "flexible" that any decision made by the state could be justified, thus encouraging non-objectivity and graft (Section 7-502), and (3) use of the code will most certainly aggravate unemployment problems (Section 7-405). Furthermore, the code which attempts to balance interests between the pro-poor and the pro-environment groups will likely be unsatisfactory in practice to either group. As has happened already in Hawaii, both groups will claim "favoritism" though the code calls for sensitivity to both issues. See also, William Reilly, "New Directions in Federal Land Use Legislation," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 331 ff., Charles Haar, "Wanted: Two Federal Levers for Urban Land Use -- Land Banks and Urbank," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 365 ff., Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 5, Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), pp. 103 ff., Linowes and Allensworth, p. 48, Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), pp. 158 f., David Falk,

8.5 Regionalization to Federalization (continued)

Building Codes and Manufactured Housing (Washington, D.C., 1973), pp. 82 ff.

- (3) A sampling of state and regional programs are described in Fred Bosselman and David Callies, "The Quiet Revolution in Land Use Controls," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 285 ff. The descriptions are reminiscent of Veiller: overly sanguine. They do not mention the dissatisfaction of both pro-growth and no-growth proponents in Hawaii; they do not mention that the Vermont plan has not been implemented because of widespread grassroots antagonism; they do not mention that the San Francisco Bay Conservation and Development Commission has been responsible for forbidding development that would have been ecologically and economically beneficial to everyone simply because it was not "water related" (Ferry Port Plaza Project); they do not mention the virtual confiscation without compensation of privately-owned property under the California Coastal Commission or the Massachusetts' Wetland Act. The most obvious flaw of all the programs mentioned by Bosselman and Callies, however, is that each plan is conservation-oriented and will therefore have a negative impact on the situation of the poorest people in our society. How these programs could gain the apparent approval of men who are aware of the exclusionary problems in building law, is a very puzzling question.
- (4) For instance, Hawaii's experience as outlined in Linowes and Allensworth, p. 69.
- (5) For instance, Vermont's experience as outlined on p. 93, *ibid.*
- (6) For instance, Massachusetts "antisnob" legislative experience as outlined in Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 174 f.

8.6 Partial Freedom

A fair number of writers have recognized the problems discussed throughout this paper and have concluded that the only solution is to eliminate (or substantially to reduce the restrictiveness of) at least some provisions

8.6 Partial Freedom (continued)

of some building laws. Babcock proposes to abolish virtually all density controls.¹ Siegan opposes all land-use controls.² And several reformers have recommended partial abolition or selective enforcement of building codes.³

There is really only one serious problem with these solutions: they don't go far enough. If we eliminate one set of local controls, let us say zoning, the other powers of local government would likely be invoked to take up the slack. This has happened and is visible in Houston. Although Houston has no zoning ordinance, strict subdivision controls, massive amounts of restrictive regulation of certain building categories (e.g., townhouses), building codes, and municipal enforcement of private covenants (regardless of the wishes of the interested parties) have eliminated many possible advantages of the "no-zoning" option. Although Houston does have some desirable characteristics (notably cheaper apartment rentals and a relatively dynamic construction industry), it is not a noticeably better place to live than, say, ...Los Angeles.

In the final chapter, we will discuss the advantages of a non-coercive, non-governmental solution to the problems with building law.

(1) Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), *passim*.

(2) Bernard H. Siegan, *Land Use Without Zoning* (Lexington,

8.6 Partial Freedom (continued)

Massachusetts, Toronto, London, 1972), *passim*.

- (3) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), p. 207. Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. 129.

9.0 TOWARD A SOLUTION

"Granting that no one can tell how much worse our cities would have been had we not had zoning, redevelopment, conservation, and public housing, it must nevertheless be admitted that we have not eliminated the slum, urban transportation is a greater problem today than it was 40 years ago, we have not achieved adequate schools, park and recreation systems, and we have failed dismally in planning public finance."¹

It is commonly assumed that the net effect of building laws is beneficial. In Chapter 2.0 A Taxonomy of Laws, we attempted to show that such an assumption is incorrect theoretically. In following chapters, we attempted to show that such an assumption is highly suspect in reality. In this chapter, we will discuss the possibilities for instituting a voluntary system of building control.

(1) Charles M. Haar and Frank E. Horack, Jr., "Emerging Legal Issues in Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 116.

9.1 A Proposal

"Few philosophic and administrative concepts have bedded down so securely so quickly. Few need such drastic reform."¹ Everyone is agreed that our current system of building law is inappropriate and needs a revamp. Very few agree on the specifics of reform. This thesis has attempted to show that the difficulties we have encountered in building law are inherent in

9.1 A Proposal (continued)

any coercive system. We should be very skeptical of any system of building law that requires complicated enforcement mechanisms and that depends on legal coercion. We should seek systems that do not involve government interference; we should seek systems that provide user control and diversity; we should seek systems that take advantage of each individual's personal motivation to create an ever-improving environment for him- or herself.

The following subsections describe this writer's suggestions for achieving such a voluntary system.

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- (1) Carl Feiss, "Planning Absorbs Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 125.

9.1.1 Damage Laws

It is this writer's feeling that most people would feel insecure in an environment that did not carry the government's stamp of approval. Concomitant with any apparent lessening in government control, an increase in user control must be offered.

The first step in reform would benefit greatly from judicial reform. If and individual is (or will be) harmed by some building or by some construction activity, he or she must be given an opportunity to gain

9.1.1 Damage Laws (continued)

fast, inexpensive relief. This is an admittedly difficult task: courts are overburdened and conservative. The elimination of government-imposed building controls should help to cut the number of real estate cases in the courts however, and the freed judicial resources should be spent on the provision of speedy, inexpensive relief for damaged individuals.

The first step would be to clarify and, in some instances, strengthen existing laws. Any new legislation that is enacted should prohibit actions that are harmful per se. Performance standards which are defined by measurable, objective criteria could be useful in this context. Precise levels of noise, air, water pollution which harm human beings or their property should be found and those levels should everywhere be prohibited except, of course, on one's own property. It is true that such levels will not be perfect and should therefore be subject to change, but certainty is the most important consideration in this context. Variations from the legal standards could be accommodated through negotiation amongst private property owners. For instance, a factory might buy the rights to allow a slightly higher level of pollution on the property of neighbors or alternately the neighbors might bribe a factory to install stricter pollution controls. It is strongly recommended that the legal levels of allowable pollution be rather strict. The difficulties of organizing a large neighborhood to bribe a business are such that the burden of varying the legal standards

9.1.1 Damage Laws (continued)

should generally be placed on the factory owner. The following five criteria should be applied to our reformed laws:

- (1) The laws should be clear. Fuzziness in standards would lead to a breakdown in the contractual variation process.
- (2) The laws should be associated necessarily with damage. Only actions which harm other people or their property should be prohibited.
- (3) No "victimless crime" laws should be implemented. If a person chooses to harm himself or his own property (as long as no harm to other people or their property results), he must be allowed to do so. This provision allows individuals to bargain with their rights to a clean, safe environment if they so desire.
- (4) Courts must recognize the validity of contractual variation agreements.
- (5) The laws must be self-enforcing. No administration (other than damage courts and normal police) should be necessary. Condition 2 above guarantees that someone would be damaged by a violation; any legal action to ensure enforcement should be instigated by the harmed party.

Another area where increased government action might prove useful is in the area of implied warranties.¹ There are two implied warranties: the warranty of merchantability (which requires goods to be (among other things) adequately labeled and in conformance with the promises or

9.1.1 Damage Laws (continued)

affirmations of fact made on the label) and the warranty of fitness for particular purpose. Although these warranties have not generally been applied to buildings, there is no reason why they ought not to be. Such application might or might not (depending on judicial decisions) mean that producers of buildings would be required to label their goods, but if labeling were required, buyers and users of buildings would be provided with the information necessary to the making of intelligent user decisions. In any event, minimal structural and functional standards are implied by such warranties. The reader may wonder how these "warranties" differ from minimal building codes. They differ in one very important way: they are not absolute. They apply normally, but the seller may contract to be relieved of the responsibilities imposed on him by the implied warranties. Any exceptions to or variations from the minimal standards implied by these warranties must be clearly established however, because the courts have traditionally favored the consumer when the clearness of the provisions of sale have been in doubt. Thus warranties can be seen to allow unlimited *user* control over building conditions, to provide some needed information regarding the quality of the building in question, and to guarantee a minimum standard of safety and utility. Another advantage of a warranty system is that it is self-enforcing. If a product is subminimal, the consumer instigates legal action.

A final step which the government might take which might prove helpful

9.1.1 Damage Laws (continued)

would be clarification of the laws which apply to separation of property rights, i.e., land-use covenants, easements, negative easements, conditions, leases, etc.² Both judicial and legislative action could improve the consumer's position. In particular laws which facilitate creation, enforcement, and termination of private, voluntary agreements applying to the land would be useful. Although the current legal framework allows great diversity (see Subsection 9.1.2 Voluntary Community Action), only a competent attorney can cope with this area of the law with any degree of certainty. De-professionalization which would allow laypeople more control and greater facility in handling such voluntary agreements is greatly to be desired.

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- (1) A discussion of implied warranties is contained in Harold F. Lusk, Charles M. Hewitt, John D. Donnell, and A. James Barnes, *Business Law Principles and Cases* (Homewood, Illinois and Georgetown, Ontario, 1970), pp. 774 ff.
 - (2) For an extended discussion of the problems associated with these (essentially private, voluntary) building and land-use controls see Charles M. Haar, *Land-Use Planning, A Casebook on the Use, Misuse, and Re-use of Urban Land* (Boston and Toronto, 1971), pp. 561 ff.

9.1.2 Voluntary Community Action

For those who want and are willing to pay for higher building and neighborhood standards than those promised by strengthened nuisance and warranty standards, the free market provides us with a wide range of

9.1.2 Voluntary Community Action (continued)

choices.

In the absence of zoning, between 150 and 200 civic neighborhood clubs have formed in Houston.¹ These voluntary groups maintain common space, arrange for police protection and insect control, and create a social environment that is conducive to neighborhood maintenance.

Other voluntary organization interested in maintaining natural conservation areas have spent their monies in buying up ecologically sensitive areas instead of lobbying for stricter environmental controls. These groups have chosen the only fool-proof method for conservation -- no legislative act can cheat them of their gains. Instead of spending money trying to force landowners to comply with their wishes, they have spent their money acquiring legal control over the land in a voluntary manner. How does this sort of mechanism differ from the legislative variety? Although some of the older land trusts have been quite successful in acquiring sizeable tracts, no private voluntary association can every be expected to be able to afford to buy enough land to have any noticeable effect on the total supply. They can however afford to buy the land near the homes of their members; they can afford to buy those properties that most concern their members. And finally, only those people who belong to the organization must pay for the land -- never the poor (who currently pay for conservation land with their taxes).

9.1.2 Voluntary Community Action (continued)

Private charitable groups have sometimes been interested in helping the destitute or incompetent to improve housing conditions.³ Although this mechanism has had negligible effect on general housing conditions, in the absence of building codes the growth of such organizations could be expected to help the least well-off and most-deserving of the people.

The single most important voluntary tool at a neighborhood's disposal is the covenant. A covenant is a contract between individuals which places a restriction on the use or alienation of the land. A covenant may apply to one parcel of land (made, perhaps, between the buyer and the seller) or it may apply to a neighborhood (made between all property owners in that neighborhood or made by the developer and inserted into all the deeds in a development). Most covenants run with the land -- or, in English, covenants are binding on all future owners of the land. And they may cover nearly any aspect of land usage: occupancy; building type; restrictions as to race, creed, or color of occupants; aesthetics; fire precautions; structural, plumbing, or electrical minimum standards; etc. Covenants may be enforced by original signers, their heirs and assigns, and by persons for whose benefit the covenant was effected.⁴ They may not be enforced by random neighbors who may accidentally benefit from enforcement of a covenant but who were not subject to its limitations (this provision provides ample incentive for individuals to enter into covenants).⁵

9.1.2 Voluntary Community Action (continued)

Until zoning became popular, the covenant was used in much the same way that zoning is being used today except that covenants have at least five distinct advantages:

- (1) They are purely voluntary.
- (2) The courts are expected to enforce them as valid contracts (not true with zoning since zoning involves governmental action and many things should be allowed to individuals which are not allowed to the government).
- (3) Covenants are known to the buyer of land in advance of the sale (not imposed or changed by the government after the sale is consummated).
- (4) Covenants can be used to control a wide variety of problems including aesthetics (probably not absolutely true of zoning).
- (5) Covenants usually apply to very limited areas (not to whole towns as do building laws).

Given these impressive credentials, it can be seen that covenants offer the individual more protection and more control over his immediate environment than zoning or building codes. At the same time, covenants cannot be expected to cover any sizeable fraction of the land in any municipality so it is unlikely that they will cause strongly adverse supply-demand-cost problems.⁶

Moreover, when covenants are used, the results seem normally to be

9.1.2 Voluntary Community Action (continued)

satisfactory. The new town of Radburn, New Jersey was protected by restrictive covenants with widely acclaimed results.⁷ In Houston, approximately ten thousand covenants have been created.⁸ Even with this extremely large number of contracts in effect, enforcement has not been a serious problem.⁹ This device has proved so successful that the FHA demands covenants on mortgaged properties that adjoin strip development¹⁰ and the city of Houston often enforces private covenants on its own initiative.¹¹

Covenants are subject to some limitations however. Though they offer much wider and more secure coverage than government-imposed building laws, covenants may be overturned or declared unenforceable for a variety of reasons. First, racially restrictive covenants, though legal, are unenforceable.¹² Second, covenants that are too old (usually 25 to 50 years or older) may be overturned.¹³ Third, covenants will not be enforced if the neighborhood conditions materially change during the life of the covenant.¹⁴ Fourth, sometimes covenants will not be able to restrict the right of alienation (i.e., they will not be able to restrict the conditions of sale of the property).¹⁵ As serious as these constraints are, it is obvious that they are not as limiting as the constitutional constraints placed on building laws.

Private land-use agreements are not limited to covenants. Easements, negative easements, conditions, leases, and a variety of other private

9.1.2 Voluntary Community Action (continued)

sector tools allow property owners to sell some portion of their property rights. The availability of such tools allows neighbors an almost unrestricted choice in finding a set of restrictions and a suitable means for their expression.

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- (1) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 35.
 - (2) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 113.
 - (3) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. 56.
 - (4) 14 Am. Jur. Covenants, Conditions and Restrictions 311 (1938).
 - (5) *Toothaker v. Pleasant*, 315 Mo. 1239, 288 S.W. 38 (1926).
 - (6) This is true first because governments already own over a third of all property in the United States and second because roughly 92% of the land in the United States (Arthur P. Solomon, *The Effect of Land Use and Environmental Controls on Housing: A Review* (Cambridge, Massachusetts, 1976), p. 10.) remains undeveloped and neither of these two categories of property could be expected to have a covenant.
 - (7) Seymour I. Toll, *Zoned American* (New York, 1969), p. 285.
 - (8) Siegan, *Land Use Without Zoning*, p. 33.
 - (9) *Ibid.*, p. 32.
 - (10) In the absence of zoning, *ibid.*, p. 47.
 - (11) *Ibid.*, p. 32.
 - (12) *Shelley v. Kraemer, McGhee v. Sipes*, 334 U.S. 1 (1948); *Hodge v. Hodge, Urciolo v. Hodge*, 334 U.S. 24 (1948).
 - (13) *Koehler v. Rowland*, 275 Mo. 573, 205 S.W. 217 (1918). This problem is regularly avoided by providing for "automatic extensions" every 25 years or so unless the majority of covenant

9.1.2 Voluntary Community Action (continued)

holders vote out the covenant (although termination and continuation clauses vary); see Siegan, *Land Use Without Zoning*, p. 34.

(14) *Hundley v. Gorewitz*, 132 Fed.2d. 24 (D.C.Cir. 1942).

(15) *Title Guarantee and Trust Co. v. Garrott*, 42 Cal.App. 152, 183 Pac. 470 (1919).

9.1.3 Market Mechanisms

What would have happened in the event that building laws had never been enacted? To some large extent, the world would have been no different. Invisible-hand natural market mechanisms tend to produce ever-improving conditions even without laws.

Early reformers noted this and often did not recommend that a provision be enacted unless the free market was already providing the mandated amenity. For instance, separate water closets for each dwelling unit were not recommended until most new tenements were already being provided with them.¹ Today, so few people would buy or rent a dwelling without separate sanitary facilities, that developers would not build them even in the absence of a law. The developer who is ignorant of, or indifferent to, the needs and wants of users will find himself in a very unprofitable position.²

Market mechanisms that would lead to high levels of amenity and safety

9.1.3 Market Mechanisms (continued)

are fairly obvious, but many writers feel that the more complicated goals involving use separation could not be accomplished without zoning. The facts belie this opinion.

The Fifth Avenue Association was a major backer of the first New York comprehensive zoning law, but they soon discovered that the wheels at city hall were grinding too slowly to offer them protection. They quickly formed a "Save New York" committee and instituted a well-publicized boycott on those garment manufacturers who were moving into the retail district. By midsummer of 1916, 95% of the transgressors were willing to move. "What the new zoning law promised was actually less than [what the "Save New York"] committee was accomplishing by private action."³

There is nothing unusual about this anecdote except that it is a case of a community cooperating to prevent the intrusion of an external-diseconomy, internal-economy producing use. In this situation the retailers were harmed by the intrusion of the manufacturers, but the manufacturers were benefited by such location decisions since they could cut transportation costs by being near their buyers. This situation is rather unusual and is the worst case. Under normal circumstances, no such cooperation is necessary. The proof of this statement can be found in Houston, Texas.

Houston which lacks any use-segregation rules has been studied extensively by Siegan. His studies are so revealing that four of them are summarized here:

9.1.3 Market Mechanisms (continued)

Study 1.⁴ In a study done of all twenty-four Chevrolet, Ford, and Plymouth dealerships in Houston, only three were contiguous with an unbuffered residential area. Moreover, all three were next to very low income areas (one with unpaved roads) -- exactly the sort of neighborhoods which would be unsuccessful in fighting a dealership's variance request in zoned cities.

Study 2.⁵ In a study done on a very poor Mexican-American district wherein the asking price of homes ranged between \$7,000 and \$11,000, there were 950 structures and no private covenants. 7% of the structures had home occupations or commercial use; 5% were duplexes or apartments; 2% were trailers; 1% were industrial; and 13% of the land was unbuilt. Between 30% and 50% of the non-residential uses would have been allowed under zoning proposals had they been approved by the voters.

Study 3.⁶ In a working class district where in the asking price for homes ranged between \$9,000 and \$19,000, there were 240 structures and about half were covered by private covenants. 5% of the structures had home occupations or commercial use; 20% were duplexes or apartments; 0% were industrial uses; and 2% of the land was vacant.

Study 4.⁷ In a middle-class white district wherein the asking price for homes ranged between \$19,000 and \$25,000, there were 450 structures and no private covenants since 1936 or before. There were two apartment

9.1.3 Market Mechanisms (continued)

complexes and part of a shopping center; 4% were commercial uses; 25% were duplexes or multiple-family; 0% were industrial uses; and 4% of the land was unbuilt. None of the apartments exceeded two stories in height.

These four studies indicate that uses seem to segregate naturally. Apartments do seem to move into residential neighborhoods, but they seem compatible with other dwellings. Why does such extensive use segregation occur without laws or even covenants? In poor areas, commercial uses won't invade because the poor people in the neighborhood can't afford to build up high demand levels for goods and services. Some convenience services do appear, but they cater to the needs of low-mobility residents. Moreover, inner residential streets are seldom fiscally sensible for commercial uses that require visibility and traffic. Because of accessibility, apartments tend to be built on major thoroughfares or in downtown areas. When suburban apartments are built, they tend to segregate themselves also.⁸ This phenomenon may in turn lead to *less* pressure for multi-family uses on quieter residential streets. Finally, industry would not be likely to choose to locate in residential areas where they are unwanted *on purpose*. Industries seek easy transportation (i.e., railways, highways, and airports), not bad publicity generated by angry neighbors.

Of course, market mechanisms are merely "tendencies." Without private

9.1.3 Market Mechanisms (continued)

action, no guarantees can be offered under a purely voluntary system. But it must be remembered from Chapter 4.0 Nonenforcement that zoning and building codes cannot offer guarantees either. Between the various mechanisms of graft, beneficent nonenforcement, variances, appeals, special exceptions, and rezoning, the average neighborhood is probably as well protected by free market "tendencies" as by costly zoning and building code laws.

- (1) Robert W. DeForest and Lawrence Veiller, "The Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 24.
- (2) Bernard H. Siegan, a great advocate of market mechanisms, relates a particularly excellent example in *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 140. In the early 1970's MacDonald's management discovered that people didn't like the garish architecture and that they were losing business. The management quickly switched to a more subdued style. Of course, building laws may actually impair the ability of the market to respond in such a beneficial manner -- the powers of zoning and building codes may grant a virtual monopoly to a local business which would materially reduce the incentives for the local business to provide responsive goods and services.
- (3) Seymour I. Toll, *Zoned American* (New York, 1969), p. 179.
- (4) Siegan, pp. 56 f.
- (5) *Ibid.*, p. 37.
- (6) *Ibid.*, pp. 39 ff.
- (7) *Ibid.*, p. 39.
- (8) This writer has no idea of why this happens, but that it does is noted by Siegan, p. 68.

9.1.4 Building Law Abolition

In order for us to attain a voluntary system of control, traditional building laws should be completely abolished. There are several ways in which this could be accomplished.

- (1) The Supreme Court might declare zoning and other land-use controls to be illegal on "substantive due process" reasoning.¹ This is unlikely given the mood of the current Court. It is also highly unlikely that building codes could be abolished in this way.
- (2) A large number of judicial decisions by lower courts could overturn all building laws on a variety of grounds (equal protection and substantive due process being the prime candidates, but freedom to travel, freedom of association, and other constitutional issues could be raised). This would be a slow, haphazard route and would probably prove ineffective in many areas of the country. Not only are the costs associated with such suits prohibitively high, but lower courts have also been reluctant to overturn legislative acts.
- (3) Localities could repeal building laws. Given the incentives for suburban communities to maintain building laws, it seems unlikely that this route would work except in poor or highly urban or highly exurban municipalities. Such communities could provide testing grounds for voluntary systems, but one could not hope that this route would be effective everywhere.
- (4) State legislatures could repeal enabling statutes for building laws. This has the advantage of being orderly and comprehensive,

9.1.4 Building Law Abolition (continued)

but it seems unlikely that legislatures would willingly cede any government powers.

- (5) The laws could be voted out of existence via ballot initiatives in state-wide elections. This would not only be orderly and comprehensive, but it would also be possible in today's political climate in a large number of midwest and western states. When zoning has been put to the vote, it has fared badly (see Appendix A -- Section 10.2 Zoning Is Popular). Subdivision controls would be unlikely to do much better. Other land-use controls and building codes could be expected to survive the vote in many (probably most) areas -- they are much more popular. But if some states voted them out of existence, and if these large-scale experiments were seen to be successful, judicial or legislative repeal might prove feasible in the other states.

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- (1) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 218 f.

9.1.5 Transition Measures

The proposal to implement a voluntary approach is very radical. In order to allay citizens' fears about the consequences of a voluntary approach (and in order to uncover and correct flaws), a number of transition measures should be associated with repeal proposals.

9.1.5 Transition Measures (continued)

In the area of land-use control, a short moratorium on use changes in residential neighborhoods would be necessary.¹ This would give owners an opportunity to create needed covenants. Although covenants have usually been imposed by developers, many covenants have been created in existing neighborhoods² and it would be politic to allow homeowners ample opportunity to protect their neighborhoods in this way.

Another deregulatory action that might prove helpful would be the repeal of all building codes coupled with temporary "mandatory advertising."³ Builders and self-helpers would be allowed to build whatever structures they wanted using whatever standards they wanted (providing these actions harmed no one else, of course). However, builders would be required to inform buyers and users of what standards had been used in construction. One could build a flimsy building, but it would have to be advertised as such. This system would help users and buyers to learn not to depend on government's (often non-existent) protection and to start taking control of the building process themselves. This method also encourages the expansion of implied and explicit warranties which could play an important role in a voluntary system.

A third transition measure would be deregulation of all undeveloped land. Existing neighborhoods could retain their protections without covenants, but new neighborhoods would be built with covenant protection only. This measure would immediately reduce exclusion and would reintroduce covenants

9.1.5 Transition Measures (continued)

into common usage under favorable conditions. When the superior protection of covenanted areas becomes obvious (admittedly the likelihood of this observation being made would be enhanced by the fact that the covenanted areas are newer developments), voluntary protections will become more palatable in older areas. Moreover, this system lends itself to serial deregulation of use zones: first, undeveloped land; then, industrial land; third, commercial areas; and finally, residential zones.

Finally, before any total repeal is considered, a number of urban, suburban, and exurban municipalities should try the voluntary approach. These test areas should be studied carefully to insure that the market mechanisms work smoothly enough to be adopted on a wider scale. Possible problems might result if nuisance levels were set too high or too low (although as we showed in Subsection 9.1.1 Damage Laws, small variations from a "perfect" level can be accommodated through contract). High levels would place too much burden on the developer and low levels would place too much burden on the neighborhood. Only through field testing could an appropriate level be achieved. Another set of problems might arise from the novelty of such a scheme. It would undoubtedly take time for neighbors and developers to adjust to the voluntary system. Educational efforts or even more slowly-moving transitions than have so far been discussed might prove necessary to make the system work well.

(1) Bernard H. Siegan, *Land Use Without Zoning* (Lexington,

9.1.5 Transition Measures (continued)

Massachusetts, Toronto, London, 1972), pp. 238 f.

(2) *Ibid.*, pp. 239 ff.

(3) This idea was suggested to the author by Michael O'Hare.

9.2 The Houston Experience

Although Houston, Texas is not an ideal testing ground for the voluntary approach to building control, it is the best that is available. Houston has typical subdivision regulations, building codes, and some provisions normally contained in zoning ordinances are contained in other regulations in Houston. Houston does not have mandatory use segregation and many of the provisions normally contained in zoning ordinances are so unrestrictive that they have no substantive effect on development.

The most obvious characteristic of Houston is that it is growing. In 1975 it was ranked as the sixth largest city in the nation, but since 1960 it has always ranked third or fourth in volume of construction.¹ 180 major industries supporting over 200,000 new households have moved into Houston since 1970 (a startling figure given the out-migration so noticeable in other major cities).² In 1976 building permits ran 82% above the previous year's total with 6,900 new homes completed in the first quarter.³

The situation for apartment dwellers is significantly better in Houston

9.2 The Houston Experience (continued)

than it is in most urban areas. The vacancy rate is 4.4% despite the extreme pressures from in-migration⁴ and rents are among the lowest for any major American city.⁵ This low rental cost seems to be a result of the fact that land suitable for apartments in Houston is cheaper than land zoned for apartments in zoned cities.⁶ In fact, in Houston land for apartments is often *cheaper* than land for single-family residences.⁷

The lack of zoning seems to have affected single-family residences only slightly. FHA-insured homes generally cost a bit more in Houston than in Dallas (a city similar to Houston in all pertinent respects except zoning), and they are generally on smaller lots, but Houston homes are usually equipped with more amenities and are always larger.⁸

Downtown Houston is about as blighted and sprawling as any urban center, but the lack of building law has made several large *private* renewal projects feasible⁹ which indicates that these may be self-correcting problems in the absence of government interference. The only "real problem" area that Houston has (that other large urban areas don't have to the same or a worse degree), is that the administrators who plan public facilities claim that planning for such unpredictable and dynamic growth is difficult.¹⁰ On balance, even the small amount of freedom allowed in Houston seems to have had beneficial results.

(1) Bernard H. Siegan, *Other People's Property* (Lexington,

9.2 The Houston Experience (continued)

Massachusetts, Toronto, London, 1976), pp. 238 f.

- (2) "Houston in the News -- Again!," *AREA Bulletin*, 2, 4 (July, 1976), p. 3.
- (3) *Ibid.* Some of the growth may be attributed to the extremely low property tax rates, climate, large amounts of undeveloped land, and other factors, but it is important to note that the lack of zoning does not seem to inhibit growth.
- (4) *Ibid.*
- (5) Siegan, p. 50.
- (6) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 95 ff.
- (7) *Ibid.*, p. 121.
- (8) *Data for States and Selected Areas on Characteristics of FHA Operations under Section 203* (Washington, D.C., 1968).
- (9) Houston Center and Greenway Plaza are noted and discussed by Siegan, *Land Use Without Zoning*, pp. 68 ff., pp. 127 ff.
- (10) *Ibid.*, pp. 130 ff. and "Houston in the News -- Again!," p. 3.

9.3 The Problem of Diseconomies

"Zoning is of interest to the economic theorist because of its relation to certain peculiarities of the urban property market. These peculiarities, external economies and diseconomies, have never been completely understood, although it is generally agreed that the presence of such uncompensated externalities means that the unrestricted market cannot function in such a manner as to achieve Pareto optimality."¹

9.3 The Problem of Diseconomies (continued)

A theoretical example of the externalization of a diseconomy is the building of a gas station in a residential neighborhood. The parcel on which the gas station is located may be increased in value, but surrounding parcels might be decreased in value. The net result of the transaction may even be a loss of value (i.e., the gas station gain could be insufficient to offset the abutters' losses). Zoning was implemented largely for the purposes of prohibiting the externalization of diseconomies.²

However, strong evidence exists to indicate that external diseconomies either do not exist³ or that if they do exist, they are of such a nature as to insure that zoning will be unable to treat them.⁴ "In fact, [zoning's] simple segregation method alone cannot be said to accomplish [Pareto optimality]. The reason is that for certain uses 'internal' profit considerations may be such that compensation theoretically could be paid for those external diseconomies which might be created." Moreover zoning's use segregation method may actually aggravate the problem by prohibiting mixtures of uses that are not only compatible, but mutually beneficial (see also Subsection 7.2.1 Incompatibilities).

A number of writers on the subject have therefore recommended compensatory programs.⁵ These schemes are normally based on some sort of zoning, but the developer is allowed to give (and, this writer assumes, accept) "bribes" in the making of location decisions. This sort of system would

9.3 The Problem of Diseconomies (continued)

approximate Pareto optimality. When one makes such a proposal, one is saying, in effect, that zoning laws (and, by extension, building codes) form a base line. If a developer wishes to intrude a below-base-line use, he must compensate the affected neighbors.

When worded like this, it becomes obvious that current building laws are not the *necessary* base line. If we were to use current laws, we would, in fact, have numerous undesirable consequences: poor people would end up paying suburbanites in order to overcome exclusionary zoning, for instance. A much more appropriate base line would be the expanded nuisance and warranty levels discussed in Subsection 9.1.1 Damage Laws.⁶ Theoretically of course, the level of amenity suggested by the base line standards is inconsequential as long as variations are controlled by the people involved in the transaction, i.e., neighbors and developers and not municipal bureaucrats and administrators. If the base line is low, the neighbors would have to band together to "bribe" the developer to locate elsewhere or to raise his standards; if the base line is high, the developer would have to "bribe" the neighbors. In both cases, Pareto optimality is approximated.

But other considerations urge us to set standards at the most equitable level we can humanly discover. If standards are unrelated to objective damage (as in the case of large-lot zoning or unnecessarily high housing standards) people will end up paying for the privilege of committing

9.3 The Problem of Diseconomies (continued)

acts that harm no one. If, on the other hand, standards allow some damage (as is the case with modern airport decisions and other pollution controls), people will end up paying for the privilege of preventing damage to themselves. As a result, reformation of nuisance laws would involve lowering of standards in many instances (legislative use separation should be eliminated entirely, for instance) and raising them in many others (allowable pollution levels should be quite low, airports and power plants would likely fall under such conditional prohibitions).

There remain a number of real difficulties with this approach. If we conditionally prohibit airports, who, exactly, will a developer have to "bribe" in order to build one? What, exactly, is the physical land area affected by such development? If neighbors do "bribe" a developer to locate elsewhere, does this mean that the property will remain unused forever? These and a host of similarly serious questions must be answered by the courts, but these are questions of damage and, in the case of unclear contracts, intent. These problems are certainly of a much smaller scale than those problems which have been plaguing both courts and local boards for many years under our current system.

(1) Otto A. Davis, "Economic Elements in Municipal Zoning Decisions," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 41.

(2) See, for example, the analysis given by Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), p. 24.

9.3 The Problem of Diseconomies (continued)

- (3) Hugh O. Nourse, *A Rationale for Government Intervention in Housing: The External Benefit of Good Housing, Particularly with Respect to Neighborhood Property Values*, could not find the expected relationship.
- (4) John Crecine, Otto Davis, and John Jackson, "Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974). A theory which reconciles the results of studies which are unable to find diseconomies and the common-sense observation that diseconomies must occur does exist. Perhaps normal diseconomies (and externalized economies) affect only abutters and not whole neighborhoods. Of course, it is also possible that the common-sense observation is mistaken: although individuals have preferences to which pricetags attach, there is always the possibility that no particular preference is accepted widely enough to have an effect upon prices.
- (5) Davis, "Economic Elements in Municipal Zoning Decisions," pp. 49 f. contains the most detailed plan that this writer has found.
- (6) A base line consisting of prohibitions of *all* diseconomy-producing uses and *all* pollution, though it sounds appealing, would be impractical. Such a base line would prohibit gas stations, funeral homes, industries, and *homes* -- any development is diseconomy-producing under *some* circumstances. Such a base line would also prohibit internal combustion engines -- not a bad idea in this author's opinion, but certainly impolitic.

9.4 The Problem of Collective Goods

Collective goods, in the troublesome sense are goods which require collective action to achieve but which individuals acting in a rationally self-interested manner will not cooperate to achieve. The reason that individuals will not contribute to the achievement of these goals is that the "good" will be achieved or not achieved regardless of the action of any

9.4 The Problem of Collective Goods (continued)

particular individual and that, if the good is achieved, all will benefit regardless of whether they contributed to the good or not, i.e., if the good is achieved, there is no way to exclude non-participants from enjoying the benefits. National defense and union labor benefits are two commonly cited examples of such goods.¹ If such goods exist in the land and buildings market, an economic argument could be used to support further government intervention. Most writers assume that such goods exist but either do not attempt to cite examples in real estate or cite examples that are caused by inappropriate current regulations. It is this writer's belief that such collective goals are relatively rare in the land and buildings market and that, when and if they do exist, noncoercive means of attaining them can be found that will work more justly than legislative means.

In the first place, in order for there to exist a collective good, there must exist *unanimity* of opinion as to its desirableness. If unanimity does not exist, people who do not want and will not use the goods will be unjustly forced to pay for them if government coercion is used to attain them. Such a system currently exists with our national park system: millions of poor Americans are forced to pay for acquisition and maintenance of a park system that they will never be able to use. The sort of unanimity required is patently impossible: diversity of opinion is the rule, at least in the United States. Even if we relax the criteria to require only a 90% majority goal (accepting the fact that

9.4 The Problem of Collective Goods (continued)

some injustice will done to the 10% minority), it is doubtful that many collective goods could be found.

Now we come to a second problem. Most of those goals that possess near-universal desirability have more to do with the prevention of harm than with the acquisition of some good -- pollution control, defense by police, national defense, etc. The reform system suggested in this paper specifies that a proper function of government is to prevent objective damage, however, so those who would increase government control in the name of these collective goods should have no complaints.

Undoubtedly there exist some goods which large numbers of people want which can be classified as amenities rather than protection, but this is exactly what is wrong with our current system of building law -- minority desires are ignored, the poor are forced to pay for amenities which they cannot afford, and so on. This does not imply that majority amenities cannot be acquired, however. As we have pointed out, most collective goods are of neighborhood (rather than town-wide, state-wide, or nation-wide) import. Covenants on this small scale (given social incentives, small numbers of people involved, and economic motivations) are demonstrably feasible without government intervention (except in contract enforcement).²

This leaves us with a very limited set of possible collective goods: they must have regional impact; they must be widely accepted as desirable;

9.4 The Problem of Collective Goods (continued)

they must be an amenity; they must not be damage-preventing. This writer can think of no good that meets these criteria. Even if one can be found, however, it seems unlikely that our bureaucrats and legislators could cope with it any more effectively than they have coped with other problems; better to leave it in the hands of prestigious charitable institutions and the like than to allow the government bureaucrats to mishandle the situation.

(1) For a more complete discussion and analysis see Mancur Olson, Jr., *The Logic of Collective Action, Public Goods and the Theory of Groups* (Cambridge, Massachusetts, 1965).

(2) The prevention of "risky" actions which cause no objective harm, e.g., the building of fire traps, should be handled through covenants, warranties, and insurance company agreements; they ought not to be prohibited under nuisance laws. Insurance companies (with government help) already play an important role in this area. They can be expected to offer stronger incentives to build safe buildings if a voluntary system is adopted and if coercive laws are removed from their repertoire of risk-reducing tools. An alternative view is presented by Robert Nozick, *Anarchy, State, and Utopia* (New York, 1974) who is a limited-state libertarian. The anarcho-libertarian usually argues that safety is an amenity rather than a right.

9.5 Evaluation

In Chapter 8.0 Reforms we discussed ten criteria for evaluation of reform proposals. Let us here investigate how our voluntary system compares with other proposals.

9.5 Evaluation (continued)

1. Responsiveness. Complete control is in the hands of the people. No control is given to bureaucrats, politicians, planners, or parochial business interests. If an individual values amenity, he may seek it through covenants, easements, bribes to neighbors, or whatever. If an individual places little value on environmental considerations, he is free to choose to spend his money on non-environmental goods. This is the most responsive system.

2. Exclusion. Some degree of exclusion is allowed in a voluntary system, but those who seek to live in an exclusive neighborhood will have to pay the costs through covenant agreements: either they must pay money to neighbors in exchange for promises to be exclusive or they must accept mutual restrictions on their own property. In either case, the costs will be commensurate with the degree of exclusion. At the same time, the amount of land that would be likely to be subject to costly exclusive agreements would be miniscule -- under 10% even in urban and suburban areas. Thus the effect of exclusion on the less affluent will be negligible. The voluntary system, because it is responsive, will probably strike the most equitable balance in this regard.

3. Flexibility. Changes between neighborhoods would be accommodated easily under covenants. More diversity should result than under any other system. Moreover if new environmental values emerge (e.g., industrialized housing), they would be able to be expressed in communities built on

9.5 Evaluation (continued)

undeveloped land not already subject to covenant agreements. Of course, covenants, easements, etc. are not very flexible, but that is why they will be formed -- those residents want security and certainty rather than innovative freedom. And if unanimity can be reached, all covenantees might agree to nonenforcement. In any event, the voluntary system offers the maximum amount of flexibility consistent with security. The controls are firmly in the hands of the people most affected by the controls, not in the hands of bureaucrats who can offer neither security nor freedom to innovate in any honest manner.

4. Objectivity. It is not expected that every covenant will be objective -- peoples' wants and desires are too irrational to expect that. But the costliness of covenants will insure that the provisions of the covenant will bear some strong relation to the values of the people in the covenant area (if they did not, why would an individual buy land in the area or agree to have the covenant restrictions placed on his property?). With respect to the government's role, in a sense, we hedge the problem: we specified that government nuisance laws, warranty laws, and private land-use laws should be clear and objective. This defining-the-problem-away tactic is useful in determining intent and it does indicate what principles ought to be used, but it does not get down to the real problems. There is some possibility that the reformed nuisance standards would not be very objective even if objectivity is a stated goal. Nonetheless, no other reform proposal has

9.5 Evaluation (continued)

a better chance of being enacted any more justly, so we must conclude that (in the absence of the exact wording of the potential laws) the voluntary system is acceptable in terms of this criteria.

5. Graft. The elimination of the present bureaucracy will insure that the unacceptable sort of graft will not occur. The voluntary system is easily the most graft-resistant.

6. Enforceability. Enforcement problems will largely disappear under a voluntary system. No enforcement agency is required over and above the usual police and court system. Standards are voluntarily accepted in all instances so it may reasonably be expected that renegeing on contracts would be minimal (the Houston experience bears this out). Nuisance law and warranty standards are sufficiently low so that, in most instances, their violation would not be necessary or desirable. And when violations of an uncompensated nature do occur, the harmed individual will, if the harm is above some nominal level, have sufficient motivation to seek judicial relief. A voluntary system can be expected to minimize (though admittedly not eliminate) enforcement problems. No system of government intervention can be expected to achieve such general levels of compliance so effortlessly.

7. Hardship. The reason for such effortless enforcement is, in part, due to the fact that the voluntary system minimizes hardship. No standard

9.5 Evaluation (continued)

can be unilaterally forced on an individual except perhaps in cases where severe physical handicaps combine with age, mental incompetence, or destitution to insure that one party to an agreement has a substantial advantage over the other. For a normal, healthy individual the alternative of self-help is always available. For the few people who are truly resourceless (the aged, the physically or mentally handicapped, and the very young), subsidies would be necessary to eliminate hardship completely.

8. Blunder-impact. The greater the "balkanization" in building controls, the less the blunder-impact. Balkanization encourages innovation and diversity because whatever errors are made will have relatively unimportant consequences. Most reform schemes, particularly building code reforms, seek greater uniformity, and are thus undesirable in this respect. Our voluntary system, on the other hand, suggests extreme diversity in controls -- every neighborhood covenant area could be subject to a slightly different set of restrictions. This means that the voluntary system is the only system that reduces blunder-impact. The real goals of those who call for uniformity will not be completely thwarted, however. Since most undeveloped land would not be subject to any covenants, manufactured housing producers and consumers would have increased freedom to build and innovate. Whole neighborhoods of industrialized housing which meet manufacturer and user standards (though they may not meet suburban middle-class neighborhood standards) could be formed and covenanted. The

9.5 Evaluation (continued)

nuisance laws, warranties, etc. that apply to such undeveloped areas would be uniform however. The voluntary system thus provides uniformity where it is most needed (i.e., in undeveloped areas) and diversity where it is most needed (i.e., in neighborhoods where the diverse tastes of residents should be accommodated). At the same time, blunder-impact is reduced to allow creativity and innovation. This is not an unmixed blessing: it is likely that uneducated users will make more errors than the conservative government experts. But the impact of such errors will be small and the costs associated with the errors will be borne by the error-makers -- a much better situation than the one which we have now.

9. Liability. Normal building codes and zoning ordinances have very weak penalties for violations even when demonstrable harm results. This author has inadvertently violated building laws on numerous occasions without ever paying a fine; this author has also paid out large sums of money for architect- and engineer-caused errors. Few reform schemes address this problem though it is of great concern to people in the industry. As long as building laws bear weak relationship to traditional concepts of damage, the situation is unlikely to change. A voluntary approach is unlikely to solve all problems in this area, but it is likely to accomplish some good. First, by tying nuisance laws to real damage, by developing implied warranties, and by controlling amenities through contracts, we place building controls in the mainstream of business law. No longer will the courts have to try to balance interests

9.5 Evaluation (continued)

between a private individual and a town government, between a person and a bureaucracy. Many legal issues dealing with the constitutionality of regulations, legislative intent, and other regulatory concerns would fade in importance. The real issues -- who damaged whom and how much -- are much more likely to be addressed. Second, naive users make many invalid assumptions about the building process because they feel protected by legislation. If we remove the false protection offered by building laws, it seems likely that users would be more wary. Bonding companies, private inspection services, and owner construction representatives would be hired more frequently. This would reduce the number of problems caused by ignorance, and facilitate both the building process and the judicial process when disagreements do reach the courts. A voluntary approach, as outlined in this paper, will not solve the problem of determining liability, but it is the only reform scheme that attempts to clear the legal waters.

10. Feasibility. A voluntary approach is clearly constitutional, but its political feasibility is in doubt. The popular mood favors ever greater government intervention and large numbers of people benefit from building laws (see Appendix C -- Chapter 12.0 "Haves" and Building Law). There is hope, however, in the counterculture, in some western states, in transition measures, and in recent anti-government grassroots working-class movements. Since the voluntary approach is so successful in regard to every other criterion, and since it is not hopelessly

9.5 Evaluation (continued)

unfeasible, there is ample reason to discuss this proposal seriously.

The following three appendices discuss some issues which may further convince the reader of the desirability and feasibility of a voluntary approach to the problems of environmental control.

APPENDIX A -- 10.0 MYTHS

There are a great number of commonly accepted beliefs about building laws and their effects. Some of them are myths, and these myths sometimes obstruct our vision so that we are unable to suggest improvements. It is the purpose of this chapter to dispel some of these myths.

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of Building Laws

Some people believe that our current system of building regulation is quite bad, but that the problems are temporary maladjustments. The assumptions one must make to hold this belief are threefold: (1) building laws are relatively new, (2) building laws aren't very widespread, and (3) building laws have not granted enough power to the regulators. All three assumptions are unfounded.

Building laws are old. The first building code on record appeared in the Code of Hammurabi in 2100 B.C.¹ As we have noted in various sections, building laws in London are about as old as the city is, but the real push toward modern codes started in Elizabeth I's reign. It was the Great Fire in 1666 that gave regulators a real chance to show what they could do. The code in effect during the rebuilding of London controlled street width, frontages, maximum wages and prices for men and materials, structural considerations, signs, sewers, taxes, and much more. The code required uniform roof lines, brick and stone facades, 12' o.c. joists, etc. It

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of
Building Laws (continued)

forced flammable uses to locate on back streets and required inspections. It also allowed for eminent domain takings and demolitions and there was, expectedly, a variance procedure.² These powers were extensive and were enforced as well as could be expected. Yet the new Building Act of 1844 cited narrow streets, explosive population growth, speculation, and fire and disease as problems which demanded even greater controls. The new powers were granted and the old powers were reaffirmed.³ In 1890 and 1894, in response to the bulk of the "Queen Anne's Mansions," bulk controls were added.⁴ In 1894 the Open Spaces Act added extensive city planning powers⁵ and shortly after the turn of the century, structural steel and reinforced concrete codes were added.⁶ With all of this power in the hands of planners, one would expect London to be a beautiful model city. Such is not the case. London is crowded, dirty, squalid, notably inferior to most Western cities in architectural style, and a prime example of urban sprawl. This does not imply that building laws *caused* these conditions, only that building laws were unable to eliminate these conditions despite over three hundred years of virtually absolute control.

Housing and building controls were likewise incapable of dealing effectively with American problems: the first extensive building code here was enacted in New York City at about the turn of the century (earlier codes were so generally ignored that it would be unfair to mention them). After over 75 years of the strictest building codes in the country, New York City

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of
Building Laws (continued)

is acknowledged to have the most serious housing problem in the country, and not even the most ardent "Fun City" booster would dare call it clean, safe, or uncongested. Again we are not implying that the laws caused the problems (although we believe that they contributed substantially in at least the case of New York City), only that the laws could not cope successfully with building problems.

Zoning regulations are also quite old (they have not traditionally been considered a thing apart from other building codes until quite recently), but use segregation was first implemented by Napoleon; he instituted use segregation in the conquered German cities,⁷ but this zoning principle spread throughout orderly Germany quite quickly. Germany again led the way with the first complete, modern set of national zoning laws which was enacted under the Nazis in 1936.⁸

In the United States the first land-use controls date back to the 1600s.⁹ With the exception of the National Land Ordinance of 1785, however, control generally stayed at the municipal level until Franklin D. Roosevelt came to office.¹⁰ Shortly after the turn of the century both building codes and zoning codes spread quickly. St. Louis adopted partial zoning in 1901, followed eight years later by Los Angeles. During the the 1910s, several states including Massachusetts passed enabling statutes for zoning¹¹ and among the cities to adopt zoning were Boston,

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of
Building Laws (continued)

Baltimore, Duluth, Minneapolis, St. Paul, San Diego, Seattle, New York City, Chicago, Washington, D.C., and numerous Wisconsin cities.¹² At the same time building and housing codes became popular too, and by the time New York City was considering the adoption of an enforceable code, most cities of any size already had at least some sort of housing or building code: San Francisco, Philadelphia, Chicago, Baltimore, Buffalo, Cleveland, Cincinnati, Washington, D.C., Providence, and Toledo.¹³ Of the major cities, only New Orleans seemed to be completely free of restrictions.¹⁴ After well over 50 years of controls, none of the controlled cities is remarkable clean, beautiful, or uncongested.

As to the current extent of building regulations, they are indeed widespread. Planning and regulatory activities, zoning and subdivision rules involve thousands of government employees and affect a high proportion of the population of the United States.¹⁵ 97.3% of all towns with populations over 5000 within SMSAs have some regulation and 95.8% of all towns with populations over 5000 outside SMSAs have some regulation.¹⁶

There are no major cities and only a few rural areas which have no building codes.¹⁷ A survey of construction codes noted that some areas such as the New York City Metropolitan Area are completely covered by local building codes.¹⁸ Zoning codes are almost as widespread with 90.1% of

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of Building Laws

all towns with populations over 5000 reporting that they had zoning ordinances.¹⁹ Of the major cities, only Houston has no formal zoning ordinance.²⁰

For at least the last fifty years, local building laws have had considerable control over all of our urban and most of our rural areas. At one time or another in the history of building law, nearly everything has been tried: carrots, sticks, local control, regional control, state control, federal control, and various combinations. If mere laws could effect the city beautiful, one would have expected some set of rules to have worked properly by now. It seems clear to this writer that the notion of building control by law has been adequately tested and has been found lacking.

Of course, there is always the possibility that building laws have alleviated building problems -- since every situation is different there can be no absolute proof of the ineffectiveness or effectiveness of building law. All we can say with surety is that building laws cannot accomplish the goals which they were designed to accomplish and we can only hint at the mechanisms by which building laws may actually do harm.

(1) George N. Thompson, "Preparation and Revision of Building Codes," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 133.

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of
Building Laws

- (2) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), pp. 30 ff.
- (3) *Ibid.*, pp. 60 ff.
- (4) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]), p. 26.
- (5) Knowles and Pitt, p. 93.
- (6) *Ibid.*, pp. 98 f.
- (7) G. Topham Forrest, *The Construction and Control of Buildings and the Development of Urban Areas in the United States of America* (Westminster, England, 1925), p. 41.
- (8) Sidney Cohn, *Practice of Architectural Control in Northern Europe, A Report Prepared for HUD* (Chapel Hill, North Carolina, 1968), p. 87.
- (9) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), pp. 21 ff.
- (10) *Ibid.*, p. 23.
- (11) Forrest, p. 41.
- (12) *Ibid.* and Seymour I. Toll, *Zoned American* (New York, 1969), p. 139, p. 155, p. 126.
- (13) Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 8. Lawrence Veiller, "Housing Conditions and Tenement Laws in Leading American Cities," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), pp. 131 ff.
- (14) *Ibid.*
- (15) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968), p. 2.

10.1 We Haven't Had a Complete and Thorough Test of the Effectiveness of
Building Laws

- (16) *Ibid.*, p. 28.
- (17) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 27 ff.
- (18) Williams, Young, and Fischetti, p. 90.
- (19) Manvel, p. 28.
- (20) It must be noted that many provisions which might normally appear in a zoning ordinance are included in the building codes, nuisance laws, and subdivision regulations in Houston. The major difference between Houston and other cities seems to be that Houston has no use separation (except, of course, by private agreement) -- a slender, but as we have seen, significant difference.

10.2 Zoning is Popular

In Appendix C -- Chapter 12.0 "Haves" and Building Law we will see that a great number of people want controls if only to protect their special interests. However, in Appendix B -- Chapter 11.0 "Have Nots" and Building Law we will see that there are a large number of people who can be expected to wish for the repeal of such laws. Most writers have assumed that the "haves" are in the majority, but there is evidence to suggest otherwise.

The National Land Use Bill was twice defeated. In 1974 the Alaskan pipeline debacle was still fresh in people's minds and the environmentalists failed to support it because they felt that it would deliver

10.2 Zoning Is Popular (continued)

insufficient protection; others who voted against it objected to its ambiguity and technical complexity.¹ In 1975 it was again defeated, this time due to "grassroots antagonism."² State controls have fared little better. Hawaii is the only state with an operable law, but its circumstances uniquely favor state legislation.³ Vermont actually passed statewide legislation,⁴ but public opposition has been so strong that Vermont politicians have been unable to adopt an implementation plan.⁵ Utah's state land control proposal was defeated 60 to 40.⁶ This antagonism to federal, or even state, intervention in traditionally local affairs is understandable without proving anything about the popularity of land-use controls. Obviously, many of the "haves" would lose their benefits if higher level governments take control, so they will fight such proposals. In addition, there is a growing distrust in this country of big government, so a number of people will fight such measures on principle.

More surprising than the public's reaction to state or federal measures is the response to local controls when they have been put on the ballot. The people almost always reject zoning proposals and have occasionally even rejected building codes. An example of the latter occurred when Racine, Wisconsin voted to abolish their building code;⁷ apparently, they were miffed at the invasion of privacy necessitated by inspections.⁸

The following list of votes on zoning is by no means comprehensive, but

10.2 Zoning Is Popular (continued)

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The following list of votes on zoning is by no means comprehensive, but

10.2 Zoning Is Popular (continued)

these are *all* of the results that this research uncovered. From the votes, one might suppose that the apparent popularity of zoning at town meetings is actually the result of the upper-middle-class dominance of local government. Bond County, Illinois defeated zoning by 71%;⁹ Jersey County, Illinois defeated zoning by 60%;¹⁰ Escambia County, Florida defeated zoning by 64%;¹¹ a town-by-town vote in Pulaski County, Indiana voted "no" to zoning in each of its twelve townships, with the lowest anti-zoning vote being 78.6% and the average of all towns being 85.2% (Spring, 1976);¹² in April, 1976, the Adams County, Illinois board of supervisors voted 22 to 5 to avoid implementing a zoning proposal (zoning had been tried there and repealed in 1958);¹³ the Burt County, Nebraska board of supervisors voted to repeal a thirteen-month-old zoning law after 95% of the county's voters had signed a petition expressing opposition to the regulations;¹⁴ numerous towns in Allegheny and Cattaraugus Counties, New York rejected zoning overwhelmingly (in Wellsville by 88.8%), but most were persuaded to adopt some controls because federal money for flood control would have been withdrawn had they not done so;¹⁵ Newton County, Missouri defeated zoning by 34 to 1 and land-use planning by 27 to 1;¹⁶ Colorado Springs, Colorado defeated two proposals to adopt open space acquisition mechanisms by 63% and 61%;¹⁷ zoning has been rejected by voters in numerous elections in Texas, Florida, Iowa, Ohio, and Missouri;¹⁸ of all the votes in all Missouri counties, 22 voted for zoning, 13 voted against zoning, and four counties which originally supported zoning have since

10.2 Zoning Is Popular (continued)

repealed it.¹⁹

Even this list is not very impressive, however, because most of the areas where zoning has been rejected are rural and unpopulous. The most significant results of zoning votes are found in Houston, Texas, the only major urban city to vote on zoning.²⁰ The conclusions of a study done on the Houston zoning-vote results are clear: the rich support zoning; the poor and minorities, when given the opportunity, defeat zoning.²¹ Zoning first came on the ballot in 1949 and was rejected 14,142 to 6,555.²² In 1962 zoning was again defeated 70,957 to 54,279.²³ When Siegan analyzed the results from the 1969 anti-zoning vote in Baytown (a 90% residential, single-family, "bedroom community" located in the Houston suburbs), he found that only one precinct favored zoning and it was a newly-built middle- and upper-income neighborhood; the strongest opposition to zoning was found in a predominantly black neighborhood.²⁴ Siegan notes that Houston and probably Wichita Falls and Beaumont, Texas followed a similar pattern.²⁵

These results show clearly that zoning is not popular -- at least among the poor and the minorities. That middle- and upper-class civic-minded community leaders support zoning is probably true -- they have enacted zoning ordinances all across this country. But wherever these community leaders have polled the people, zoning has usually suffered an ignominious defeat.²⁶ In these results lies the

10.2 Zoning Is Popular (continued)

hope of the deregulator.

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- (1) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 70.
 - (2) *Ibid.*, p. 71.
 - (3) In Appendix C -- Section 12.3 Monopolists and Oligopolists we will discuss the oligopolistic land market as one factor which enabled such a law to be enacted. Another circumstance which favored state legislation in Hawaii is that the state has always had land-use control -- even before the coming of westerners, tribal chiefs had great discretion in these matters. As in Germany, if a people is accustomed to a lack of freedom, building laws have a better chance of gaining acceptance.
 - (4) At least one Vermonter interested in these problems has said that the urban retreat population (emigres from New York, Massachusetts, and Connecticut) got the law through before native (usually poorer) Vermonters had had an opportunity to organize the opposition.
 - (5) Siegan, p. 72.
 - (6) *Ibid.*
 - (7) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. 73.
 - (8) HUD had threatened to withdraw federal money if codes were not enforced in owner-occupied non-rental buildings, *ibid.*, p. 57, and apparently this combined with vigorous enforcement triggered the grassroots demand for a referendum.
 - (9) Siegan, p. 53.
 - (10) *Ibid.*
 - (11) *Ibid.*
 - (12) "Thumbs Down on Zoning in Midwest," *AREA Bulletin*, 2, 5 (September, 1976), p. 6.
 - (13) *Ibid.*

10.2 Zoning Is Popular (continued)

- (14) "Nebraska County Repeals Zoning," *AREA Bulletin*, 2, 3 (May, 1976), p. 3.
- (15) "Zoning Fight Spreads in Western New York State," *AREA Bulletin*, 2, 1 (January, 1976), pp. 2 f.
- (16) Siegan, p. 72.
- (17) *Ibid.*
- (18) *Ibid.*, p. 54.
- (19) *Ibid.*
- (20) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 25.
- (21) Siegan, *Other People's Property*, p. 54.
- (22) Siegan, *Land Use Without Zoning*, p. 25.
- (23) *Ibid.*
- (24) *Ibid.*
- (25) *Ibid.*, pp. 25 f.
- (26) It should be mentioned that even voting percentages are not the most accurate measures of popularity. For various reasons, predominantly poor neighborhoods, black neighborhoods, and anti-government sympathists do not vote in proportion to their numbers. If their strength were to be considered, the anti-zoning votes would be considerably larger.

10.3 Zoning Protects Residential Values

This statement is usually made by a slightly insecure, urban- or suburban-family, residence owner living in an area restrictively zoned for single-family residences. This fellow often has one or more of three assumptions on his mind when he says this.¹ First, he may be worrying

10.3 Zoning Protects Residential Values (continued)

about racial integration or about large influxes of poor neighbors; he reasons that, without the costly restrictions, small houses on small lots would be built and the cost of housing in his neighborhood would fall to the point where ghetto residents and other excluded persons could afford to move in. Second, he may be worrying about invasion from other uses such as the proverbial glue factory or commercial development. Finally, he may be concerned about the more general issues of aesthetics and urban blight (this issue is not necessarily unconnected to the previous two); he may not object in theory to an integrated, diverse neighborhood, but only to side issues such as lack of adequate open space to meet his aesthetic tastes or pollution. The following subsections discuss each of these three issues in more detail.

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- (1) Tax-related issues are discussed separately in Appendix A -- Section 10.5 Zoning Maintains Low Property Tax Levels.

Numerous subconscious reasons may also be a factor as mentioned by Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), p. 1072. Here we discuss only the more tangible factors.

10.3.1 The Blacks Will Invade

If the objector is a racial bigot, pure and simple, zoning does not provide the sort of racial discrimination he seeks. Racially restrictive zoning is illegal. Racially restrictive covenants, although not illegal, are unenforceable (a fine legal distinction accomplishing the same end).

10.3.1 The Blacks Will Invade (continued)

Thus the bigot has no legal protection with or without zoning and his worries, while founded, are not remediable.

But the bigot notices that many of those whom he wants to exclude are also poor, and he reasons correctly when he believes that costly zoning restrictions keep the poor out. Some writers believe that repeal of all zoning restrictions might result in the sort of ghetto migrations the bigot fears,¹ but others, including this writer, find such a scenario implausible. As was noted in Section 7.1 Economics, the poor sometimes voluntarily choose to live in deplorable conditions in order to save money for other, more highly-valued goods. There is no reason to suspect that they have any enormous urge to move from their present surroundings to middle-class white neighborhoods. In fact, there is reason to believe otherwise. The first evidence is provided by the BRA study mentioned in Section 7.1 Economics: the poor blacks often cited expense, but some also claimed fear of bigotry when they told the researchers why they had not moved to the suburbs. Understandably, they did not want to move into neighborhoods where they would be unwanted. Banfield provides us with additional evidence: only 17% of the blacks (70% of whom live in cities) questioned in one study reported that they were dissatisfied with their neighborhoods² and in another study two-thirds of the blacks questioned indicated that they preferred to live in a predominantly black neighborhood.³ Thus we have reason to suspect that blacks would not invade "lily-white" neighborhoods even if zoning

10.3.1 The Blacks Will Invade (continued)

were completely abolished.

This does not mean that poor ghetto residents would not benefit if zoning were to be repealed. First of all, those blacks who were dissatisfied with poor or predominantly black neighborhoods would have an opportunity to live in suburban communities where some inexpensive housing could be built if zoning did not prevent it. But probably more important, without zoning, more housing could be built and the densely populated cores of our urban centers would be relieved. Each new house built and bought starts a chain of moves, each of which represents a bettering of housing conditions for each mover. These chains do reach down to the poorest segments of our society, thereby causing an improvement in their position.⁴ Thus we see that the "no-zoning" option probably would not result in significant harm to the wealthy or middle-class neighborhoods (the influx of poor would probably be insignificant -- especially if most neighborhoods adopted exclusionary covenants), but it might result in a considerable improvement in housing conditions for both the working classes and the very poor.

(1) For instance, Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), p. 1071 believe that a black suburban migration is possible.

(2) Edward C. Banfield, *The Unheavenly City Revisited, A Revision of the Unheavenly City* (Boston and Toronto, 1974), p. 22.

(3) *Ibid.*, p. 90. Other results have not shown such a marked

10.3.1 The Blacks Will Invade (continued)

preference for blacks to want to live in black neighborhoods, but Banfield points out that even a very mild preference would result in considerable segregation.

- (4) In a study of the filtering process, John B. Lansing, Charles Wade Clifton, and James N. Morgan, *New Homes and Poor People, A Study of Chains of Moves* (Ann Arbor, 1969), p. 66 and *passim.*, the very poor (earning less than \$3000 per year) and the working class (earning between \$3000 and \$6000 per year) were benefiterers from the construction of new housing.

10.3.2 A Glue Factory Will Move Next Door

The possibility of invasion of residential neighborhoods by industry and commerce is quite complicated. First of all, some invasion would probably occur -- especially in poor, transportation-deficient neighborhoods. Beauty parlors, antique shops, "Mom and Pop" groceries, and the like would spring up. This sort of growth, however, would be beneficial to nearly everyone involved. It provides needed services in locations convenient to the neighborhood and it provides opportunities for working out of one's home for those who need it most. Furthermore, since this sort of commerce is often dependent upon neighborhood patronage, if it is to be economically viable, it must conduct business in a manner that will not alienate its patrons. Thus we see that some commercial or industrial invasion is not unacceptable.

At the other extreme are industries which are location-independent. These industries theoretically might locate anywhere, including in residential

10.3.2 A Glue Factory Will Move Next Door (continued)

neighborhoods where they may cause the character of the neighborhood to deteriorate in the eyes of the residents. As we have seen, there are several market mechanisms which tend to reduce the incidence of diseconomy-producing location decisions.

At this point we need only note that zoning does not significantly alter the "no-zoning" pattern. The proof of this statement is found in the Houston area where there are virtually no use-segregation controls. Siegan notes that there is no clear difference in use-segregation patterns between zoned and unzoned areas.¹ He notes that in unzoned Baytown, Wichita Falls, Laredo, and Pasadena, Texas, industry "automatically" (by market mechanisms) segregates itself.² Even after land-use covenants expire, industry does not seem to invade residential neighborhoods.³

This does not imply that "no-zoning" results in 100% use segregation, but as we have seen in Chapter 4.0 Nonenforcement, even zoning is unable to accomplish complete use segregation. This only means that zoning has no observable effect on the quantity or quality of use segregation. This statement is impossible to prove in any scientific manner since there is no quantifiable measure of use segregation, but Siegan's results noted in Subsection 9.1.3 Market Mechanisms indicate that, although some use desegregation would occur if zoning were abolished, it would be unlikely to reach undesirable levels.

10.3.2 A Glue Factory Will Move Next Door (continued)

Understandably, many people would have little faith in market tendencies. Those people, if they valued use segregation, could create covenants which would result in more use segregation in their neighborhoods than zoning could deliver. Moreover, stricter nuisance standards would supply use segregation between necessarily harmful activities (such as airports) in neighborhoods with or without covenants. Thus a neighborhood under the reform scheme we propose would be more protected from undesirable uses than neighborhoods are today under traditional zoning controls.

(1) Bernard H. Siegan, "The New Approach to Planning: Nonzoning," *Reason Magazine*, 4, 12 (April, 1973), pp. 8 ff.

(2) *Ibid.*, p. 7.

(3) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 32.

10.3.3 Neighborhoods Would Grow Ugly, Unsanitary, and Unfit

To the extent that this anxiety is motivated by an aesthetic judgment, little can be said. If a neighborhood contains homes that are more expensive than the minimum house, the abolition of zoning would probably have little or no effect on the appearance of the neighborhood. But if a neighborhood contains mostly homes that are minimum homes and if the homeowner finds the monotony of such development pleasing, the "no-control" option will not be acceptable. However "no-control" is not synonymous

10.3.3 Neighborhoods Would Grow Ugly, Unsanitary, and Unfit (continued)

with "no-zone" or "no-law." The private voluntary controls outlined in Subsection 9.1.2 Voluntary Community Action could attain the same aesthetic results, and perhaps with more consistency given the difficulties inherent in zoning. In any event, whatever aesthetic objectives zoning has achieved bear no necessary relationship to the desires of community members. Each individual should decide for himself if the "control" aesthetic is more pleasing than the "no-control" aesthetic; in no case should a law mandate a particular vision of beauty across an entire municipality.

Other people might worry that a lack of codes would bring about a dark, unventilated housing condition.¹ Early reformers claimed that dark, unventilated conditions and even density per se caused unacceptable health hazards² despite the fact that their own statistics showed no correlation between death rate and dense slum living conditions.³ At most times the laws were only thinly veiled in the language of public safety, health, and morality as can be seen in the case of billboards or in justifications for building size limitations. Such limitations were imposed to protect the public safety, for instance, because it was shown that in the event of fire, if all the people in all the buildings in one section of lower Manhattan had to be evacuated, there would not be enough room for them on the street!⁴ And fire code enactors cited 41 deaths in one year from tenement fires (when well over 2 million people were living in such buildings) as justification for their pet

10.3.3 Neighborhoods Would Grow Ugly, Unsanitary, and Unfit (continued)

laws.⁵ Although this deathrate does seem moderately high, it is hardly justification for fire codes: the virtually unregulated, turn-of-the-century New York City deathrate from fires was 17 per million which compares favorably with the highly regulated, modern Cambridge, Massachusetts deathrate from fires which in fiscal 1975-76 was 19 per million and is projected to be 49 per million in fiscal 1976-77.⁶

More recent writers have noted that dark, unventilated conditions are not overwhelming problems given modern technological innovations such as electricity⁷ and admit that housing codes have little to do with health or safety anyway.⁸ This writer feels that such a view does not give sufficient weight to the values of sunshine and fresh air. The solution to this problem seems to be similar to the solution to the aesthetics problem above. Each individual should be free to find the optimum conditions for himself; in no case does a law covering an entire municipality seem justified or desirable. Some people want (and are willing to pay for) more light and air than the minimum zoning standards could guarantee. Others less. It would only be by accident that a particular zoning law or building code provision delivered an optimum mix to any individual.

(1) Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), p. 1065. They argue against many aspects of modern zoning processes, but they favor setbacks because they're supposed to insure that enough light and fresh air reach buildings.

10.3.3 Neighborhoods Would Grow Ugly, Unsanitary, and Unfit (continued)

- (2) Lawrence Veiller, "Tenement House Reform in New York City, 1834-1900," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 82.
- (3) Although the Italian tenements had a deathrate twice as high as the average New York City rate, the Jewish tenements had a deathrate which was only half the average. See Robert W. DeForest and Lawrence Veiller, "The Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903) pp. 54 f.
- (4) Seymour I. Toll, *Zoned American* (New York, 1969), p. 153.
- (5) DeForest and Veiller, p. 23 and Robert W. DeForest, "Tenement House Reform in New York since 1901," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. xix.
- (6) Based on statistics given to the author by the Cambridge Fire Department and Cambridge City Hall in early February, 1977. A fiscal year runs from July 1 to July 1.
- (7) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]), p. 40.
- (8) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), pp. 154 ff.

10.4 Zoning Curbs High Density, Congestion, Sprawl, and Blight

As was pointed out in Subsection 7.2.3 Urban Sprawl or Garden City, zoning does not curb sprawl. If anything, zoning encourages sprawl.

Blight is probably a similar phenomenon: zoning certainly cannot offer protection from blight and may actually aggravate it. Local building laws frequently have the effect of limiting the supply of apartments.

10.4 Zoning Curbs High Density, Congestion, Sprawl, and Blight (continued)

This forces the vacancy rates lower, which reduces landlord incentives to maintain property in adequate repair.¹ This is of course not the only cause of blight -- regressive property taxes, urban renewal projects, simple poverty, and natural wear and tear all play a role -- but zoning doesn't help the situation.

Building codes also encourage blight under some circumstances. For instance, if a roof needs repair, the owner must get a permit to embark on such a job. But before he can obtain the permit, the building must be brought up to compliance with the local code. This may be too costly and thus a whole building may be lost because of irrational enforcement of the building code. Codes probably do not always have such a negative impact, but this example shows how they can contribute to blight.

Congestion is often defined as excessive street traffic. Since zoning often aims at restricting car washes, gas stations, and the like, it might be believed that zoning could alleviate traffic problems. Such is probably not the case. Limiting the number of gas stations only results in longer waiting lines and longer average trips to such services.² If all goods and services were available on one's home block, there would be no need for cars and therefore no congestion. Thus we see that use segregation as implemented in zoning ordinances probably promotes congestion rather than curbs it.

10.4 Zoning Curbs High Density, Congestion, Sprawl, and Blight (continued)

Finally, there is the often-stated myth that without density controls developers would overdevelop their parcels, that skyscrapers would be built on every block. This is pure nonsense. Developers will voluntarily choose the highest density of development that is appropriate considering the quantity and quality of demand. If most people hated dense living conditions, the developer who built dense residential areas would find that he would be unable to attract consumers and would therefore lose money -- a developer who was that stupid would not long stay in business. Furthermore, if demand for housing were low (meaning that not many people needed new housing), the developer who built too many units might also find that he could not sell or rent them. In this way the market process insures that both the quality and quantity of demand are met if the zoning laws or some other legal restrictions do not interfere. That the above logic is correct is verified by the situation in Houston. Some high-rise residential towers were built, but were found to be economically unsuitable for the area. Developers quickly switched to garden apartments which have been built at ever-decreasing densities over the past twelve years.³

But the conditions that lead to low density in a free market situation do not always obtain. Some people prefer dense living conditions. As Jacobs observes, density per se is not necessarily evil, and, in fact, may be an asset;⁴ densities of 400 luxury apartments per acre in Chicago and 275 units per acre in Boston's North End and unbelievably high densities

10.4 Zoning Curbs High Density, Congestion, Sprawl, and Blight (continued)

in Hong Kong do not seem to be unacceptable to the residents. Other people, of course, prefer low densities. It is therefore expected that Houston might offer a greater range of densities than do zoned cities, and such is the case.⁵

In this section we looked at four building "problems." In each case we found (1) that zoning does not necessarily insure that these problems will not exist, and (2) that zoning may even be a major factor in the genesis of these problems.

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- (1) High vacancy rates result in high maintenance standards. Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), pp. 1065 ff.
 - (2) A good discussion of zoning and traffic is contained in Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 48 f. Limiting the number of gas stations obviously cannot limit the demand for gas.
 - (3) *Ibid.*, pp. 66 f.
 - (4) Jane Jacobs, *The Death and Life of Great American Cities* (New York and Toronto, 1961), pp. 200 ff.
 - (5) Siegan, pp. 65 ff.

10.5 Zoning Maintains Low Property Tax Levels

It is argued that zoning excludes uses that would not pay their way and uses that would depress property values and would thereby force

10.5 Zoning Maintains Low Property Tax Levels (continued)

property tax rates upward. The facts belie the myth. Zoning usually excludes apartments (especially efficiencies which cater to young, mobile singles) and overzones for single-family residences and choice light industries. How does this policy affect tax rates?

A study done in Cook County, Illinois showed that a single-family residence had to have an assessed value of \$70,000 to support fully one grade-school student in school.¹ Single-family residences were obviously not a paying proposition. Subsidized housing and townhouses are also usually tax-detrimental, but garden apartments (usually built for the one-child or childless family), are tax-beneficial.² In 1971 Chicago adopted a zoning provision limiting the number of efficiency apartments and New York has passed similar measures.³ Considering the number of school-age children who are likely to live in efficiency apartments, such zoning is fiscally irresponsible. An ASPO study in Philadelphia concluded that apartments, particularly high-rises, were tax-beneficial.⁴ Since it is inexpensive for a municipality to provide city services to concentrated populations, and since few multiple-child families are attracted to apartments, it appears that apartments are almost always tax-beneficial.⁵ "In short, the best fiscal zoning is no zoning."⁶

As for the popular belief about zoning preventing land devaluation, it is an ambiguous case. Land prices for homes are actually somewhat

10.5 Zoning Maintains Low Property Tax Levels (continued)

higher in unzoned Houston than they are in zoned Dallas.⁷ However, land suitable for apartments in Houston costs much less than land zoned for apartments in Dallas.⁸ This is not surprising since zoning often restricts apartment development by limiting supplies of land zoned for apartments and thus raises the costs of such land. It appears that the oligopolistic owner of zoned land would have his land devalued, but that the average owner would not be damaged (and might be benefited) by the abolition of zoning.

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- (1) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 125.
 - (2) *Ibid.*
 - (3) *Ibid.*, p. 126.
 - (4) *Ibid.*, p. 127.
 - (5) These results are not clearly true. See Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), pp. 1062 ff. for a discussion of the various issues involved.
 - (6) Siegan, p. 127.
 - (7) *Ibid.*, p. 110.
 - (8) As reflected by the lower rental costs, *ibid.*, pp. 117 ff.

10.6 Land-use Controls Protect the Environment

This statement is most certainly not completely a myth. As we pointed out in Chapter 4.0 Nonenforcement, some building laws seem justified. Those

10.6 Land-use Controls Protect the Environment (continued)

laws that prevent one person from doing material harm to another person without the other person's permission are just and necessary. Building laws do sometimes fall into this category. But most building laws do not prevent damage; they try rather to promote a good.

Modern ecologists justify building laws by citing problems with the pollution of aquifers, destruction of delicate marshland environments, and the like.¹ These are relatively new ideas. The laws of our country should reflect the increased knowledge that we have about our environment. For instance, if a developer in the course of construction will necessarily pollute or partially destroy an aquifer which affects millions of acres of other peoples' land (or even one acre of an abutter's land), that construction should be prohibited. The legal action required in this instance does not necessitate a building law however. The reformation of nuisance laws outlined in Subsection 9.1.1 Damage Laws would suffice. This case needs no complicated administrative machinery and no nosy building inspector. The person (or people) who is damaged should simply be able to sue the developer for damages or seek a restraining order to keep the developer from committing damaging acts.

The building laws of our country do not prevent damage, however; they only tell developers that some standards must be maintained. These standards may or may not prevent damage to innocent abutters. The effect

10.6 Land-use Controls Protect the Environment (continued)

of these laws is to allow developers to harm others (without being held legally liable for the damage) and to prohibit them from doing acceptable damage to themselves and others. The following hypothetical examples illustrate this point.

Case I. A structural engineer designs an enormous building using and obeying the local building code, but it is discovered that the building is unsafe and the changes needed to make it safe will cost \$100,000 more than if it had been designed correctly in the first place. Under our present laws the person responsible for the damage, the structural engineer, is held harmless and the damaged party, the owner, must accept the cost without recompense. This is an unjust result. When this principle is extended into the area of environmental law, the results could be catastrophic -- because of simple oversights on the part of the framers of the law (a common occurrence in this rapidly changing field), careless developers could destroy an invaluable asset and the damaged parties would be unable to stop them or even seek redress. As long as the developer can remove his legal liability by filing an environmental impact statement or by meeting the standards promulgated by law (without reference to the particular situation), injustice and harm to innocent others will result.

Case II. A self-helper with 40 acres of land moves to the site and starts to build. Temporarily he uses an outhouse and buries his

10.6 Land-use Controls Protect the Environment (continued)

garbage on his own property. No pollution results on abutters' property. Under present law, the self-helper may be prosecuted despite the fact that the only person damaged was himself. Obviously, this result is also unjust.

Case III. A self-helper with a 40' by 40' plot of land moves to the site and starts to build. Temporarily he uses an outhouse and buries his garbage, but he cannot prevent pollution so he makes a deal with his abutters: he pays them each \$10 if they will not object to the level of pollution that his project will generate for four months and they agree. Under present laws, the self-helper may be prosecuted despite the fact that those who were damaged were justly compensated (compensation was just by definition; if it were not, the abutters would not have agreed to the deal). This result too is unjust.

These three cases are all very simplified versions of injustices that may result from the sort of environmental protection we now have. The principles are clear: neither the environment nor people will be protected by such simplistic regulation. Both causes might better be served with reformation of existing nuisance laws and abolition of building laws.

(1) For instance, as in Edward M. Bergman, *Eliminating Exclusionary Zoning: Reconciling Workplace and Residence in Suburban Areas* (Cambridge, Massachusetts, 1974), p. 9.

10.7 Without Building Laws We Would Have Chaos

The chaos in land-use planning, in standards, and in building laws today is not the result of an uncontrolled free market. That we have chaos already cannot be denied, but mightn't we have even more chaos in the no-control situation? This contention is hard to rebut. A no-control situation might well look chaotic. No one, neither the powerful nor the powerless, could control it. But therein lies its attractiveness.

When each individual is given freedom to choose his own housing and when no individual has the power to dictate standards and requirements to others, then we will all have the freedom to find the most appropriate environments for ourselves. And that is, after all, what this paper is all about.

APPENDIX B -- 11.0 "HAVE NOTS" AND BUILDING LAW

As we have seen, building laws favor some people at the expense of others. Although the distinction between those who are harmed and those who harm is not found along traditional class lines, the preponderance of the former are poor and the preponderance of the latter are rich. Let us investigate the plight of those who are damaged by building laws first.

11.1 Racial Minorities

"The more general pattern involves the imposition of zoning and subdivision regulations so strict as to make development prohibitively expensive. These regulations are then varied downward only for those developers who the local leaders are confident will be properly selective in determining future residents. All of these techniques are justified by the superficially appealing slogan of protecting the tax base."¹

A pattern like the one described above certainly fosters economic segregation. Unfortunately, high consumer demand for housing correlates well with high consumer demand for services and both correlate with high income and whiteness.² Because of this correlation it is difficult to ascertain exactly how much racial prejudice has motivated exclusionary practices, but it was certainly one factor and since we must not allow our laws to discriminate on racial grounds, this situation must be investigated.

11.1 Racial Minorities (continued)

The notorious "Laundry Cases" of San Francisco which abetted the rise of local zoning and building code laws were most certainly motivated by racial hostility. In these cases the marked prejudice against the oriental population was only thinly veiled by rationalizations about nuisance and fire protection.³ Although such schemes came under fire, some towns, notably Atlanta, actually built explicit racial segregation into the zoning laws. Cold comfort was the provision assuring both whites and *blacks* that their servants could live with them regardless of color.⁴

But a deeper understanding of the provisions of the Fourteenth Amendment started to creep into the judiciary and the more flagrant, directly racially segregatory provisions of zoning were declared unconstitutional in *Buchanan v. Warley*.⁵ Judge Westenhaver in his lower court decision in *Ambler Realty Co. v. Village of Euclid* said, "the result to be accomplished is to classify the population and segregate them according to their income or situation in life."⁶ There is no doubt that Westenhaver considered the implications for racial segregation when he rendered his opinion, but the Supreme Court was not as perceptive as the lower court judge.

Since then the courts have grown even more aggressive. In *Kennedy Park Homes Association, Inc. v. City of Lackawanna, New York*⁷ racially segregatory intent invalidated local laws and in *Shannon v. HUD*⁸ the

11.1 Racial Minorities (continued)

courts prevented HUD from building subsidized housing in the inner city because it would have had the effect of reinforcing residential racial segregation patterns.

Although the more recent cases have had an optimistic ring, de facto racial segregation has not been eradicated. Not only are the courts unwilling to strike down racially segregatory zoning when racial segregation is not the apparent *goal* of the legislation, but federal programs such as 701 Planning Assistance Plan⁹ and local ordinances such as rent control¹⁰ continue to subsidize the racial bigotry of some at the expense of others in the community who would not discriminate. Thus, though all of our laws are superficially race-neutral, many of them -- including zoning ordinances -- have de facto racially segregatory results. Such laws, while not necessarily improper, should be scrutinized carefully to be certain that they do not aggravate our racial problems needlessly.

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- (1) Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), p. 93.
 - (2) Bruce Walton Hamilton, *The Impact of Zoning and Property Taxes on Urban Structure and Housing Markets* (Ann Arbor, Michigan, 1972), p. 29.
 - (3) *Barbier v. Connolly*, 113 U.S. 27 (1885) and *Soon Hing v. Crowley*, 113 U.S. 703 (1885). These cases usually involved violations of local land-use laws which regulated the location of shops and prohibited night work. Since the laundries involved were usually wood-frame structures, the city claimed the power to close the laundries in the name of fire prevention.

11.1 Racial Minorities (continued)

The courts usually upheld that city ordinance despite frequent claims by orientals that the laws were racially segregatory in their intent.

- (4) Seymour I. Toll, *Zoned American* (New York, 1969), p. 262.
- (5) 245 U.S. 60 (1917).
- (6) 297 Fed. 307, 316 (N.D. Ohio 1924), reversed, 272 U.S. 365 (1926).
- (7) 436 F.2d 108, 401 U.S. 1010 (1971).
- (8) 436 F.2d 908 (1970). See also *Crow v. Brown*, 332 F.Supp. 382 (1971) and *Gautreaux v. The Chicago Housing Authority*, 296 F.Supp. 907, 304 F.Supp. 76 (1969).
- (9) Herbert M. Franklin, *Land Use Controls as a Barrier to Housing Assistance* (Springfield, Virginia, 1973), p. II-11.
- (10) William R. Havender, "Race and Economics," *Reason Magazine*, 8, 7 (November, 1976), pp. 28 ff.

11.2 Alternate Life-stylers and Third Worlders

"The minimum standards for housing, building, and planning to which I refer are those which specify *what* should be built, and, very often, they go a long way to determining *how* the subdivision, dwelling, or ancillary equipment should be built as well. Almost all official codes, in the wealthiest and poorest countries alike, require that a building plot be fully equipped with modern utilities, and even with paved streets and sidewalks, before it may be sold to a would-be home builder. Even then the buyer cannot occupy his house until it is completed, at least to a minimum standard, which usually means separate bedrooms, an equipped bathroom, and a kitchen separated from the living room. An investment

11.2 Alternate Life-stylers and Third Worlders (continued)

of this kind demands a mortgage loan, and, if the property cannot be occupied until it is finished, or at least certified as habitable, it is extremely difficult for the owner to build it himself -- he is virtually obliged to employ a general contractor or, more likely, to buy a ready-made unit in a speculative development or in a publicly sponsored project....

"Hence it is not surprising to find that two-thirds of all new dwellings built in Lima [,Peru] since the early 1940s...were put up by squatters or buyers of lots in clandestine subdivisions. Neither is it surprising to observe that since it became illegal to build tenements which the mass of the people can afford, those remaining have become grossly overcrowded while illegal shanty towns have proliferated.... In fact, housing conditions for the poorest fifth or quarter of Lima's population are far worse now than they were in the 1890s, and demand substantially higher proportions of personal income to boot."¹

Whether because of poverty or because of philosophical convictions, a growing number of people are rejecting minimum standards in housing and workplace. They want to build their own homes in peace and privacy, but our laws prevent it. They are willing to live in a partially finished home while they work on it, but occupancy permits may make this impossible. They are willing to suffer lack of electricity and modern plumbing but our paternalistic laws won't give them this option. They

11.2 Alternate Life-stylers and Third Worlders (continued)

want to unify their lives by working and sleeping in the same place, but zoning forbids it. And they know that they could do better for themselves without interference from the government, and they are right.

From the beginning, building laws have militated against this group by requiring non-cost-effective features and prohibiting innovations, but only during the last two decades have any sizable number of people voluntarily chosen a life-style which emphasizes this primitiveness. Before this only the very poor and very unpowerful lived so close to nature. But now young, energetic, intelligent people have joined the movement, and we can expect more and more challenges to our middle-class standards from this group. In Mendocino County, California, a group of self-helpers calling themselves United Stand has already won several court cases involving "inadequate" plumbing and are working on a reformation of the local codes.² They and their counterparts in Oregon, Washington, Vermont, and other states may well contribute to the death of our building laws.

(1) John F.C. Turner, "Housing as a Verb," *Freedom to Build*, eds. John F.C. Turner and Robert Fichter (New York, 1972), pp. 149 ff.

(2) "Owner's Victory," *Reason Magazine*, 8, 7 (November, 1976), p. 15 f.

11.3 Innovators

"Control over the local building code gives the traditional homebuilding industry a capacity to frustrate competition almost without precedent in other industries. Any technological change can be killed at the city's doors by writing into the code the appropriate prohibitions. Since most residential codes specify materials and techniques, restrictions are easily added."¹

Most zoning and building codes have discouraged innovations. A developer often is forbidden from experimenting with mixed-use projects, innovative structural systems, alternate plumbing systems, or novel residential plans. Disneyworld and Radburn² could not have been built had zoning been in effect and Sunnyside, New York had to be built on land zoned for industrial uses.³

Model codes have often been adopted by municipalities, which would seem to alleviate this problem. But localities modify these codes to reflect local conditions (often the condition is one of ignorance on the part of the building inspector), and these modifications are frequently restrictive.⁴ The appeals procedure would also seem to afford some remedy, but in practice neither the time nor the money is usually available to pursue such a slow, costly course of action; and as a result few appeals are ever made.⁵

Another factor which increases diversity, even in uniform code areas,

11.3 Innovators (continued)

is differences in enforcement procedures. In a study done in southern Michigan, it was noted that "in the judgment of most persons interviewed during this study, the personal variations among building officials and inspectors do even more to prevent uniform regulation than does the diversity of codes and ordinances. This variability among officials can never be done away with."⁶

Thus the innovator (and those who would use his product) suffer and are denied any substantive relief. The extent of this harm is extremely hard to document because there is no objective measure of the value of innovation that has been forbidden, but in a study done on building codes, developers and construction managers ranked such codes as the most serious problem in the development of innovative products.⁷

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- (1) Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), p. 68.
 - (2) Seymour I. Toll, *Zoned American* (New York, 1969), p. 287.
 - (3) *Ibid.*, pp. 284 f.
 - (4) Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 2.
 - (5) *Ibid.*, p. 3, p. 91.
 - (6) Public Administration Service, *A Study of Local Building Codes and Their Administration in the Southeast Michigan Six-County Region* (Detroit, Michigan, 1966), p. 21.
 - (7) Field and Rivkin, p. 73. See also Appendix B -- Section 11.6 Producers and Consumers of Mobile and Manufactured Homes.

11.4 Ordinary Owners and Developers

Building laws harm not only innovative developers, but ordinary ones as well. From the earliest times, developers and slum housing owners have been characterized as inhumane, money-grubbing profiteers. Turn-of-the-century reformers indicted them for "exploiting" the poor¹ and modern socialists find it fashionable to iterate the same accusations. In fact, building laws were enacted, in part, to control the avarice of these businessmen -- these businessmen are *intentionally* damaged by such laws. But before we implement a public policy which harms some group of individuals, we should be very certain that that group has done something to deserve it.

Reformers have noted high rents and presumably high profits as "proof" of exploitation. But this belief does not agree well with the actual situation: bankruptcies among developers and abandonments among slumlords are frequent and serious problems. Presumably, a profit-hungry developer would not dissolve a profitable business -- if it was profitable, he could sell it and make more money.² The same argument holds true for the slumlord: if he was making so much money, why did he abandon his building?

The fact is that building or owning real estate -- especially inexpensive housing -- is not particularly profitable at all. The profits cited by turn-of-the-century reformers seem quite reasonable (i.e., equivalent to saving money in a bank) given the considerable risks (e.g., how many

11.4 Ordinary Owners and Developers (continued)

projects are finished? how many tenants don't pay rent or vandalize the property?) and given the considerable public opprobrium attached to such a livelihood.³ Modern owners and developers, if anything, seem to be in a worse position than their turn-of-the-century equivalents (abandonments were unheard of then and modern government interference has certainly worked to the detriment of such groups). If the reader remains unconvinced of the nonprofitability of owning slum apartments, the results of a recent auction in New York City should dispel all doubts. Although the city offered low down payments and subsidized interest rates, only 72 of 123 properties were sold -- no one wanted the rest!⁴

Another popular misconception is that the innocent homebuyer or small tenant is no match for the big slumlord or big contractor-developer. The truth of the matter is that market concentration in the building industry is almost non-existent. Land is very widely held; the only major landowner is the government.⁵ Contractor-developers are notably small and impotent -- the contractor with more than three full-time employees is rare. The average landlord is also merely a small businessman. In a study done in Newark, New Jersey 40% of the properties in the slums were owned by people who owned *no* other property. Less than 25% of the property was owned by people who owned more than 6 parcels. 36.6% of the parcels were owned by occupant-owners. Results of New York City showed only a slightly higher degree of market concentration: 31.3% of the parcels were owned by occupant-landlords. The study noted that rent

11.4 Ordinary Owners and Developers (continued)

control laws which drive some (less efficient) small landlords out of business probably account for the difference.⁶

It appears that our public policy which reduces the profitability of owning and/or developing land (especially inexpensive development) and which drives small occupant-owners out of business is inappropriate. It reduces both quantity and quality of housing for the poor and increases market concentration.

How does our building law system accomplish such undesirable results?

The small developers, contractors, and landlords cannot cope with government. The small builder simply cannot afford to appeal the arbitrary decisions of local governments; he cannot afford the corps of lawyers and technical specialists needed to fight city hall.⁷

Moreover, the stakes in any given instance are so low that court battles cannot economically be pursued.⁸ And appeals are also avoided because, even if won, the contractor fears reprisals. If the developer alienates local officials by going "over their heads" to appeals boards, he might find it difficult to get other approvals. "The developer who is unwilling to compromise is either highly principled or in contact with a remarkably patient and generous financial angel."⁹

The small landlord is in even worse shape. "In many cities in the United States, for example, owner-building is virtually prohibited, and, in many

11.4 Ordinary Owners and Developers (continued)

more, the administration of building codes is an important factor in the precipitate abandonment of older housing, so badly needed by the urban poor. The disastrous abandonment rate of structurally sound but obsolescent housing -- which each year in New York City alone currently amounts to the stock of a fair-sized town -- is in part due to housing codes and their administration. A license has to be obtained in order to replace a defective roof, for example. But if the building is obsolescent, this may not be granted unless the entire building is brought up to standard and by licensed builders. Therefore, because the owner or a willing tenant is forbidden to do a job he would have been quite able to do, and very cheaply, an entire building is lost, thus accelerating the decay of the neighborhood."¹⁰

It seems that here, again, we have found that building laws which aim at protection of the poor only serve to worsen housing for the poor and that they probably compound the problem by driving small (handleable) landlords out of business and leave large (unhandleable) realty corporations in charge.¹¹ When we damage ordinary developers and owners, we also hurt the poor who depended on them for affordable housing.

(1) See, for instance, Elgin R.L. Gould, "Financial Aspects of Recent Tenement House Operations in New York," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), pp. 357 ff., or Lawrence Veiller, "The Speculative Building of Tenement Houses," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), pp. 369 ff.

11.4 Ordinary Owners and Developers (continued)

- (2) There may be an element of "cream-skimming" going on in the bankruptcy situation (collecting construction payments and renegeing on debts), but this only proves that such businesses do not have long-term profitability.
- (3) It has been claimed that the developer is more socially-conscious than local government administrators and a rather good case for this contention has been made. See Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), pp. 47 ff. It has also been claimed that the slumlord is a "hero" for continuing to provide housing for the poor in the face of social opprobrium and government interference. Walter Block, *Defending the Undefendable* (New York, 1976), "The Slumlord."
- (4) Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), p. 45.
- (5) Hawaii is an exception. Strict laws which abrogate the right of alienation and strict land controls have undoubtedly helped to cause this unusual situation. But even there, the percentage of land held by the largest landowners cannot compare to the percentage of land held by the government.
- (6) Parratt, pp. 49 f.
- (7) Bernard H. Siegan, "The Case Against Land Use Planning," *Reason Magazine*, 7, 9 (January, 1976), p. 8.
- (8) Babcock, p. 93.
- (9) *Ibid.*, p. 54.
- (10) John F.C. Turner, "Housing as a Verb," *Freedom to Build*, eds. John F.C. Turner and Robert Fichter (New York, 1972), pp. 150 f.
- (11) Parratt, pp. 49 f., though in general agreement with the contents of this chapter, believes that codes are desirable *because* they favor the large, efficient landlord. He apparently believes that codes can be more easily enforced against such landlords and that the efficiency of such landlords works to the benefit of the poor. There may be some validity to this reasoning, but the author believes that the trend toward merging private enterprise and state is unhealthy in other respects. Furthermore, it does not rebut the argument that building laws reduce both the quantity and quality of housing for the poor.

11.5 Apartment Dwellers

Probably the largest group that has been penalized by building laws in the United States are apartment dwellers. As described in previous sections, building laws increase the costs of building considerably. While these laws are a serious problem in the building industry generally, the especially stringent regulations on multifamily dwellings aggravate the problem even further for apartment builders and dwellers.

Apartments first became popular in the United States in the 1830s when emigrants flocked to New York City from the "teeming shores" of Europe where many of them had grown accustomed to densely-populated, unsanitary conditions.¹ But Americans were shocked by the nasty tenements and soon passed laws that were aimed at correcting apartment conditions.² Thus apartments were among the first buildings to be affected by building laws and they remain among the most regulated.

Because Americans' first experience with apartments was so negative, the courts tended to think of them as disease carriers, fire hazards, and blots on the landscape rather than as homes, and they upheld unusually restrictive provisions that were aimed at multiple-family dwellings.³

One of the most serious problems facing apartment builders has been finding land zoned for apartments. 13.3% of all municipalities with populations of over 5000 people do not allow any apartments.⁴ If only SMSA governments are considered, this figure jumps to 14.8%.⁵ And many

11.5 Apartment Dwellers (continued)

of the towns which do allow apartments, plan such land in unsuitable locations or as buffers between industrial and commercial areas and "real residential areas."⁶ But there is even little of this unsuitable land.

Since so little land is allotted to apartments, the supply is abnormally restricted. To make matters worse, high speculative land prices (in part caused by zoning policies), high tax rates, and strict subdivision controls serve to price many customers out of the single-family residential market,⁷ thus artificially increasing the demand for apartments. To this is added the problem that apartment builders are usually unable to obtain variances in neighborhoods suitable for residences because of neighborhood opposition.⁸

Because of the strict building codes and restrictive zoning ordinances, apartment buildings became excessively costly and these costs were passed on to tenants. Early reformers noted the rent increases, but claimed that such increases had little to do with the building laws and paternalistically added that even if the laws had caused an increase in rent "[i]t would be sorrowful comment on the intelligence of the working people if they were not willing to pay a little more for vastly improved living accommodations."⁹

The experience of New York City is a striking example showing how local

11.5 Apartment Dwellers (continued)

building laws affect housing. The problems of New York City are, of course, extreme and are complicated by other (non-building-related) factors, but the pattern is clear and has been repeated in city after city across the country. When building codes were first enacted in New York City, rents ranged around \$8 per week and tenement vacancy rates averaged about 9% and ranged up to 43% in Ward 12.¹⁰ This indicates that an adequate supply of apartments existed and that a brisk competition between landlords was occurring. These large quantities of vacant apartments insured that each (aware) landlord, acting in his own self-interest, would try to offer the most desirable (for the users) mix of price and quality to his tenants in order to achieve low vacancy rates and high profits. Under such circumstances, the landlord is obligated to please his tenants for if he doesn't, they will move and his profits will fall. As suburban areas prohibited apartments and building codes cracked down on "inadequate" conditions, rents skyrocketed. Instead of seeking ways to increase supplies of housing, New York City adopted rent control which naturally discouraged new construction and maintenance¹¹ which only aggravated the problem. After 75 years of strict building law, New York City has a vacancy rate of under 1% (compared to 5% nationally and 3% in the heavily restricted Northeast).¹² This figure indicates that the supply is insufficient to motivate landlord competition -- no matter the landlord's indifference to the wants and needs of tenants, the tenants have little choice but to accept high prices and poor quality housing. Added to this are over

11.5 Apartment Dwellers (continued)

400,000 "deteriorated or dilapidated" apartments, a gap of \$274 million between the price of proper maintenance and the revenues actually allotted by controlled rents, the abandonment of between 15,000 and 30,000 apartment units annually,¹³ and notoriously exorbitant rents.

That strict building codes and restrictive zoning ordinances cause rents to rise can hardly be doubted,¹⁴ but we have no way of estimating actual costs. There is no metropolitan area in the United States where neither set of laws exists, and only one, Houston, Texas, where zoning has never existed. If we look at Houston's experience, however, our theory seems to be affirmed -- at least with respect to zoning.

Dallas and Houston are almost twins: they are similar in terms of cost of living, available land, unions, and virtually every other consideration that might enter into the cost of housing. But Houston, despite a reasonably strict building code which actually incorporates some of zoning's features and despite city enforced covenants which effectively "zone" some sections of the city, has no zoning. Predictably Houston rents are considerably lower.¹⁵

Since the neediest people in our urban areas are usually apartment dwellers and since building laws have increased costs and worsened housing conditions for apartment dwellers, it follows that our building policies run counter to our stated policies. Our building policies increase the

11.5 Apartment Dwellers (continued)

cost of housing and decrease its availability while our stated goals were to provide decent housing at affordable costs. Again, we must question the efficacy of legal requirements in dealing with housing problems.

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- (1) Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), p. 1041.
 - (2) *Ibid.*, p. 1043.
 - (3) *Ibid.*, pp. 1044 f.
 - (4) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968), p. 32.
 - (5) *Ibid.*
 - (6) Convincing proof of this statement can be found in Norman Williams, Jr. and Thomas Norman, "Exclusionary Land Use Controls: The Case of North-eastern New Jersey," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), pp. 17 f.
 - (7) Babcock and Bosselman, p. 1053.
 - (8) Chris Kristensen, John Levy, and Tamar Savir, *The Suburban Lock-out Effect* (White Plains, New York, 1971), p. 6 and Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971), p. 151.
 - (9) Robert W. DeForest, "Introduction, Tenement Reform in New York since 1901," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. xvi.
 - (10) Lawrence Veiller, "A Statistical Study of New York's Tenement Houses," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 195, p. 214.

11.5 Apartment Dwellers (continued)

- (11) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 25 f.
- (12) Richard E. Slitor, "Tax Incentives and Urban Blight," *Tax Incentives* (Lexington, Massachusetts, 1971), p. 259. David M. Grant, "Phasing Out Rent Control," *Reason Magazine*, 6, 4 (August, 1974), p. 24.
- (13) Grant, p. 24.
- (14) Both proponents and opponents admit this readily. Spencer D. Parratt, *Housing Code Administration and Enforcement* (Washington, D.C., 1970), *passim*. and Siegan, p. 8.
- (15) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 117 ff.

11.6 Producers and Consumers of Mobile and Manufactured Homes

Most of what we have already said about apartment dwellers and innovators in previous subsections is true and worse for mobile and manufactured home producers and consumers.

First, high costs in traditional housing and apartments have forced the demand for alternate homes higher than it would normally be. Then building codes and zoning have been used virtually to ban this sort of housing from many parts of our country. Needless to say, this policy frustrates a large number of would-be consumers and producers of alternate homes.

Manufactured housing producers find it difficult to achieve the

11.6 Producers and Consumers of Mobile and Manufactured Homes (continued)

potential cheapness inherent in mass production methods. Not only is this sort of housing subject to the same minimum lot, minimum floor area, frontage, and setback requirements that burden traditional housing, but it has especial difficulties with building codes. A HUD report¹ lists four major problem areas.

First, prefabricated housing is difficult to inspect.² Either the local inspectors must be sent to the factory (usually a financial impossibility since these factories may be located anywhere in the world) or the components must be partially disassembled on site which largely destroys the cost savings involved in preassembly. Although a number of states have adopted state-wide factory inspection systems, local inspectors still require partial disassemblies and sometimes even prohibit manufactured housing altogether.³

Second, the lack of uniformity of codes forces the manufacturer to obey all codes -- the strictest requirements of each apply.⁴ As we have seen, local codes, even when based on a model code, are likely to have some expensive, restrictive provisions. The traditional contractor can, because of his one-house-at-a-time methods, build a minimum house and make the necessary variations as the local inspector and codes require. The manufactured home producer, because of his assembly line techniques, finds it difficult to make changes for the small number of homes that might be built in any given town. Therefore each expensive, restrictive

11.6 Producers and Consumers of Mobile and Manufactured Homes (continued)

requirement must be incorporated into every manufactured home or sufficient flexibility must be built in to allow on-site variations. This naturally forces costs up. Furthermore, efforts at implementing state-wide codes have not met with notable success: manufactured housing per se is illegal in at least one town in Massachusetts despite the adoption of the BOCA code.⁵ Local variations in enforcement and administrative policies are the most likely cause of such anomalies.

Third, local unions and local inspectors are often unable to cope with the technological advances that could make manufactured housing inexpensive.⁶ As a result, lengthy approval procedures and rejection of new techniques are often the result. This is expensive at best and prohibitive at worst.

Finally, partially as a result of the above and partially as a result of structural problems in the industry, manufactured housing suffers a competitive disadvantage.⁷ The rules were made for a different game, traditional homebuilding, and as a result, manufactured housing has never been able to attain the volume of sales necessary to take full advantage of its mass production techniques. It is not surprising to find that manufactured housing has not fared well on the market; it is only surprising to find that it exists at all.

Mobile homes have a different set of problems. A uniform mobile home

11.6 Producers and Consumers of Mobile and Manufactured Homes (continued)

code disallowed the use of building codes to burden mobile homes, so localities switched to zoning laws to keep out this variety of cheap housing. As noted previously, the courts have held that zoning prohibitions against mobile homes are enforceable (*Vickers v. Township Committee of Gloucester Township*).⁸ Although some courts have not followed this decision,⁹ the complete prohibition of mobile homes is not uncommon. In a study done on four New Jersey counties 100% of the 500,000 acres studied effectively excluded mobile homes.¹⁰ We say "effectively" because even when a community does allow mobile homes, they may put such onerous zoning restrictions on them that they lose the competitive cost advantage. For instance, one of the New Jersey towns in the study required a one-acre minimum lot size and a 1500 square foot minimum floor area for almost all mobile homes.¹¹

Thus we see that people seeking inexpensive detached housing have also been disadvantaged by our building laws.

(1) David Falk, *Building Codes and Manufactured Housing* (Washington, D.C., 1970).

(2) *Ibid.*, p. 8.

(3) Private conversation with Paul Kelly James of Boise Cascade.

(4) Falk, pp. 9 f.

(5) Private conversation with Paul Kelly James of Boise Cascade.

(6) Falk, pp. 12 f.

11.6 Producers and Consumers of Mobile and Manufactured Homes (continued)

- (7) *Ibid.*, pp. 13 ff.
- (8) 37 N.J. 232, 252, 181 A.2d 129, 140 (1962).
- (9) *Bristow v. City of Woodhaven*, 35 Mich. App. 205, 192 N.W.2d 322 (1971).
- (10) Norman Williams, Jr. and Thomas Norman, "Exclusionary Land Use Controls: The Case of North-eastern New Jersey," *Land Use Controls: Present Problems and Future Reform*, ed. David Listokin (New Brunswick, New Jersey, 1974), p. 114.
- (11) *Ibid.*, p. 117.

11.7 The Supersensitive

This is a rather amorphous group of people whose standards for housing are higher than or different from standards which the building law enforces. First, they may be Jews, blacks, or philosophical pacifists (or any other religious, ethnic, or ideological group members) who want to live and raise their children in a sympathetic environment. Second, they may be physically handicapped or noise-sensitive or asthmatic and be unable to cope well in an environment geared for average people. Or, third, they may be average gullible people who rely on the promises of safety and security contained in our building laws.

Society has answered the first group of people with a resounding, "No, you may not do that, you bigots." Our dubious vision of America as the great melting pot has dimmed our vision of reality. Many

11.7 The Supersensitive (continued)

people want to exclude "the others" (although this had traditionally been used against racial minorities, this writer does not necessarily mean it in that sense), and, whether this desire stems from bigotry or a sincere desire to conserve and pass on cultural values, "the others" will be excluded one way or another. It is indeed wrong to enforce religious, ethnic, or ideological segregation with our building laws (although it is often done because the excluders find it easy to manipulate local laws to their advantage). But what is wrong is that it is *enforced* segregation -- that people living under such laws often do not have the option of living in a more diverse neighborhood. It is equally wrong (and futile) to try to *enforce* integration. This problem obviously is of greater dimension than building laws, but because building laws have played such an important role in enforcing segregation and because building laws could play such an important role in enforcing an equally repressive cultural homogeneity, we must make some attempt to deal with the problem.

Society's answers to handicapped, noise-sensitive, asthmatic, or other physically special people has been mixed. Sometimes we say yes: Massachusetts recently adopted an accessibility code which forces everyone to live in and pay for an environment modified for the blind, the aged, and the wheelchair-ridden. Such a code, if enforced (and it shows every sign of being enforced), is rife with all the problems of normal building codes: graft, increased cost, decreased supply, and

11.7 The Supersensitive (continued)

all their ancillary difficulties. We have not given a satisfactory answer to the majority of our populace when we say yes to special interests -- no matter how legitimate the needs of those special interests may be.

At other times, society has said no to these people: "Of course, many of these [noise] risks must be accepted as the inevitable burden of community living and for the over-sensitive the choice must be the soundproof apartment or the secluded farm."¹ We have not given a satisfactory answer to our physically special people when we adopt positions which allow them no feasible environmental alternatives. This then is a problem with which our building laws have dealt inadequately.

Finally, in this category are the many people who, because of the existence of the law, naively rely on the structural integrity, electrical capacity, or fire resistance of structures. They feel that their neighborhoods are adequately protected because they are appropriately zoned, and they trust contractors, engineers, architects, and their workmen because the law sets standards which everyone must obey. But as we saw in the chapter on nonenforcement, these people are sadly led astray. Because of legal variances, illegal graft, inspector discretion or ignorance, and beneficent nonenforcement, the standards promulgated in our laws are often not achieved. For the same reasons,

11.7 The Supersensitive (continued)

our neighborhoods are not protected from unwanted encroachments. A striking example of our lack of protection can be seen if we review an earlier hypothetical example: Nature Lovers' Association vs. Cheapo Homes, Inc. Previously, we grieved over the fact that the poor would usually be excluded because the nature lovers were able to exert more influence over local decisions. However, in light of recent complaints, it seems likely that the courts will eventually recognize the fact that potential residents should have some standing and will start to decide these cases in favor of the developer. The result may often lead to subsidized projects invading middle- and upper-income neighborhoods and occupying desired recreation or conservation areas. Invasions of low-income, powerless neighborhoods have been common; such invasions in wealthier neighborhoods, although perhaps more equitable, are no more desirable. Residential neighborhoods should be allowed some protection that is inviolate from the whims of a local official or even a Supreme Court judge. The sad fact is that our building laws frequently have been unable to deliver the promised goods and, sadder still, our building laws have lulled many millions of Americans into believing that their homes and neighborhoods are secure, safe, and sanitary when they are not. This too, then, is a problem any reformation of building laws must address.

The factor that ties all these examples together is their basic unsolvability. Forced segregation is wrong, but so is forced integration. Forcing poor tenants to pay for wheelchair ramps is wrong, but can we,

11.7 The Supersensitive (continued)

as a society, ignore the real needs of some members just because they were unfortunate enough to be physically handicapped? How safe is safe enough? How secure is secure enough? How sanitary is sanitary enough? Each of us has answers to these questions that are appropriate for ourselves, but are we so sure of our personal solutions that we are willing to enact them into law and force others to comply with them?

When the law intrudes into these areas, it will, no matter how carefully interests are balanced, necessarily err. The decisions that must be made in these areas ought not to be made in the political arena -- such insures that whoever controls the government will control the values that are enacted into law. Only a dispersed, voluntary decision-making process can be equitable.

(1) Frank E. Horack, Jr., "Performance Standards in Residential Zoning," *Urban Land Use Policy: The Central City*, ed. Richard B. Andrews (New York and London, 1972), p. 76.

APPENDIX C -- 12.0 "HAVES" AND BUILDING LAW

We have noted that a large number of people, perhaps most people, are harmed by building law. But building laws would have been repealed long ago, good intentions notwithstanding, unless someone benefited from them. Those are the people discussed in this chapter. Siegan provides us with our first hint of where to look to find these people: "Use will be determined by who has the political power, who has the graft, who has the influence, who has the multitude of things that causes the political powers to act as they do."¹

(1) Bernard H. Siegan, "The New Approach to Planning: Nonzoning," *Reason Magazine*, 4, 12 (April, 1973), p. 6.

12.1 Building Law Professionals

It is no accident that architects, engineers, lawyers, and planners have often played starring roles in the enactment of various building laws.¹ Such laws provide them with work and increase demand for their services while the supply is usually being limited by registration laws or bar requirements. Obviously, under these conditions of artificially created excessive demand and artificially created limited supply, their wages rise. This does not imply any actual dishonesty on the part of such professionals; it does mean that, as professionals, we have been loathe to consider the possibility of doing away with such laws and we have often been blind when considering the results of our legislation. Not

12.1 Building Law Professionals (continued)

only is economic self-interest at stake however. Often we honestly believe that we have special skills and insights which consumers ought to be forced to buy, and this puts our self-esteem at stake also.

Once the laws were enacted, the professions quickly moved in to administer them and to keep an eye on them so that unfavorable trends could be blocked. Thus we find that the first building inspectors in England were often architects;² the aesthetics commission in the Netherlands provides numerous jobs for architects;³ and in Sweden, where architects have not been able to get registration laws passed, the City Architects reject all plans not prepared by fellow-professionals thus insuring that the lack of registration laws will not result in fewer jobs for architects.⁴

In this country, building laws provide the same sort of incentives: planners, architects, engineers, and realty lawyers almost always benefit because of the existence of such laws and the more stringent the law, the more they benefit. Since these same professionals oftentimes control the contents of our building laws, the incentives we offer favor strict laws.⁵ Our policy of intervention has offered inappropriate incentives. Only a policy of non-intervention can correct this difficulty.

(1) In England, the RIBA played a major role in instituting architectural controls (see Sidney Cohn, *Practice of Architectural Control in Northern Europe, A Report Prepared for HUD* (Chapel Hill, North Carolina, 1968), p. 120.) In New York City, the AIA, the Architectural League, and the Society of Beaux Arts Architects

12.1 Building Law Professionals (continued)

all supported tenement building codes (see Robert W. DeForest and Lawrence Veiller, "The Tenement House Problem," *The Tenement House Problem, Volume I*, eds. Robert W. DeForest and Lawrence Veiller (New York and London, 1903), p. 67.). Early zoning efforts were supported by planners seeking a wedge to get into the door of our laissez-faire land-use policy and by numerous architects and lawyers. See Seymour I. Toll, *Zoned American* (New York, 1969), p. 125, p. 147, pp. 155 ff. and R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), pp. 42 ff.

- (2) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 54.
- (3) Sidney Cohn, *Practice of Architectural Control in Northern Europe, A Report Prepared for HUD* (Chapel Hill, North Carolina, 1968), pp. 67 f.
- (4) *Ibid.*, p. 44.
- (5) See, for instance, Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 3 and *passim*. for documentation of how various professional groups influence decisions and code contents.

12.2 Inspectors

Probably the single group deriving the most obvious benefits from building laws is comprised of the enforcers of the law -- without building laws they would have to find another way to make a living.¹ The first building inspectors were "scavengers" and "city viewers" who worked in London as early as 1193; they were compensated by a tax-exempt status.² In 1774 "surveyor" was made an official government post; these building inspectors earned their livings from fees charged to the builders³ -- a situation

12.2 Inspectors (continued)

which, combined with their extensive powers to mandate demolitions and issue occupancy permits, led to notorious abuse and graft.

The modern American situation has not much improved on the medieval English situation. Inspectors are poorly paid and are often only part-time employees⁴ -- a circumstance which encourages graft and discourages conscientious professionalism. Inspectors are often older men at the end of their careers who take the position out of civic pride or employment security.⁵ They are often chosen "informally"⁶ -- in other words, on the basis of kinship, friendship, or political support -- and this naturally leads to insecurity, conservatism, and general incompetence. Finally, the inspectors often have much control over the contents of the codes they enforce.⁷ Thus building law enforcers are a group of 33,000 building code administrators and an unknown, but large, number of local zoning administrators who form a built-in and influential lobbying group in favor of ever more stringent controls.

(1) In the absence of building laws, private inspection and construction management firms would be likely to grow since many people want some assurance that buildings meet requirements. Many government inspectors could be expected to be hired by such firms. It is impossible to say how inspectors would fare under a free-market situation because of complications in the market. Some inspectors for private firms earn considerably less than government inspectors and some earn considerably more. This is further complicated by the fact that building codes sometimes require owners to hire private inspection firms in addition to local services. This writer suspects that, under a non-interventionist policy, the number of inspectors would decline slightly, the less professional inspection services would be driven out of business, and the better inspection

12.2 Inspectors (continued)

companies would benefit. This belief, however, is contradicted by some evidence: in Massachusetts the better private inspection agencies have supported legislation to increase the scope of mandated inspection services while the marginal private inspection companies have ignored the lobbying efforts.

- (2) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), pp. 45 f.
- (3) *Ibid.*, pp. 51 f.
- (4) Allen D. Manvel, *Local Land and Building Regulation, How Many Agencies? What Practices? How Much Personnel?* (Washington, D.C., 1968), p. 30.
- (5) Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), pp. 48 f. and Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 67.
- (6) *Ibid.*
- (7) Field and Rivkin, pp. 51 ff.
- (8) Williams, Young, and Fischetti, p. 65. Even if they do not control code contents, they have considerable discretion in enforcement.

12.3 Monopolists and Oligopolists

This group is comprised of all businessmen (and workers) who use building law's capability to limit market entry to their own advantage: local businesses, contractors, unions, speculators, and landlords. As has been pointed out by many writers, local private interests regularly influence the contents and enforcement of building laws.¹ This is because monopolistic or oligopolistic situations can be created by skillful

12.3 Monopolists and Oligopolists (continued)

manipulation of these laws.²

Probably the first private interest group to influence building legislation was the union -- or, as it was known in those days, the guild; Queen Elizabeth's proclamations strengthened the monopolistic market position of London's guilds.³ Our modern codes accomplish a similar goal: for instance, a plumbing code typically serves to delineate "plumbers' work" and often contains a provision requiring that all "plumbers' work" be done by licensed plumbers.⁴ Union influence has been well documented.⁵ It is clear that the incentives favor actions that contribute to union member's well-being and to homeowners' costs. Probably unions have had their worst effects in the areas of self-help and manufactured housing. Many of the local provisions which require that only licensed tradesmen (with licensing being controlled by the tradesmen themselves) may do the work, and many of the provisions prohibiting preassembly were likely instigated by local unions.

Unions also have been known to help a second group of monopolists and oligopolists: local contractors. "Like many regulatory processes, [building regulation] is complex and influenced by those it purports to regulate."⁶ Local contractors have long influenced local building laws⁷ by making codes so restrictive and complicated that they discourage self-helpers, manufactured housing producers, and competitors who might be located in the next town. "Codes are thus powerful documents favoring

12.3 Monopolists and Oligopolists (continued)

certain ways of doing business and excluding others, which limits competition."⁸ Another interesting way in which contractors have sometimes limited competition is the contractor licensing system. This is a system whereby only licensed contractors are allowed to do construction work in a given locality. Since contractors themselves often control entry requirements, oligopolistic practices and prices result.⁹

Despite our previous defense of landlords, it should be recognized that many landlords enjoy a monopolistic or oligopolistic market position. As we have shown, building laws have artificially increased demand for and lessened supply of various building goods. This situation leads to artificially high rents (and often high profits)¹⁰ -- especially in the absence of offsetting conditions such as differential taxes, rent control laws, and the like. One measure of the extent of oligopoly is the vacancy rate: highly restricted situations such as that found in New York City result in low vacancy rates.¹¹ Since zoning is a prime weapon of landlords in obtaining monopoly profits, we might expect Houston to have a comparatively high vacancy rate; such is the case.¹² Thus in every place where zoning has been enacted (and that is in almost every urban place), we must expect landlords who have been favored with an oligopolistic position to fight to maintain zoning ordinances.

Another benefiting group is composed of speculative realtors. Realtors, though significantly inactive in housing code enactment, have, along with

12.3 Monopolists and Oligopolists (continued)

architects and lawyers and planners, been the stars of zoning enactment dramas.¹³ They recognized zoning's potential for "raising the value of land." A typical example of the profitability of zoning-enhanced speculation is the following. A speculator with local "connections" (i.e., a friend or a bribable zoning official) buys a large tract of land which is presently a farm and is presently zoned for agricultural use. He pays relatively little for the land (because so much land is zoned for agriculture, it is typically quite cheap) and, while he holds the land, the property taxes are low (because land zoned for agriculture is lightly assessed). When the speculator finds a buyer, a developer seeking to build tract houses, the speculator applies for a rezoning. With the help of his "connection," the land is rezoned for single-family residences. And the speculator sells the land to the developer at a considerable profit. Of course, the "connection" in this scenario is unnecessary if the speculator knows that rezoning decisions are usually approved by the local board or if he is willing to accept some risk. Speculative realtors can also capture profits by controlling the uses of properties adjacent to their own land. Thus we see that, while realtors are unlikely to object to building code reform, they benefit so much from current zoning practices that they will most certainly lobby to maintain the status quo in zoning.

Finally, we will look at local businessmen. They too are generally more interested in zoning regulations than in building codes. The impetus for implementing zoning in New York City first came from the retailers of

12.3 Monopolists and Oligopolists (continued)

Fifth Avenue (the Fifth Avenue Association) who were being pushed uptown by the Jewish-Italian-Russian garment industry.¹⁴ They were joined by the neighbors of the duPont building who feared that duPont (and other potential skyscraper builders) would supply so much office space that they would be unable to compete.¹⁵ More recent cases have been similar. In the Atherton case, zoning had allotted only one and one-tenth acres of land for commercial purposes; this bestowed a monopoly on the existing businesses. "A businessman who had been convicted of running a store in a residential zone challenged the ordinance.... The court invalidated the ordinance for having conferred a monopoly on existing businesses. While the Atherton case has never been overruled, its rationale has not been followed in recent decisions."¹⁶ In another case "[a] recent development plan for one community in East Sussex noted that shoppers had been taking their trade elsewhere, and planned the community accordingly. The addition of new shops was restricted."¹⁷ Unfortunately, despite the lessening of consumer choices and the increase of prices involved in these monopolistic practices, at least one author favors the use of zoning to control competition. He writes, "No question of fulfilling community demand is presented, but an application is denied because another filling station or shopping center is located close by. Were the application granted, the service areas of the two stations (or centers) would overlap and neither would be completely successful."¹⁸ Unhappily, the public costs accompanying such a paternalistic zoning policy far outweigh the private benefits to businessmen. At any rate, we must expect our businessmen to resist any reformation which would

12.3 Monopolists and Oligopolists (continued)

allow competitive businesses to locate in their communities.

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- (1) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), pp. 1 ff., pp. 134 ff. Charles G. Field and Steven R. Rivkin, *The Building Code Burden* (Lexington, Massachusetts, Toronto, London, 1975), p. 81. Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), pp. 39 f.
 - (2) Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), pp. 135 ff.
 - (3) C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 13.
 - (4) Field and Rivkin, p. 41.
 - (5) Williams, Young, and Fischetti, p. 2.
 - (6) Field and Rivkin, p. 71.
 - (7) Williams, Young, and Fischetti, p. 2.
 - (8) Field and Rivkin, p. 2.
 - (9) Williams, Young, and Fischetti, pp. 3 f.
 - (10) Edmund Contoski, "Government Controls and Urban Renewal," *Reason Magazine*, 7, 1 (May, 1975), p. 24.
 - (11) See discussion of this mechanism in Siegan, starting on page 137.
 - (12) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), pp. 8 f.
 - (13) Seymour I. Toll, *Zoned American* (New York, 1969), p. 147.
 - (14) *Ibid.*, pp. 108 ff., p. 146.
 - (15) *Ibid.*, p. 71.
 - (16) Daniel R. Mandelker, "Control of Competition as a Proper Purpose in Zoning," *Urban Land Use Policy: The Central City*, ed.

12.3 Monopolists and Oligopolists (continued)

Richard B. Andrews (New York and London, 1972), p. 21.

(17) *Ibid.*, p. 22.

(18) *Ibid.*, p. 19.

12.4 Big Business and the Wealthy

From the beginning, building laws have always favored the wealthy. The framers of housing codes in New York City lamented the fact that they could not discriminate between upper-class apartments and tenements, and the first setback law was instituted to ensure that only wealthier people could afford to live on the grand avenue envisaged by the planners.¹ A common complaint in the various political zoning battles in New York City has been that the laws do not threaten the bigger architects, builders, or realtors -- they give the larger firms a competitive advantage.² Today the situation is more complicated, but not essentially different. The townships in which zoning is most popular are populated by the wealthiest, the least unemployed, the most educated, young, white, mobile, white-collar workers;³ and what they institute in the way of zoning regulations has been termed snob-zoning, or "Ivy League Socialism."⁴ The only state with a working state-wide land-use policy is Hawaii -- a state in which 85% of the land is owned by 100 individuals:⁵ these owners don't mind zoning; they use it. Most of the land is zoned for agricultural uses and is taxed accordingly.⁶ But landowners are powerful enough to get the zoning changed to allow development at a rate which has prompted

12.4 Big Business and the Wealthy (continued)

charges of "conflict of interest," "pro-growth policies," and much else.⁷ This situation should remind the reader of the speculator's mechanism in the last section.

The objections cited above involve simple favoritism. They are a result of *someone* possessing legal power to enforce legislation which has economic consequences. Historically, such situations have favored the powerful, but even if we could turn the tables (an unlikely event), the laws favoring minorities or the poor would be no more equitable. But, let us suppose for the moment that we could enforce a truly equitable law. The powerful and wealthy would still have at least two advantages: (1) they are wealthy enough to obey the law and (2) they are wealthy enough to fight the law.

The situation in the first case is illustrated by a study⁸ done on building bulk regulations. The act of adding a number of small sites (a possibility that is feasible only for relatively wealthy developers) increases the size of the maximum permissible envelope disproportionately, thereby allowing greater built volume factors than had been anticipated by planners.⁹ In this way minimum setbacks favored the agglomeration of parcels and percentage reductions per story allowed taller buildings on agglomerated parcels than would have been allowed on any of the component smaller parcels. This consideration was used by developers in New York City until 1961 when FAR legislation was enacted.¹⁰ But since

12.4 Big Business and the Wealthy (continued)

most municipalities have not adopted FAR, and rather rely on setbacks, this advantage for the large landowner is retained by most communities. Similarly, careful study of the complex daylight indicator legislation used in London shows that the first high-rise builder (usually the wealthiest) has a significant advantage over later builders.¹¹

The second situation has been noted by many writers. The most frequent type of case in zoning law involves gas stations;¹² the large oil companies can afford the fight. In at least one study,¹³ it was suggested that appeals were generally sought only by the owners of larger parcels.¹⁴ Only the largest developers and landowners can afford litigation, thus assuring them of a favored position.¹⁵

(1) 50' setbacks were established on some grand avenues in London in 1757. C.C. Knowles and P.H. Pitt, *The History of Building Regulation in London 1189-1972 with an Account of the District Surveyors' Association* (London, 1972), p. 39.

(2) S.J. Makielski, Jr., *The Politics of Zoning* (New York and London, 1966), p. 136, p. 140.

(3) Seymour I. Toll, *Zoned American* (New York, 1969), pp. 293 f.

(4) *Ibid.*, pp. 296 f.

(5) About 40% is held by government and about 40% is held by less than 100 individuals, corporations, and trusts. R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), p. 61.

(6) *Ibid.*, pp. 62 ff.

(7) *Ibid.*, pp. 69 ff.

12.4 Big Business and the Wealthy (continued)

- (8) Dean Hawkes, *Building Bulk Legislation: A Description and Analysis* (Cambridge, England, [n.d.]).
- (9) *Ibid.*, p. 9.
- (10) *Ibid.*, pp. 19 f.
- (11) *Ibid.*, p. 36 and diagrams following.
- (12) Richard F. Babcock and Fred P. Bosselman, "Suburban Zoning and the Apartment Boom," *University of Pennsylvania Law Review*, III, 8 (June, 1963), p. 1040.
- (13) Daniel R. Mandelker, *The Zoning Dilemma, A Legal Strategy for Urban Change* (Seattle, 1971).
- (14) *Ibid.*, p. 140.
- (15) See, for instance, Bernard H. Siegan, *Land Use Without Zoning* (Lexington, Massachusetts, Toronto, London, 1972), p. 171.

12.5 The Middle Class

As we have seen earlier, large segments of the middle class are harmed by building laws, but those middle-class families who live traditional life-styles and who would choose voluntarily to pay for some of the costs associated with building law may actually benefit from the existence of building laws. As was pointed out in the Supreme Court decision in *Euclid v. Ambler*, "Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing as necessary accompaniments, the disturbing noises incident to increased traffic and business, and

12.5 The Middle Class (continued)

the occupation, by means of moving and parked automobiles, of larger portions of the streets thus detracting from their safety and depriving children...." Large segments of the middle class subscribe to the reasoning cited in this case and, since the middle class is numerous and the local political process is democratic, the middle class does have a large role in deciding the exact provisions of building laws.¹

This means that this group has usually benefited from building laws. They get open space; some protection for the residential character of their neighborhoods; some guarantee that the home that they buy will be safe and sanitary, and many miscellaneous benefits varying from community to community. Of course, the middle class not only receives these cultural and aesthetic benefits; economic considerations also play a role. "It seems unlikely that a community with housing units of widely divergent values is viable so long as there are alternative communities available which offer the financial benefits of homogeneity. Residents would have to be willing to make explicit payment for the privilege of living in a heterogeneous community and I expect that the demand for the opportunity to live among lower-income people is rather limited in this country."² Given that the poor have been excluded and given that many suburban communities have maintained their traditional residential character in the face of explosive growth, we cannot doubt that some substantial portion of the middle class has been benefited.

12.5 The Middle Class (continued)

Through the force of law, the traditional middle-class family receives these benefits without having to pay -- *they* voluntarily obey the laws. Even when a middle-class individual is oppressed by zoning or building codes, he will often perceive that the net effect of the law in question is beneficial to him and will support it. The problem is that they are able, through building laws, to force people with different values to obey the building laws too, and this causes hardship for those whose values are not traditional middle-class ones.

(1) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), p. 170.

(2) Bruce Walton Hamilton, *The Impact of Zoning and Property Taxes on Urban Structure and Housing Markets* (Ann Arbor, Michigan, 1972), pp. 30 f.

12.6 Environmentalists

The most common building law struggles in the courts have recently revolved around, not the question of property rights versus human rights, but the question of ecology versus the poor.¹ The open space proponents and conservation commissions have been quite successful: between 35% and 40% of all land in the United States is owned by some level of government;² despite numerous complaints, the growth of development in Hawaii seems to have been significantly retarded;³ despite the fact that the vast majority of applications for development

12.6 Environmentalists (continued)

on the California coast are approved by the California Coastal Commission, many of them are modified and development has proceeded at a slower pace than would have been expected in the absence of the environmentally conscious Commission.⁴ Our various "conservation" programs have quite clearly worsened conditions for the poor and bestowed unearned rewards on the environmentalists. The quantity of land suitable for development decreases which forces housing prices higher which pushes the poor out of the market. At the same time, environmentalists get "free" open space.⁵

(1) R. Robert Linowes and Don T. Allensworth, *The States and Land-Use Control* (New York, Washington, London, 1975), p. 198.

(2) Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 112.

(3) Linowes and Allensworth, pp. 60 ff.

(4) Bernard H. Siegan, "The Case Against Land Use Planning," *Reason Magazine*, 7, 9 (January, 1976), pp. 6 f.

(5) This open space is not truly "free:" either the owner of regulated property must pay for the environmentalists' goods (because of reduced opportunities to use the land profitably) or everyone must pay for eminent domain takings through taxes. In no case do the environmentalists have to pay the full costs. Of course, we must assume that environmentalists would be willing to pay for *some* conservation areas (if they could not obtain them more cheaply through government interference), so an exact prediction of the ratio of conservation land to buildable land under free market conditions is impossible. This author believes that, absent government, the ratio would decrease substantially because conservation land would no longer be so inexpensive.

12.7 Some Politicians

As we saw in Section 4.2 Graft, the Personal Variety, some politicians gain quite directly from the existence of building laws: without such laws they would not have been able to extract graft from developers. This graft can either be used as disposable income or as additions to one's campaign funds. An "honest" politician can gain the same benefits with much less risk by consistently using his official capacity to serve some special interest group.¹ For instance, the "environmentally conscious" politician gains respect as a concerned public servant and also gains a staff of dedicated, energetic, young campaign workers. No matter how unsound a proposal might be, this politician will support it if it is labelled "conservationist." To this writer's mind there is little difference between the politician who accepts money in exchange for support of an unsound law and the politician who accepts campaign staff help in exchange for support of an unsound law. Both types of politicians benefit from building laws unjustly.

(1) Read Richard F. Babcock, *The Zoning Game, Municipal Practices and Policies* (Madison, Wisconsin, 1966), pp. 140 ff. for a discussion of how local legislators "cave in" under neighborhood pressure. Read Lawrence A. Williams, Eddie M. Young, and Michael A. Fischetti, *Survey of the Administration of Construction Codes in Selected Metropolitan Areas* (Washington, D.C., 1968), p. 3 for a discussion of how special business interests control appeal board members and other government decision-makers. Read Bernard H. Siegan, *Other People's Property* (Lexington, Massachusetts, Toronto, London, 1976), p. 15 for a discussion of how "pro-environment" politicians win support from ecologically-minded voters.

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