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Conserving and Developing the Land†

BERNARD H. SIEGAN*

Land is a precious and scarce natural resource. It should be utilized to best provide for the needs and desires of the people. This will occur to the most optimum degree if the use and development of land is left to the private marketplace except in those instances when government has a vital and pressing need to impose regulation. The great lesson of our times is that the forces of production, conservation, and creativity rest principally in the marketplace and not in government. True, private entrepreneurs act largely in their own self interest, but probably no more so than people in government, and their endeavors in the economic area are much more oriented to the general public welfare.¹

This wisdom is now subscribed to by government leaders throughout the world, including those in China, the Soviet Union, and other eastern bloc countries.² Leaders in the Marxist world have come to

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1. This view is consistent with the "public choice perspective" advanced by James M. Buchanan, Nobel Laureate in Economics for 1986. He emphasizes self interest as the motivating factor in both private and political choice. However, the forces of the economics marketplace are more likely to channel individual self interest into socially desirable outcomes. See generally J. Buchanan & G. Tullock, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1965); Buchanan, *The Constitution of Economic Policy*, 77 *AM. ECON. REV.* 243 (1987).

2. See generally Z. BRZEZINSKI, *THE GRAND FAILURE: THE BIRTH AND DEATH OF COMMUNISM IN THE TWENTIETH CENTURY* (1989). Brzezinski served during the Carter Administration as Assistant to the President, National Security Affairs, and as Director of the National Security Council. "Prospering only where it abandons its internal substance even if still retaining some of its external labels, communism will be remembered largely as the twentieth century's most extraordinary political and intellectual aberration." *Id.* at 1.

Indicative of the greater acceptance of capitalist theory, 50 countries during the last 10 years—including industrial countries—have significantly reduced their maximum

recognize that private ownership and enterprise offer their countries relief from economic regression and stagnation. They understand that collectivist systems have wasted and exploited their nations' resources, and that their only hope for economic and social progress rests with private enterprise and ownership.³

Such philosophical conversions are understandable. By comparison to the socialist world, capitalism's economic accomplishments have been enormous.⁴ This point is well illustrated by the state of this

marginal tax rates on individual incomes. In the United States, this rate was 70% in 1979, and 28% in 1989. A. Reynolds, *International Comparisons of Taxes and Government Spending* (presented at conference on "Rating Economic Freedom," Banff, Alberta, Oct. 5-8, 1989).

3. See generally Z. BRZEZINSKI, *supra* note 2. Recent media stories indicate the Soviet economy will allow for greater private ownership and enterprise.

On August 11, 1988 *Pravda* reported, "Aleksandr Yakovlev, the Politburo member then responsible for Marxist-Leninist doctrine, proclaim[ed] that nowadays 'the ideology of the owner must be paramount,' adding that 'instilling a sense of ownership was a good thing, for when a worker has a stake in something, a person will move mountains; if he does not, he will be indifferent.'" *Id.* at 11.

Soviet leader Mikhail Gorbachev, speaking in Siberia, stated that "only by opening more private businesses could the country generate the competition that will ultimately bring down prices." *Siberians Scold Gorbachev for Empty Stores, Lines*, San Diego Union, Sept. 13, 1988, at A1, col. 4, at A9, col. 1.

In April 1988, a new law was published in Soviet newspapers allowing Soviet citizens to lease land, animals, equipment, or even entire factories for 50 years or more, sublease it to others, and pass it on to their children when they die. *Extensive Soviet Land Rights Listed*, San Diego Union, Apr. 10, 1989, at A2, col. 5. In early 1990, the Communist Party platform embraced the principle of private property. *Soviet Communists Accept Notion of Private Property*, Wall St. J., Feb. 13, 1990, at A19, col. 3.

Professor Paul Craig Roberts quotes Abel Aganbegyan, chief economic advisor to Mikhail Gorbachev as stating, "We are going to establish private property in the means of production." Roberts, *Supply-Side Theory is Alive and Well—In Moscow*, Bus. Wk., July 24, 1989, at 10.

In Poland in 1989, the government owned 98.4% of the country's productive assets in industry, and a major concern of the Polish government in spring of that year was how to privatize them. Filar, *Poland on a Rough Road Toward Economic Pluralism*, Wall St. J., Mar. 13, 1989, at A15, col. 3.

4. See generally Z. BRZEZINSKI, *supra* note 2; J. SHELTON, *THE COMING SOVIET CRASH* 3-100 (1989). Some perceptive observers explain that communism has eliminated the booms and busts of capitalism by eliminating the booms.

According to Brzezinski, in recent years, research and academic economists supporting Gorbachev urged a "truly comprehensive dismantling of the centralized planning apparatus. . . . Central planning, they argued, had to be replaced with a modified market mechanism." Z. BRZEZINSKI, *supra* note 2, at 67. For some interesting insights into the operation of the Soviet economic system, see Soviet leader Mikhail Gorbachev's recent book M. GORBACHEV, *TOWARD A BETTER WORLD* 251-302 (1987). Specifically, note his criticisms of central planning, *id.* at 279-85, and his conclusion that a "serious restructuring is required in planning work." *Id.* at 284.

Leon Aron, who formerly lived in the Soviet Union, writes in *Commentary* that since Glasnost, reports within the Soviet Union have been candid about its economic problems. With the official poverty level set at 75 rubles per person per month, it has been reported that 43 million are under the poverty line, and 40% of Soviet families, about 100 million people, live on less than 100 rubles a month. The consumption of meat and dairy products by the Soviet "poor" has declined by 30% since 1970. A total of 1.2 million beds are in hospitals with no hot water; every sixth bed is in a hospital with no running water at all; 30% of Soviet hospitals do not have indoor toilets. Half the nation's elementary

nation's economy in recent years. Notwithstanding the minimal amount of price controls in the United States, prices rose annually during the seven years including and prior to 1988 only an average of about 3.6%, the biggest increase occurring in 1988 in the amount of 4.4% and the lowest in 1986 at 1.1%.⁵ Moreover, during this period the economy was strong, registering a record length of prosperity. It grew at an average annual rate of about three percent, and unemployment decreased from 9.5% to an historically low rate of 5.4%.⁶ This impressive record is in large measure attributable to the high level of production that existed during this period.

To be sure, communism's failures do not mean that every control over private enterprise or property will be unsuccessful. However, the magnitude and breadth of that system's failures should encourage careful inquiry into the costs and benefits of limitations on private economic activity. At the very least, it would seem this nation should be wary of utilizing economic restraints that have not worked in the communist countries. Thus, one major failing of the communist system has been master planning. On a micro level, master planning is an essential part of zoning regulation. Under zoning, the use of all property in a locality is restricted pursuant to a master plan. The major trouble in zoning—as elsewhere—is that the

schools lack central heating, running water, or sewage systems. Aron, *What Glasnost Has Destroyed*, COMMENTARY, Nov. 1989, at 30-31.

In 1983, there was one car for every 1.8 Americans, 4.4 Japanese, 2.5 Germans, and 2.8 Italians, but one for every 14.2 Soviets, 5.8 Czechs, and 10.8 Poles. "It is a startling fact that blacks own more cars per capita in South Africa than do citizens in the Soviet Union." Z. BRZEZINSKI, *supra* note 2, at 238. In October 1989, it was reported that Soviet consumers were suffering some of the worst shortages of food and other goods the country had ever known. With the approach of winter, complaints "ha[d] grown to an angry chorus." *Soviet is upset by food*, San Diego Union, Oct. 16, 1989, at A2, col. 2.

Initiated in 1978, the progressive decollectivization of Chinese agricultural land "had prompted a dramatic surge in productivity. . . . China was transformed from a net importer of food to an actual exporter." Z. BRZEZINSKI, *supra* note 2, at 165. "This agricultural rebirth stimulated growth in the output of Chinese rural industry, which increased by a staggering 400% between 1981 and 1986 and which grew by a further 36% in 1987 alone." *Id.* at 166.

5. COUNCIL OF ECON. ADVISERS, ECONOMIC INDICATORS 24 (Dec. 1989).

The foregoing figures do not take into account the improvement in quality that occurs over time. Were quality improvement considered, the price increases would be, in my opinion, significantly less than those set forth. Thus, it has been suggested that a two percent per year increase in the official price index would be the equivalent of stable prices. *An Interview with Milton Friedman*, FRASER FORUM, July 1989, at 7. I used these statistics in comparing the two economic systems in part because the speech was delivered in Brazil which has long experienced high inflation despite numerous regulatory efforts to cabin prices and wages.

6. ECON. REP. OF THE PRESIDENT 294, 301 (Feb. 1990); COUNCIL OF ECON. ADVISERS, *supra* note 5, at 12.

plan limits production arbitrarily with adverse effects on supply, prices, and competition.

Eliminating master planning is a theme common to the recommendations for reform of land use regulation proposed by President Reagan's Commission on Housing. The President appointed this thirty-member commission in 1981 to seek ways to increase the supply of housing and lower its cost. The Commission's report,⁷ issued in 1982, urged severe limitations on zoning and other land use regulations in order to accomplish these purposes. It urged that municipalities retain only such powers over the development of private housing as are necessary to preserve vital and pressing governmental interests.

The report contains over 100 recommendations covering all aspects of housing. The proposals on land use present a message common to many others endorsed in the report: to obtain more housing at lower cost, remove most government controls. The Commission recommended that a "vital and pressing" standard be applied to determine the need for regulation. According to the report, market forces should determine the location and composition of new development—type, size of unit, density, land coverage, and height—unless the municipality could prove that it had, in effect, an extremely persuasive justification—a vital and pressing one—for applying restraint. The objective is to forbid imposition of regulations that curtail housing development and that do not in fact implement police powers.

Similar to the determinations made by presidential commissions appointed by prior administrations,⁸ Reagan's found great wrongs and abuses at the local level, but, unlike the prior studies, proposed deregulation. Regulation, this commission concluded, was the problem, not the solution. Deregulation would not only remove the wrongs and abuses, but would better serve the public interest.⁹

Some local controls relating to use and development should continue. Only municipalities are able to plan and build streets, parks, public buildings, schools, storm and sanitary sewers, and water mains. Municipalities must also secure the public's vital and pressing interests, which the Commission identified broadly as limited to pro-

7. REP. PRESIDENT'S COMM'N ON HOUS. (1982) [hereinafter REPORT]. The recommendations on regulations are contained in Section IV, beginning on page 177. The author of this article was a member of the Commission, serving as Chairman of the Regulations Committee.

8. PRESIDENT'S COMM. ON URBAN HOUS., A DECENT HOME (1969); NAT'L COMM'N ON URBAN PROBLEMS TO THE CONG. AND TO THE PRES., BUILDING THE AMERICAN CITY (1968). "In short, although the basic justification for zoning is to protect the overall public good, this often appears to be the last consideration as zoning is now practiced." *Id.* at 20.

9. REPORT, *supra* note 7, at 177-82.

protecting health and safety, remedying unique environmental problems, preserving historical resources, and protecting investments in existing public infrastructure resources.¹⁰ More specifically, "vital and pressing governmental interest" includes requiring adequate sanitary sewer and water services and flood protection; assuring that topographic conditions will permit safe construction and accommodate septic tank effluents; protecting drinking water aquifers; avoiding nuisance or obnoxious uses; requiring off-street parking; prohibiting residential construction amid industrial development; and avoiding long-term damage to the vitality of historically established neighborhoods.¹¹

Accordingly, government controls would be limited to forbidding private activity that is truly harmful, much as is the case when other private actions such as speech, press, religion, mobility, or privacy are restricted.¹² This is the proper role of government: to protect the public from harm, and not to prohibit or diminish production, competition, and creativity.

Residents often complain when new development increases traffic and pollution of air and water, and when it decreases open space. They object that growth brings more crime and taxes. Although comfort and convenience levels may be reduced for some as a result of growth, it is difficult to conclude that existing residents have been injured in a legal sense. In our society, states and municipalities are part of a political union and not walled enclaves serving solely their own interests. They are expected to develop and grow to serve the diverse demands of the population. To exclude people and limit development to a level that is not consistent with these ordinary expectations would unfairly grant certain residents special benefits. As a New York judge observed many years ago, one who chooses

to live in the large centers of population cannot expect the quiet of the

10. *Id.* at 200.

11. The Commission's recommendations apply only to the development of housing. The vital and pressing standard is set forth as follows:

To protect property rights and to increase the production of housing and lower its cost, all State and local legislatures should enact legislation providing that no zoning regulations denying or limiting the development of housing should be deemed valid unless their existence or adoption is necessary to achieve a vital and pressing governmental interest. In litigation, the governmental body seeking to maintain or impose the regulation should bear the burden for proving it complies with the foregoing standard.

Id. The commission adopted this recommendation without any dissent.

12. The Commission suggested an elevation in the level of judicial scrutiny applied in land use decisions to provide greater judicial protection for rights of ownership. *Id.* at 202 n.13.

country. Congested centers are seldom free from smoke, odors, and other pollution from houses, shops, and factories, and one who moves into such a region cannot hope to find the pure air of the village or outlying district. A person who prefers the advantages of community life must expect to experience some of the resulting inconveniences.¹³

The Pennsylvania Supreme Court viewed the matter as one of individual liberty:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid.¹⁴

Erecting barriers to travel and occupancy interferes with a free society's ideals of mobility and opportunity. Absent a vital and pressing justification, growth control lacks equitable or philosophical roots in a legal system essentially dedicated to maximizing liberty.

Actually, as previously stated, the vital and pressing standard does allow a community to limit development in order to remedy "unique environmental problems." The burden would be on the community to prove that conditions have reached an unusually adverse level demanding application of growth restrictions. In addition, the community must show that the primary purpose of the regulation is to ameliorate this problem and not to exclude people since, as the Reagan Commission concluded, "exclusion is clearly not an acceptable governmental interest."¹⁵

Some reject growth on a utilitarian basis: it does not pay its way, and therefore raises taxes. Many studies have been conducted to determine the costs and benefits of new development, and the results

13. *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 40, 58 N.Y.S. 229, 232 (1932).

14. *National Land & Inv. Co. v. Easttown Township Bd. of Adjustment*, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965). The right involved has been identified by one federal judge as the right to travel. *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976).

In *Edwards v. California*, 314 U.S. 160 (1941), the United States Supreme Court struck down a California statute which made criminal the bringing of nonresident indigents into the state. In support of this law, California argued that the influx of migrants had resulted in staggering problems of health, morals, and especially finance. However, the Court held the law violated the right of travel protected under the commerce clause of the Constitution; no "state [may] isolate itself from the difficulties common to all of them by restraining the transportation of persons and property across borders." *See id.* at 173. The Court noted that indigent nonresidents were deprived of the opportunity to exert political pressure on California lawmakers in order to obtain a change in policy. *Id.* at 174. The same also occurs in growth control situations.

State laws that deny newly arrived indigents welfare benefits during the first year in the state inhibit their exercise of the right to travel, and are therefore unconstitutional, according to *Shapiro v. Thompson*, 394 U.S. 618 (1969). Growth controls operate similarly, and thus may fail similar constitutional examination.

15. REPORT, *supra* note 7, at 200.

are mixed. The problem with such studies is they are necessarily incomplete and misleading—they are unable to quantify many advantages localities obtain from new residents. For example, how does one evaluate the gain to the elderly from the arrival of a cancer or heart specialist or nurses to staff the local hospital, all of whom might be excluded by growth controls or by the increased cost of housing such controls cause? Similar advantages are reaped from other professionals or technicians who might also be excluded. Larger cities boast of cultural, educational, religious, library, medical, shopping, and transportation facilities not available in smaller cities. Growth controls can also be costly when they cause unemployment or reduce the incomes of those who depend for their livelihoods directly or indirectly on the construction industry, one of the nation's major industries.

Some demand that in addition to paying for the direct costs connected with it, new developments should also pay for all the indirect costs, such as for the added use of roads, highways, sewer and water facilities, schools, libraries, and so on. However, these facilities are the property of the community and all its residents, new and old. Congested roads may become more congested with the arrival of newcomers, but the problem is not solely attributable to them: it is the result of the development of the entire community. If the community had not developed so extensively, the newcomers' impact would not be significant.

Once a person becomes a resident of a city, he or she is entitled to all the benefits and burdens of residency—the use of facilities as well as the responsibility of paying for these facilities. If their homes are specially assessed (either before or after they purchase them), new residents would be paying, in effect, an entry fee, which they would again have to pay in taxes as residents. They would be subject to double taxation.

Deregulation of zoning may augment tax receipts. By limiting zoning restrictions, cities and towns will be encouraging the location of developments that are highly profitable for the tax base, such as factories, shopping centers, and high-rises, all of which yield substantial tax revenues and cost relatively little to service. The plants and centers result in no children and the high-rises result in relatively few children, and schools are by far the most expensive of municipal services, typically accounting for two-thirds to three-fourths of real estate tax bills.

By limiting growth, towns and cities also limit the number of po-

tential shoppers, consequently deterring the construction of shopping centers. Housing limitations may likewise exclude workers for industry, and thereby prevent location of that revenue source in the area.

I. PLANNING

Any critique of land use regulation should begin with a discussion of land use planning. There is obviously much appeal in the notion that we must have more and better planning. Do not individuals and corporations carefully plan their activities and outlays? Why then should government not be allowed or required to engage in this self-same activity? The simple, yet highly profound answer is that public land use planning is doomed to failure in a representative society.

Public land use planning means or implies an orderly, rational arrangement of land uses directed by experts in planning. Although this definition raises many questions, it seems to represent what most people think of when they speak or write of planning. The assumption seems to be that there is something precise, measurable, or quantitative about planning, or its standards.

This assumption is exceedingly difficult to substantiate, and few of even its most ardent proponents make the effort. Is there some precise measurement available to determine the "best" use of some or all of the land, of growth and antigrowth proposals, and whether the land is better suited for trees, industry, or the housing of people? Should the land be developed with two, eight, or twelve housing units to the acre, or is it better suited for a mobile home park or shopping center, or should it be retained as open space?

By now, after seventy years of zoning experience in the United States, it should be clear there are respectable, distinguished, and knowledgeable planners who would disagree in many if not most instances to any or all of these alternatives. Planning is unquestionably highly subjective, lacking those standards and measurements that are requisites of a scientific discipline.¹⁶

16. This writer once practiced law in Illinois. In every major zoning case in which the writer was involved or had knowledge of, each side of the controversy was able to hire a professional planner to testify in support of its position. Some of the cases were basically verbal duels between planners with opposing views. For further discussion about land use planning, see B. SIEGAN, *LAND USE WITHOUT ZONING* 4-9 (1972); C. HAAR & M. WOLF, *LAND USE PLANNING* 45-87 (4th ed. 1989).

Plans, of course, may reflect a particular ideology such as rejection of any marketplace solutions to urban problems. Consider the following:

Program for Downtown Recovery.

1. Freeze downtown highrise development. *There is no need for any new highrise structures.*
2. Selectively dismantle whole buildings and parts of buildings; save materials for reuse.
3. Close off streets for orchards, vegetable gardens, parks, market places. Close the city center to private automobiles. Buses and other service transit

Planners confront serious problems in evaluating the present and forecasting the future, whether it be on a micro or macro level. With respect to zoning, overruling market based decisions on land use would seem to require adherence to special goals or values, or perhaps understandings that relatively few possess. Zoning experience is replete with instances where planners classified land either to allow uses unacceptable in the market or to deny uses eagerly sought in the market. Theory and education alone cannot substitute for the actual experience of making practical decisions and suffering their consequences. Few planners have ever been part of the construction or development industry, nor have they been responsible for decisions on the location and development of residential, commercial, or industrial projects. Even if they once had been, their information about prices, materials, innovations, trends, and consumer desires and preferences must now necessarily come from secondary or more remote sources, not directly from the "firing line."

How then, can planners possibly be as familiar with the location, development, construction, and operation of shopping centers, housing developments, nursing homes, or mobile parks as those who develop, own, and operate them? Owners and their mortgage lenders risk substantial funds on their success. Master planning will inevitably forbid developers to build where they want, and will permit them to build where they do not want.

However, regardless of their knowledge or ability, planners are not destined to make a significant impact on the regulation of land use. The major decisions will be adopted by the elected office holders who possess the final authority. They can be expected to and will respond to a variety of pressures and concerns, a principal one being the interests of those who help them obtain and keep public office.

Politics, rather than planning, will be largely involved. In short, zoning and other land use regulations are, and have to be, tools more of politics than of planning. Consider these limitations on the power of the planner. First, he is a paid employee and cannot be expected to espouse, with any degree of consistency, policies contrary to those of his employers. The basic rules are established by those elected to

only.

4. Rebuild southern exposures for hydroponic gardens.

5. Renovate office space for multiple use—housing, community marketing, meeting places, schools and other much needed things for the surrounding communities. Diversify and decentralize downtown.

Berkeley, *People's Architecture: The Recovery of Cities*, in THE ENVIRONMENTAL HANDBOOK 234, 238-39 (1970).

govern.

Secondly, even if a proposed plan appears in accord with the general desires of the lawmakers or administrators, and its preparation may actually have been commissioned by them, there will still have to be public hearings and debates before it can be adopted. Amendments required for passage can easily change the meaning and impact of the proposed legislation. In practice, the "perfect" plan stands little chance of remaining intact against the opposition of a group of voters or politicians, pressures exerted by political supporters or contributors, payment of graft, or perhaps even the voice of the local newspaper.¹⁷

Accordingly, the "perfect" plan is likely to be quite imperfect by the time it emerges from the legislative process, whether it be on a local or higher governmental level, and it might be ravaged still more as administered. And it is possible the courts may ultimately lay some or much of it to rest.¹⁸

Nor is the plan or law that is finally passed likely to remain intact very long. From the moment of adoption, special interest groups such as environmentalists, developers, and civic organizations will seek to change it to their own benefit. A plan will never have enough open space for the many environmentalists hostile to development. Nor will those who can reap huge profits by avoiding the regulations sit idly by. They will make every conceivable effort to rezone the classi-

17. In the San Diego area, persons seeking election to the County Board of Supervisors or to the City Council frequently take positions on land use issues. Those elected to office who have adopted a particular view are likely to be immune to persuasion from another side, regardless of the evidence submitted in the hearings or the recommendation of the planners. See Siegan, *Land Use Planning in America: Controlling Other People's Property Through Covenants, Zoning, State and Federal Regulations*, 14 ENVTL. L. 385, 404-05 (1975). Planning is no less difficult in other economic areas. See INST. FOR CONTEMP. STUDIES, *THE POLITICS OF PLANNING: A REVIEW AND CRITIQUE OF CENTRALIZED ECONOMIC PLANNING* (1976). For different opinions on the urban planning process, see C. HAAR & M. WOLF, *supra* note 16, at 730-44.

18. Two recent United States Supreme Court cases have seriously limited zoning options. First *Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), makes some losses incurred as a result of zoning regulation compensable; *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), applies a substantial means-ends test to determine zoning validity. The Court has also ruled in recent years that a land use regulation can effect a taking if it denies an owner economically viable use of his land. *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

Over the years, state courts have struck down zoning ordinances considered as exclusionary of lower-cost housing. *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975); *Oakwood at Madison, Inc. v. Township of Madison*, 72 N.J. 481, 371 A.2d 1192 (1974); *Urban League v. Mayor of Carteret*, 142 N.J. Super. 11, 359 A.2d 526 (1976), *cert. denied*, 74 N.J. 262, 377 A.2d 667 (1977), *rev'd*, 170 N.J. Super. 461, 406 A.2d 1322 (1979), *rev'd sub nom.* *Southern Burlington County NAACP v. Township of Mt. Laurel*, 92 N.J. 158, 456 A.2d 390 (1983); *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

fication on their properties or on those they would like to buy. They will attempt to increase the number of units per acre or change the category to one that is more valuable. Civic groups, likewise, will sooner or later find the plan wanting in some or many respects.

Many of these pressures are bound to succeed, and that "perfect" plan will in time be little more than history. The changes will be made on a piecemeal basis, guided principally by political rather than planning considerations. Consequently, the control of land use and development through public planning and regulation is frequently akin to performing surgery by a team consisting of faith healers, exorcists, and surgeons. While the patient may not die instantly, he may well wish he had.

II. POLITICS

The conventional wisdom at city halls across the United States is that urban growth must be planned and controlled by the government. The overwhelming majority of municipalities have adopted zoning. City officials often profess that zoning generally is in everyone's best interests and the planning commissioners and city council members are acting for the "overall good" and "general welfare." The question arises: Why are politicians or political appointees competent to understand and motivated to implement the "public interest?" What reason is there to believe that, unlike most people, public office holders will make decisions inconsistent with their own interests? Can they possibly ignore their own personal welfare in the judgments they make?

Politicians cater to those who put and keep them in office. This may be in the tradition of representative society, but it warns us of the hazards when economics are involved. Politicians are a conduit for public whims and passions. That is a basic reason why we limit their powers over speech, press, religion, and in criminal proceedings. Should we not apply the same perspective whenever *any* individual rights are at stake?

Studies show that the most important factor in zoning controversies is the extent of the opposition to the proposed use. The larger the crowd at the public hearings, the greater the likelihood that its demands will prevail.¹⁹ A big enough gathering of protesters appar-

19. Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273 (1961-62); Note, *Zoning Variances and Exceptions: The Philadelphia Experience*, 103 U. PA. L. REV. 516 (1955).

ently may even overcome graft and political contributions. What conceivable relationship is there between crowds on one hand, and individual rights and wise development on the other hand?

There is also the matter of competency. Zoning has given enormous powers to local politicians, who frequently have minimal or no qualifications for the trust. While there are notable exceptions, the city council or zoning board is not likely to attract many individuals with any special knowledge or technical competence in land use planning and development.²⁰ It is rare to find that persons holding these jobs have had practical experience in these fields. As a result, enormous powers are vested in persons to decide matters that they could not possibly be hired to handle in private industry.²¹

Obviously there should be great concern that land is not wasted. It is one of our most precious resources. This is why we should prefer the controls of the private rather than the political marketplace. The political process that governs zoning encourages expediency and incompetence.²² By contrast, builders and developers, like all entrepreneurs, have to be reasonably expert at their business. They have to use the land efficiently and effectively to survive financially. They and their lenders, who also have significant stakes in the success of a project, must plan and develop every parcel to provide maximum utilization and minimum spoilage. Although of course they do go astray, they surely are not motivated to reach the level of the political process where the verdict of the crowd may be most decisive.

III. ENVIRONMENT

It is often maintained that the environment will suffer in the absence of zoning.²³ However, it would seem that environmental

20. Zoning is, of course, one of many issues which local politicians have to address. It is a matter of chance whether someone with special knowledge in the field will be elected to office.

21. Local elected officials are responsible to their own constituencies, and not to persons living beyond the municipality's borders. Yet, land use decisions impact nonresidents such as prospective home buyers. By contrast, developers and builders must be concerned with satisfying potential purchasers, regardless of where these purchasers live.

22. The objective of efficiency—defined as that allocation of resources in which value is maximized—is uppermost in the private market, for it is related to profits. By contrast, for the legislative process, efficiency is usually not a primary concern, and quite frequently may have little, if any, significance. Politicians do not gain much by promoting efficiency. Yet, a traditional theory of zoning is that it removes barriers to the efficient operation of the market. On the general subject of political and economic decision making, see M. FRIEDMAN & R. FRIEDMAN, *FREE TO CHOOSE* 9-69 (1979); F. HAYEK, *THE CONSTITUTION OF LIBERTY* 340-75 (1972); H. JOHNSON, *ON ECONOMICS AND SOCIETY* 3-60 (1975).

23. Opponents of a development quite often argue that it will cause congestion and pollution and will reduce open space. From this perspective, all development is adverse to the environment. Housing consumers should insist, however, that construction is beneficial and essential to their environment.

problems would be better resolved if addressed specifically, and not as part of a system intended to serve a host of other purposes. The market itself is not oblivious to environmental concerns. The greater the level of competition, the more a developer will seek to lure consumers with appearance, design, open space, landscaping, and recreational facilities.

Nor has zoning shown itself to be a friend of the environment. Consider, for example, two kinds of zoning regulations that are frequently imposed in the name of environmentalism but which actually harm it: first, those that reduce the amount of living units, single family or multiple family, that will be allowed on an acre of land; and second, those that prohibit high-rise or low-rise multiple family construction. To require one house on two acres of land when the potential occupants would be satisfied with a fraction of that amount constitutes a waste of the land and their money. Similar reasoning applies to limitations on multifamily buildings (apartments, condominiums, and townhouses) or the prohibition entirely of these structures. (Each floor of an apartment building in effect adds to the supply of land.) There is no surer means for consuming needlessly the land than by forcing persons who prefer to live in apartments or townhouses to live in houses.²⁴ Frequently, sites for houses for the same number of families will occupy five or even ten times as much land as low-rise apartments do, and the figure is much higher with respect to high-rises.

Needlessly consuming the land obviously limits the supply of that resource.²⁵ Moreover, prohibiting or limiting development will injure the portion of the environment that is unquestionably the most important: that which houses the people and supplies their material needs.²⁶

24. For example, in early 1989, the New York Department of City Planning prepared a revision of the city's zoning ordinance that would reduce density by 10% to 30% in the districts zoned R-3, R-4, and R-5. These districts accounted for 60% of all housing completions in Queens, Brooklyn, Bronx, and Staten Island boroughs in 1987. *Changing the Rules for Attached Housing*, N.Y. Times, Apr. 30, 1989, at R9, col. 2.

25. See B. FRIEDEN, *THE ENVIRONMENTAL PROTECTION HUSTLE* (1979). The author discusses three proposals to develop major housing projects in Northern California opposed by, among others, environmental groups. Originally intended to provide over 25,000 units, the developers could only obtain permission to erect about 3500. Even an environmentally enhanced development was sacrificed in favor of permitting only very low density, upper middle-class housing. Unit prices in the new developments were much higher than those originally contemplated, largely due to the requirements imposed by governmental authorities.

26. For most people, the home is where the major part of life is spent. Its characteristics greatly influence the quality of one's life. Accordingly, the home should be a

One direct consequence of these antidevelopment policies will be to deny those who would occupy the new and excluded housing an opportunity to better their environment. Another consequence is that the many people dependent on the construction and related industries for their livelihoods will see their living standards suffer temporarily if not permanently by the resultant curbs on production.²⁷

The indirect effects of antidevelopment policies will be considerably more pervasive. Environmental conditions throughout the affected housing market will suffer. These policies will (1) curtail the filtering process upon which great numbers of people are dependent for better housing conditions, (2) generally raise the cost of shelter, (3) cause worse environmental conditions for many or most apartment dwellers within that housing market, and (4) cause greater spreading and scattering of housing accommodations, something popularly condemned as "urban sprawl."

Filtering in housing occurs when new homes and apartments are constructed and families move into them, vacating their former residences for occupancy by others. The others, in turn, may vacate still other units and the process continues through a number of sequences. A study of this process in seventeen metropolitan areas made in the middle 1960s by the Survey Research Center at the University of Michigan has shown that on the average, the construction of one new unit makes it possible for a succession of 3.5 moves to occur to different, and more likely better, housing accommodations.²⁸ New construction thus benefits more people indirectly than it does directly—2.5 moves to existing housing and only one move to new housing.

The survey shows that for every 1000 new housing units built there are over 3500 relocations. Of these 3500, an average of 333 are by families defined as poor, and 933 are by moderate income families.²⁹ Thus, more than one-third of all those who move are likely to be in the lower and moderate income categories. While most con-

major concern for all environmental regulation.

27. According to Herb Cawthorne, President and Chief Executive Officer of the Urban League of San Diego, a proposed limited growth initiative then before the voters would have brought "havoc to the working class people of San Diego." *No-Growth Racism Is An Abuse*, San Diego Union, Aug. 26, 1988, at B11, col. 1. Bayard Rustin, long a leader in civil rights causes, observed that liberal oriented environmentalists "have failed to consider the implications of their creed that while a no-growth economy may protect the fields and streams (which in itself is a dubious claim), it will most certainly result in untold misery for thousands of ordinary people, many of whom are the black poor of America and the poverty-stricken masses of Asia, Africa and Latin America." Rustin, *No-Growth and the Poor*, San Diego Evening Tribune, July 31, 1975, at B3, col. 1.

28. J. LANSING, C. CLIFTON & J. MORGAN, *NEW HOMES AND POOR PEOPLE: A STUDY OF CHAINS OF MOVES* (1969).

29. *Id.* at 41, 68.

struction occurs in the outer portions of the metropolitan area, these moves extend to older areas near the center of the city.³⁰ The nation's worst environmental conditions exist in these areas, and conditions will further deteriorate if filtering is reduced. In the United States, the housing subsidy programs have not done much to alleviate these problems, and improvement necessitates greater housing supply in the private market. For the government to elevate the living standards of just 1000 families would require enormous expenditures.³¹

Those of higher income who are ineligible for subsidized housing and who cannot afford new housing are similarly dependent for better housing on the filtering process induced by new construction. The University of Michigan survey makes it clear that prohibiting new construction seriously harms the groups that are in need of a better housing environment.

When government curtails construction in a housing market, prices will increase and competition will decrease.³² In the case of apartments, vacancies will decrease. Rents will be raised either directly, through the amount actually charged, or indirectly, through reduction in services, repairs, maintenance, and improvements, or probably in many instances, through a combination of all or most of these.³³ Higher rents will cause more doubling-up, thereby increasing

30. *Id.* at 19, 20.

31. I am told by builders that in 1989, the cost of construction of a 1000 square foot moderately equipped apartment in San Diego was about \$50,000. Accordingly, construction of 1000 new units would cost \$50 million, plus land, which could be priced at \$20,000 to \$40,000 per unit in low and moderate income areas.

Some localities have sought to provide lower cost housing by requiring developers to set aside portions of their developments (from 10% to 20%) for this purpose. Among other things, such requirements erode development feasibility, thereby limiting production of housing. For an analysis of such zoning restrictions—usually referred to as “inclusionary zoning”—see Ellickson, *The Irony of “Inclusionary” Zoning*, in *RESOLVING THE HOUSING CRISIS: GOVERNMENT POLICY DECONTROL, AND THE PUBLIC INTEREST* 135 (B. Johnson ed. 1982) [hereinafter *RESOLVING THE HOUSING CRISIS*].

32. See discussion of economic impact of the rules promulgated by California Coastal Commission which controls development along California's coast. Frech, *The California Coastal Commissions: Economic Impacts*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 31, at 259. For an interesting socioeconomic analysis of growth controls, see *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D. Cal. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). In this case, a federal judge found that Petaluma, California's growth controls would lead to a smaller housing supply and increased prices in its region.

33. Increases in rental costs will also increase pressure on government to adopt rent controls, another regulation that limits production of housing, and therefore raises its price. See FRASER INSTITUTE, *RENT CONTROL: A POPULAR PARADOX* (Vancouver, B.C., 1975).

density within areas containing these buildings. These conditions will be intensified as the filtering process is halted or reduced. The end result will be much poorer housing conditions for a great many people, and further deterioration for marginal and older buildings and areas. Buildings that otherwise would be removed will remain in service.³⁴ More people will be paying more for the same or lesser quality housing.

Although the antidevelopment pressures will curtail much construction, they cannot stop it all. The demand for new housing will remain largely unabated, and it will be forced to locate in the places of least resistance, where opposing political pressures are absent or limited.³⁵ The most likely areas for this to occur will be those of small population, principally the more rural and outlying sections, areas that otherwise would not be in demand. The result will be a greater proliferation or scattering of housing and all of the problems and detriments that come with "urban sprawl." These include the cost of installing new or extending existing sewer and water facilities, and building new or wider roads and highways. More telephone poles and utility lines and generating stations will have to be installed. The cost of school bus transportation will increase. More people will be spending greater amounts of time driving to and from work and shopping. And much open space and green and wooded areas will be disturbed or destroyed by this intrusion of housing and related facilities. Land that should be used for farming will be converted to urban development.³⁶

Similarly, severe density restrictions will cause housing to spread out, also necessitating the installation of more streets and other facilities, and creating greater burdens and inconveniences for more people. Obviously a two acre minimum lot size will generally require the installation of more lineal feet of road than a one acre restriction. An apartment or townhouse project containing many more times the number of residents will require only a fraction of the lineal footage of pavement needed for a single family development.³⁷

34. Opposition to zoning changes allowing construction of new apartment buildings may, at times, come from existing apartment owners who fear the influx of new competition. Quite often, businessmen seek government regulation to achieve personal advantage.

35. As a general matter, developers have much more difficulty achieving their building goals in high growth areas. Antidevelopment groups are usually not very influential in the slowly developing sections of the country, where the ills of growth are less evident.

36. Those concerned about potential food shortages should seek to increase housing density, thereby lessening pressure to convert farmland to urban use.

37. A study of infrastructure costs for 1980 in Westchester County, New York, shows that as density decreases, these costs dramatically increase:

IV. THE HOUSTON EXPERIENCE

Houston, Texas is the only major city in the United States that has never adopted zoning.³⁸ Despite this, it is likely that land uses on the whole are about as separated in Houston as they would be under zoning. But even if this is not entirely accurate, it is more than offset by the economic and social rewards emanating from the absence of unnecessary government restraints over the development of property.³⁹

How has this occurred without zoning controls? The answer is that Houston does have land use controls, but these are primarily economic. Specifically, the use and development of land and property in Houston are controlled in three different ways. First, by the normal economic forces of the marketplace; second, through legal agreements, principally restrictive covenants; and third, through a relatively limited number of land use ordinances adopted by the city.⁴⁰ Houston also controls development through subdivision, building, traffic, and housing regulations that do not seem to vary significantly from those of other cities in its region.⁴¹ But the contrast with

<i>Lot size</i>	1 acre	½ acre	<i>Cluster</i> 2 units/acre
<i>Lot width</i>	125 feet	25 feet	35 feet
<i>Infrastructure Costs</i>	\$30,125	\$18,075	\$8,435

Infrastructure costs include costs for streets, curbs, lighting, sidewalks, sanitary sewer and water lines. URBAN SYSTEMS RESEARCH AND ENERGY, INC., *THE EFFECTS OF ENVIRONMENTAL REGULATIONS ON HOUSING COSTS* 71 (1982); REPORT, *supra* note 7, at 203 (table 15.1), 203 n.20.

38. Houston is the only major city that held straw votes on adopting zoning. In 1948, only property owners were allowed to vote, and the result was 14,142 to 6555 against zoning. In 1962, when there was no such restriction on voting, the vote also went against zoning, 70,957 to 54,279; approximately 48.5% of those qualified voted. B. SIEGAN, *supra* note 16, at 25. To date, no other vote has been held on this issue. Houstonians retain, of course, the option to impose zoning if they wish.

39. See generally B. SIEGAN, *supra* note 16; R. Jones, *Houston City Planning Without Zoning*, in M. GOLDBERG & P. HORWOOD, *ZONING: ITS COSTS AND RELEVANCE FOR THE 1980s* (1980).

Jones was formerly Director of City Planning in Houston. In 1981, appearing before a public hearing of President Reagan's Commission on Housing, Jones said, "Zoning is archaic. It makes the marketplace respond to outmoded ideas." Carreau, *Hearings on Housing, City planner tells commission "zoning archaic,"* Houston Post, Dec. 15, 1981 at 5A, col. 1.

40. See B. SIEGAN, *supra* note 16, at 26-27, 30-31.

41. Most cities in the region use either the Southern Standard Building Code or the Uniform Building Code, with modifications. They both were drafted by private industry organizations. However, Texas law prevents counties from adopting and enforcing

zoning is clear: unless the property is subject to an enforceable restrictive covenant (to be discussed later), the city exercises minimum control over the uses that will be made of that property.

The Houston experience demonstrates that in the United States, zoning schemes regulating land use separation and yield are not essential to the existence and viability of cities. The real estate marketplace does not operate chaotically or haphazardly. Residential, commercial, and industrial uses tend to develop separately from each other. Certain uses will develop only in certain places. Gas station and fast food franchises, and most other major commercial developments provide an obvious illustration; regardless of where they are permitted, they will locate only on heavily trafficked streets.⁴²

This means that major business and commercial uses generally will be absent from the residential or local streets which constitute close to eighty percent of total street mileage within Houston, and probably about the same elsewhere. In areas of Houston no longer subject to restrictive covenants or in which covenants were never imposed, these local streets contain relatively few commercial uses, probably no more than five percent within a specified area. The bulk of these are home occupations and businesses that serve the residents of the area, and therefore, contrary to much conventional thinking on the subject, are probably compatible with the area.⁴³

There is also a great tendency for industrial uses to group and concentrate separately from residential uses. A comparison of maps showing the location of industrial uses in the metropolitan area of Houston with similar maps of Los Angeles or Dallas, cities with

building codes, and city governments' extraterritorial jurisdiction does not include any power to enforce building codes beyond their city limits. Bjornseth, *No-Code Comfort*, REASON, July 1983, at 43, 44.

42. Gas stations and fast food franchises usually are located only on streets with a heavy traffic count. On the rare occasion when this does not occur, the life of the enterprise will be very short.

43. These conclusions are based on surveys made in December 1969 of three substantial areas of Houston never or no longer restricted: Denver Harbor (950 structures), Montrose (450 structures), Riverside (240 structures). Denver Harbor was never subject to restrictive covenants; most covenants in Montrose expired in 1936; and one-half of Riverside's covenants terminated in 1950. See B. SIEGAN, *supra* note 16, at 36-42; Jones, *supra* note 39, at 46-49.

Houston contains a great many areas of single family occupancy that look identical to zoned areas. There are also mixtures of uses available for those seeking to demonstrate the ill effects of nonzoning. Frequently, however, the same mixtures exist in cities that are zoned. See Siegan, *Non-Zoning in Houston*, 13 J. L. & ECON. 71, 91 n.42 (1970). Houston's appearance has long been a subject of considerable controversy. For a favorable view of this aspect of the city, see Huxtable, *Houston Is The Future . . .*, Houston Chron., Feb. 22, 1976, § 4, at 7, col. 1. The author was then the architecture critic of the *New York Times*, and a Pulitzer Prize winner. See also Huxtable, *Houston Will Never Be New York*, Houston Chron., Feb. 22, 1976, § 4, at 7, col. 1.

Recently, the Population Crisis Center rated Houston as the seventh most livable city in the world. *Study Names World's Best, Worst Cities*, San Diego Union, Nov. 20, 1990, at A2, col. 2.

which Houston is often compared, suggests that the proliferation of industry in the Houston area is probably no greater than in these other metropolitan areas. There may be even less dispersal, although the large territories involved and differing definitions of industry make measurement very difficult. This pattern is generally confirmed by the land use maps of other nonzoned Texas cities: Pasadena, Wichita Falls, Laredo, and Baytown.⁴⁴

It is generally too costly in terms of land prices and potential residential hostility for heavy industry to locate near new residential subdivisions.⁴⁵ The plants and factories in the Houston area which are contiguous to and which were erected subsequent to homes are usually "light" rather than "heavy" in character. In most instances, their existence appears to pose no more, and possibly less, peril to residential values than would be the case if the same property had been developed for an alternative use such as apartments.

Apartment and condominium development also reflects this pattern of separation. Thus, notwithstanding the absence of location restrictions, the vast bulk of multifamily development in Houston has occurred in the southwest section of the city.

There are substantial areas in and around Houston where there is minimum demand for multiple family, industrial, and commercial development. These areas provide the land for single family occupancy. Most single family unit developers in Houston (as well as in many other parts of the country before the advent of zoning) have traditionally imposed restrictive covenants to permit only the erection of houses of specified characteristics within their subdivisions.⁴⁶ Because many of the earlier restrictive covenants in Houston were limited in duration, legally insufficient, or not enforced by owners, zoning would probably have kept more areas as single family.⁴⁷ As it happens, zoning would thereby also have impeded the development of much housing and also nonhousing facilities that has occurred subsequently within the city.

44. BERNARD JOHNSON ENGINEERS, INC., SUMMARY REPORT OF THE COMPREHENSIVE CITY PLAN BAYTOWN, TEXAS 32, pt. 7 (1964); MARMON, MOK & GREEN, INC., DEVELOPMENT PLAN FOR PASADENA, TEXAS 77 (1967); TEXAS HIGHWAY DEP'T, LAREDO URBAN TRANSPORTATION STUDY fig. 9 (1964); WICHITA FALLS, TEXAS, URBAN TRANSPORTATION PLAN 1964-1985, at fig. 9 (1964).

45. B. SIEGAN, *supra* note 16, at 62-65.

46. In contemporary years, regardless of whether zoning exists in the community, developers of planned unit developments—both detached and attached housing—usually impose restrictive covenants as a sales device to accommodate the needs and desires of the residents.

47. B. SIEGAN, *supra* note 16, at 33.

Studies of zoning have shown that market mechanisms operate to reduce the impact of uses that are regarded in zoning theory as adverse to property values.⁴⁸ This is evident in Houston, where the price of vacant land depends in part on the actual or potential use of adjoining land. Thus, land on the perimeter of a residential subdivision may sell for far less than that located in the interior if the land adjoining the subdivision is vacant or used for purposes other than residential development. In a nonzoned market, economic forces operate to internalize many externalities of land development and use.

Most of the covenants created subsequent to World War II are much more durable, and seem to offer a reasonably practical solution to the conflicting desires of allowing for change yet maintaining stability. Most post-World War II covenants contain an automatic extension provision.⁴⁹ They provide for an initial duration period of twenty-five to thirty years, and an indefinite number of ten-year automatic extension periods. Agreement on the part of fifty-one percent of the owners (usually one vote per lot or on the basis of frontage) may cancel or amend the covenants before the end of the initial period or before the end of any subsequent ten-year period. Under this provision, a majority of homeowners can control the destiny of their subdivision.

Inasmuch as enforcement of restrictive covenants can be costly for homeowners in lesser income subdivisions and small subdivisions, Houston adopted an ordinance in 1965 enabling the city to enforce these covenants.⁵⁰ Houston has also adopted an offstreet parking ordinance for residential development, a limited number of location restrictions, and a relatively small number of other government regulations designed to cure problems of land use not satisfactorily controlled by the private market.⁵¹

For homeowners, restrictive covenants serve the same purpose of

48. Crecine, Davis & Jackson, *Urban Property Markets: Some Empirical Results and Their Implications for Municipal Zoning*, 10 J. L. & ECON. 79 (1967); Maser, Riker & Rosett, *The Effects of Zoning and Externalities on the Price of Land: An Empirical Analysis of Monroe County, New York*, 20 J. L. & ECON. 111 (1977); Rueter, *Externalities in Urban Property Markets: An Empirical Test of the Zoning Ordinance of Pittsburgh*, 16 J. L. & ECON. 313 (1973); Stull, *Community Environment, Zoning and the Market Value of Single Family Homes*, 18 J. L. & ECON. 535 (1975).

49. B. SIEGAN, *supra* note 16, at 34-35.

50. Susman, *Municipal Enforcement of Private Restrictive Covenants: An Innovation in Land Use Control*, 44 TEX. L. REV. 741 (1966); Comment, *Houston's Invention of Necessity—An Unconstitutional Substitute in Zoning?*, 21 BAYLOR L. REV. 307 (1969); Comment, *The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning*, 9 HOUS. L. REV. 816 (1972).

51. Ordinances as of 1972 are set forth in B. SIEGAN, *supra* note 16, at 26-31. In recent years, Houston has adopted ordinances prohibiting "undesirable" uses such as sexually oriented businesses, junk yards, and helicopter pads in or near residential areas. Other of its recent land use ordinances are reported in *Houston's Council Tries to Control City Growth*, N.Y. Times, June 23, 1982, at A12, col. 1.

maintaining exclusivity as does zoning. While similar in this respect, the covenants otherwise vary greatly from zoning both in application and operation, and they illustrate the difference between the economic and political marketplaces in determining land use and development. As heretofore explained, zoning is controlled by the political system and principally achieves that which is most important politically. It allows homeowners to influence zoning of land far removed from their subdivision.

On the other hand, developers or owners and their lenders impose covenants on their subdivisions solely as a means to secure and maximize their investments. They will apply covenants in accordance with what they believe are the desires of their prospective purchasers. Since there is usually no incentive for owners to restrict the use of their land while it is in a raw state, covenants normally affect little more than land already developed or programmed for development, and then largely for homes or townhouses. As a result, probably no more than fifteen to twenty percent of the land area of Houston is subject to restrictive covenants. Under zoning, every square inch of the city's land would be regulated.

Restrictive covenants are a device of the market to maximize the value of property. Most American homeowners prefer to live in a homogeneous environment, and they should have the freedom to pursue this goal, provided others are not harmed. Restrictive covenants come close to achieving this balance. By contrast, zoning allows almost unlimited pursuit of exclusivity, often with consequent adverse effects upon many others.

When one wants to quantify the results of zoning, it is useful to consider the experience of Houston and its environs. By comparing the Houston area with a similar area that has imposed zoning, the consequences of the regulation can be estimated. The most obvious area for comparison is Dallas. Houston and Dallas are approximately 230 miles apart and share similar economic profiles.⁵² Dallas has been zoned since the early 1930s. The bulk of the Houston Standard Metropolitan Statistical Area (SMSA) is not zoned, while approximately the reverse situation occurs in the Dallas SMSA. Zoning in Dallas is of relatively moderate character. It is far less severe

52. For comparisons for 1960 to 1970, see B. SIEGAN, *supra* note 16, at 100-03. Generally, similar relationships appear in the 1980 census figures. See U.S. DEP'T OF COMMERCE, 1980 CENSUS OF HOUSING (GENERAL SOCIAL & ECONOMIC CHARACTERISTICS—TEXAS) 45-21. One difference is that the median income in 1979 was about 10% higher in the Houston SMSA than in the Dallas-Fort Worth SMSA. This difference does not significantly affect any Houston-Dallas comparisons contained in this article.

than the zoning regulations in many of the nation's developing suburbs, including some Houston and Dallas suburbs that have enacted strict zoning control. The other regulations affecting housing in the two cities, such as subdivision, building, minimum housing, and traffic regulations, do not appear to differ appreciably.⁵³

Until the fall of world oil prices in the early 1980s, both areas had for many years experienced very high housing demand. There is no evidence that the spectrum of this demand between the two areas varied significantly. The similarity of income statistics over the years supports this conclusion.⁵⁴ However, the supply response in each differed considerably; the Houston area catered much more to average and lesser income people by producing a far greater percentage of multifamily units.⁵⁵ Land use regulation appears to be the major factor accounting for this difference, since its presence in Dallas likely restricted apartment production there.

Statistics on housing starts for comparable portions of both localities for the periods 1973 to 80, inclusive, show that the Houston area produced 73% more starts than the Dallas area. Multifamily starts were 116% greater and single family starts 36% greater in the Houston section.⁵⁶ This difference in multifamily output probably accounts for rents in the Houston area being lower in those years than in Dallas. The most comprehensive rent comparisons for the two areas are provided by the Bureau of Labor Statistics, in its annual estimates of living costs at three income levels for a four-person family and a retired couple. For the years 1972 to 1979, inclusive, these estimates show that Houston SMSA rents were the same or

53. In recent years, most building in the Houston area has occurred in the unincorporated sections of Harris County, which has virtually no building regulations. I am uncertain as to this situation in the Dallas area. The absence of building codes would operate to reduce costs of construction. Accordingly, the comparisons between Houston and Dallas are subject to possible modification, depending on how much new construction has occurred in areas without building codes. Houston's building costs are apparently higher than those in Dallas. *See infra* note 57. Due to Houston's favorable attitude toward development, the percentage difference between building costs in the city and county are probably in the low, single-digit area.

54. *See supra* note 52 and accompanying text.

55. *See infra* note 56.

56. The comparisons below are between Harris County, which contains Houston, and the Dallas SMSA. I have used Harris County and not the Houston SMSA for comparison because the figures come from the same source as those for Dallas SMSA, and this source, unlike others, separates townhouses and condominiums, which for purposes of this analysis, should be regarded as multifamily housing. Harris County's population was 12% less in 1970 and 17% less in 1980 than that of the Houston SMSA. About three-quarters of the SMSA's housing starts occurred in the county for the period in question. Siegan, *Commentary on Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 720, 728 n.1 (1983). The portion of the Houston SMSA that is excluded by using Harris County figures produces probably 50% multifamily housing, and, therefore, the SMSA would show somewhat less difference from the Dallas SMSA in category of construction. Multifamily housing includes townhouses (not identified as to rental or sale) and condominiums.

lower in all categories. Totaling all of these figures on an unweighted basis, the Dallas SMSA rents were about thirteen percent higher

Multifamily and single family housing starts in
Houston and Dallas areas: 1973-1980

	Harris County	Dallas SMSA	Harris County % Higher
Total Housing Starts	300,732	173,854	73 %
Total multifamily starts	173,158	80,266	116 %
Total single family starts	127,574	93,588	36 %
Population Growth 1970-80	653,488	393,050	66 %
Individual Housing Units 1970	587,671	529,785	11 %
Population 1970	1,741,912	1,555,950	12 %
Population 1980	2,395,400	1,949,000	23 %

Percentage of multifamily and single family
housing starts for Houston and Dallas
areas: 1973-80

	Harris County	Dallas SMSA
Multifamily	58 %	46 %
Single family	42 %	54 %

The above figures are reproduced from Siegan, *supra*, at 728. Inasmuch as multifamily housing occupies much less land than single family housing, Houston has used considerably less land for urban purposes than Dallas.

The actual housing productivity of the Houston area may be far greater than the foregoing figures suggest. According to Chicago Title and Insurance Company Market Research Services, Chicago, Illinois, the Houston SMSA has produced in 1978 to 1981 many more new residential units per 100 existing households than the Dallas-Fort Worth SMSA, and the United States average. The company shows the following units per 100 households:

	Houston SMSA	Dallas- Forth Worth SMSA	U.S. Average
1978	7.35	5.02	2.61
1979	5.68	4.52	2.19
1980	3.58	3.05	1.64
1981	4.39	2.62	1.35

Figures for 1980 and 1981 are reported in Pfister, *The Housing Recession*, THE GUARANTOR, May-June 1982, at 12. Figures for 1978 and 1979 are contained in Chicago Title Insurance Company Market Research Services, 1980 New Residential Units Per 100 Households Forecast (1980) (on file with author).

than Houston SMSA rents. For the other years for which comparable figures are available for both SMSAs, 1966 to 1969, inclusive, the difference in rental prices was about fifteen percent.⁵⁷

Support for these findings comes from the *Eton Journal* surveys of 1979, 1980, and 1981 apartment rentals in the nation's sixteen most significant real estate markets. For units located in the city, Dallas rents were fourteen percent higher than Houston's in December 1980, and sixteen percent higher in March 1981. For units identified as "suburban," Dallas area rents were seventeen percent higher in December 1980, twenty-five percent higher in March 1981, and eleven percent higher in May 1981. In January 1979 Dallas rents were five percent higher in both city and suburban sections, and twelve percent higher in January 1980.⁵⁸

Moreover, throughout this period, vacancy rates in Houston apparently were much higher than those in Dallas. According to the *Eton Journal* figures, Houston averaged the highest vacancy rate (six to seven percent) of any city surveyed in both January 1979 and 1980.⁵⁹ This finding is not surprising, since Houston frequently has had large vacancy rates due to its high productivity.

Comparable price statistics for single family dwellings do not appear to be available.⁶⁰ However, housing generally should be much

57. See U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS BULLETIN, THREE BUDGETS FOR A FOUR PERSON FAMILY AND FOR AN URBAN RETIRED COUPLE (1972-79 annual eds.). The 1966-69 figures are set forth in B. SIEGAN, *supra* note 16, at 112.

Boeckh Building costs show that for the sample years of 1970, 1976, and 1980, Houston construction costs were a little higher than those in Dallas. BOECKH DIVISION, AMERICAN APPRAISAL COMPANY, BOECKH BUILDING COST-INDEX NUMBERS (Jan.-Feb. 1982) (on file with *San Diego Law Review*). As of 1980, Houston used the 1970 Uniform Building Code, and Dallas used the 1979 Uniform Building Code, with each city imposing its own modifications.

58. Siegan, *supra* note 56, at 729. Notwithstanding these statistics, the 1980 Census shows that the median contract rent for Houston SMSA was \$256 and for Dallas-Fort Worth SMSA \$239; \$258 and \$244, respectively, for the urbanized areas. U.S. DEP'T OF COMMERCE, 1980 CENSUS OF HOUSING (GENERAL HOUSING CHARACTERISTICS—TEXAS) 45-9 to 45-10. The evidence that has come to my attention and herein reported leads me to discount the 1980 Census figures as revealing the actual differences in rent between the two cities.

59. Siegan, *supra* note 56, at 729. The 1980 Census shows the rental vacancy rate for the Houston and Dallas-Fort Worth SMSAs as 14.7% and 10.4% respectively. For the urbanized areas, the figures were 14.5% and 10.5%. U.S. DEP'T OF COMMERCE, 1980 CENSUS OF HOUSING (GENERAL HOUSING CHARACTERISTICS—TEXAS) 45-9 to 45-10.

60. Home prices show a different pattern than apartment rentals. The Federal Housing Administration (FHA) has published annually prices and other data relative to sales of existing and new homes that it has insured under its section 203 program. See FHA, DATA FOR STATES AND SELECTED AREAS OF CHARACTERISTICS OF FHA OPERATIONS UNDER SEC. 203 (1960-74 annual eds.). This program principally involves the most inexpensive, nonsubsidized housing available in the market. According to these surveys, from 1960 through 1974, there was often little difference in actual prices (taking into account construction, square footage, and amenities) of existing or new FHA insured homes between the Houston and Dallas SMSAs. For most of this period, Houston's prices were lower, although in some years they were noticeably higher. Beginning in

cheaper in the absence of regulation. The Report of President Reagan's Housing Commission concludes that unnecessary zoning and related requirements may often elevate the price of housing by twenty-five percent or more.⁶¹

1975, FHA changed the measurement area from Dallas SMSA to Dallas-Fort Worth SMSA, of which Dallas is a much smaller component, limiting the relevance of this information. See Siegan, *supra* note 56, at 729-30. Thus, the population of Dallas in 1980 was 904,078, while that of the Dallas SMSA was then 1,949,000, and that of the Dallas-Fort Worth SMSA was 2,960,000. For that year, Houston's population was 1,594,086, and that of the Houston SMSA was 2,887,000. Siegan, *supra* note 56, at 730 n.11.

I am aware of only one study concerning residential price differences in Dallas and Houston. Professor Richard Peiser observed that when similar houses in equivalent locations were compared, prices were about \$4000 to \$10,000 less expensive in Houston. He attributes this difference largely to the higher price of land in Dallas, brought about by zoning and other regulations in that city. Peiser, *Lot Costs Compared in Dallas and Houston*, 18 *TIERRA GRANDE* 30 (1982).

A study by the Urban Land Institute to determine land prices and rates of their increase between 1975 and 1980 for 30 SMSAs showed the following prices and percentage increases for Dallas and Houston SMSAs:

SMSA	Improved Lot			Raw Acreage		
	1980	1975	5 yr. % increase	1980	1975	5 yr. % increase
Dallas	\$16,000	\$9,500	68.4	\$20,500	\$8,500	141.2
Houston	\$12,000	\$7,850	53.8	\$10,000	\$7,004	42.8

Dunau, Working Paper on Land Price Levels and Rates of Increase, (Urban Land Institute, Washington, D.C. 1981).

61. REPORT, *supra* note 7, at 180.

Economics professors Lloyd Mercer and W. Douglas Morgan conducted a study of Santa Barbara County Housing and found that development restrictions accounted for more than 27% of the increase in real housing prices during the 1972 to 1979 period. Mercer & Morgan, *An Estimate of Residential Growth Controls Impact on Housing Prices*, in *RESOLVING THE HOUSING CRISIS*, *supra* note 31, at 189.

L. Sogalyn and C. Sternleib studied certain zoning and building requirements in New Jersey. These authors concluded that reducing three major zoning requirements (lot size, lot frontage, and living area) would reduce prices considerably and enlarge the effective housing market. Changing two building code specifications (thickness of exterior wall sheeting and size of foundation cinderblock) would also lower selling prices, but not to the same degree as would altering zoning policies. See L. SOGALYN & C. STERNLIEB, *ZONING AND HOUSING COSTS: THE IMPACT OF LAND USE CONTROLS ON HOUSING PRICE* (1972).

To determine the impact of local government regulation on the cost of housing, the Department of Housing and Urban Development initiated a Housing Cost Reduction Demonstration project in 1980. Four communities across the country were selected to participate in the project, which used reduced local government regulations as the only variable. In these communities, zoning, building, and subdivision regulations were limited. In the initial projects for which early figures were available, the prices of homes were reduced by 21% to 33%. In Shreveport, Louisiana, demonstration housing units had sales prices of \$52,850, while homes in a comparable suburban project with conventional regulations and processing sold for \$70,000. In Hayward, California, the demon-

In addition, zoning rules have prohibited the construction of many low cost accommodations. Again, Houston provides an interesting example. The city has no density controls, and in the late 1960s, rental projects were built in minority neighborhoods containing sixteen or more detached houses per acre, an unusually high concentration by prevailing standards.⁶² This density was even too much for Houston's planning department, which sought unsuccessfully to ban them.

The developments in question were being erected in very low income, black areas by private, unsubsidized investors, a rare occurrence in the United States. The principal inducement for the developers was the opportunity afforded by the large density to reduce land and construction costs. These projects offer unusually inexpensive rental housing, in all likelihood superior to that which the tenants last occupied.

Because Houston imposes no restriction as to size and type of construction, the market for new houses is very flexible. As mortgage rates rise, for example, the developer is able to reduce the size of units to limit prices. In many suburbs of Dallas, on the other hand, where zoning regulates dwelling unit size and type, it is not possible to construct units below a specified square footage. A Texas developer testified before the Reagan housing commission that, as a result, he had to discontinue building in these suburbs, denying many potential consumers an opportunity to purchase housing.⁶³

V. OTHER CONSIDERATIONS

Critics of Houston's land use system contend that as a result of it, the city is not very pleasing aesthetically. Beauty being in the eye of the beholder, it is not difficult to find others who disagree and consider the city quite attractive. However, the use of land should not be judged by this or any other single factor. If aesthetics were to be the major concern, the tightly zoned, strongly exclusionary suburbs would be the ideal. The issue is instead to determine the land use system that best serves society, an inquiry that involves the extensive analysis seen in this article.

One virtue of the Houston system that has been previously referred to is worthy of some additional observations. The absence of regulation in that city affords great opportunity for builders and de-

stration units ranged in price from \$53,000 to \$65,000. Comparable units subject to conventional regulation in the area sold for \$79,500 to \$97,500. In all instances, the builders sought to obtain a normal profit margin. Bjornseth, *supra* note 41, at 44.

62. At the time, single-family detached units typically ranged in density in the United States between one and five units per acre. COUNCIL ON ENVIRONMENTAL QUALITY, *THE COSTS OF SPRAWL* (1974).

63. REPORT, *supra* note 7, at 204.

velopers to satisfy consumer demand. Human resourcefulness and inventiveness are able to thrive in Houston because of the absence of their enemy, government regulation. Unfortunately, in zoned cities, these talents are often spent in persuading or outmaneuvering the zoning authorities.

The communist collapse reveals how debilitating government regulation is to human creativity, ingenuity, and productivity. The communist rulers sought to regulate almost every human activity to achieve the common good; instead of producing a paradise, however, they created virtual prisons. These prisons did not necessarily confine physical bodies, but they did incarcerate the human mind.

VI. CONCLUSION

Is the Houston system of land use applicable elsewhere? Is nonzoning feasible and desirable for, say, areas where land is much more scarce? In answering this inquiry, consider the fate of the last forty acres that remain vacant in a zoned community where all other land has been fully developed. Assume its zoning has not been finalized; that is, it is in a holding classification. The decision as to how this last tract of vacant land will be used in a zoned city will be made through the planning and political processes of local government.

The city council or other governing board will zone or rezone the property after hearing from all of the interested parties, their planners, lawyers, and other representatives. These include the owner, the neighbors, the local civic or homeowners groups, political organizations, the school and park boards, perhaps the Chamber of Commerce, labor groups, and, of course, assorted do-gooders and do-badders. Almost everyone except those who will directly benefit from the development, such as potential homeowners, tenants, and shoppers, can be expected to enter the fray. Each side will have little difficulty in producing a planner to prove "conclusively" that its position is the only correct one.

How it will come out will depend on who or what is best able to influence, pressure, or even pay for the vote of the city council members. That there may be an enormous demand for apartments in the community is likely to be a less important factor than the opposition to such use by certain politicians, by a homeowner or civic group, or by the media.

By contrast, the answer where there is no zoning is relatively clear. The property will in all likelihood be developed for the most

valuable use, the one that society values the greatest.⁶⁴ The land will thereby satisfy the predominant consumer demand. Thus, as the Houston and Dallas comparisons reveal, a high demand for apartments is much more likely to be satisfied in the absence of zoning than in the presence of zoning.

This is, I submit, the most socially rewarding use of the property as determined by the least fallible of city planners, the marketplace. It will provide more material and environmental benefits for more people, both those who benefit directly and those who benefit indirectly from the project. It will make for a more efficient allocation of resources within the community. And precious land will be used to provide for the needs and desires of human beings, and will not be wasted for the sake of political expediency and planners' speculations.⁶⁵

64. This example assumes, of course, that the city will still exercise controls under the vital and pressing standard previously discussed. See *supra* text accompanying notes 10-11.

If the 40 acre tract in question is in a zoned area, the owners of adjoining and nearby property presumably relied on the zoning ordinance in acquiring their property. Their investment expectations should be supported. Consider in this respect, the following recommendation of Reagan's Housing Commission:

A possible problem of deregulation [of zoning] is that it may adversely affect those who in good faith made their purchase or investments in reliance on the old rules [the prior zoning ordinance]. A change to the proposed "vital and pressing" standard would pose such a problem. Persons who purchase a home or a lot for construction of a home near vacant land assume that it will not be arbitrarily reclassified to allow other uses. The reasonable investment expectations of these homeowners should be protected. When vacant land is proposed for a use that would have required rezoning, homeowners entitled to notice under the old rules should be protected under the requirements and procedures of the old rules.

REPORT, *supra* note 7, at 201.

65. One likely result of political expediency and planners' speculations would be a limitation of supply as explained in this interesting observation on planning and regulation by a Soviet economist:

[Plans] are like idols to which everybody is bowing due to some mesmerizing force. . . . What we call planning, in real life is more often than not only the regulation of the economic processes which are developing as if of their own accord, beyond society's conscious control. This is the only explanation for the fact that planning often coexists with the existence of chronic scarcity of commodities. . . .

Oleg Bogomolov (academician, director, Institute of Economics of the World Socialist Systems), Planning, Moscow News, No. 29, 1987, at 9, col. 3.

Addendum

In April 1990, the author was a member of a ten-person team appointed by the American Institute of Architects to study and make recommendations regarding future land use planning and regulation in Houston. The formation of the team was prompted by some public demands that the city adopt zoning. The team recommended that the city establish "a process for city coordination of metropolitan systems (transport, utilities, open space/environmentally sensitive areas) and capital improvement programs and implement a comprehensive planning process at the 'Sector' scale with land use regulation determined by the sector." The team did not recommend the adoption of any specific regulatory techniques.

In its inquiry as to existing land use regulation, the team heard testimony that the city was not adequately enforcing existing restrictive covenants. It is apparent that fears exist in the community that residential neighborhoods are not being adequately protected from adverse uses. The team urged the city to substantially increase staffing and enforcement in this area. To further protect residential neighborhoods, the team also recommended that the list of uses prohibited within or certain distances from residential areas be increased.¹

1. See HOUSTON R/UDAT TASK FORCE REPORT (Apr. 20-23, 1990).

