

# LAND USE REGULATIONS SHOULD PRESERVE ONLY VITAL AND PRESSING GOVERNMENTAL INTERESTS

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## The Failure of Planning

Land is a precious and scarce natural resource. It should be used to best provide for the needs and desires of the people. This objective will best be realized 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 toward the general welfare.<sup>1</sup>

This wisdom is now subscribed to by government leaders throughout the world including those in China, the Soviet Union, and other Eastern bloc countries.<sup>2</sup> Zbigniew Brzezinski, who served during the

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<sup>1</sup>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, for example, Buchanan and Tullock (1962), and Buchanan (1987).

<sup>2</sup>Indicative of the greater acceptance of capitalist theory, 50 countries during the past 10 years—including most major industrial countries—have significantly reduced their maximum marginal tax rates on individual incomes. In the United States, this rate was 70 percent in 1979 and 28 percent in 1989 (Reynolds 1989).

Carter administration as assistant to the president, National Security Affairs, and as director of the National Security Council, recently wrote: "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" (Brzezinski 1989, p. 1).

Leaders in the Marxist world have come to recognize that private ownership and enterprise offer their countries relief from economic regression and stagnation. These leaders 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.<sup>3</sup>

Such philosophical conversions are understandable. By comparison to the communist world, capitalism's economic accomplishments have been enormous. Some perceptive observers explain that communism has eliminated the booms and busts of capitalism by eliminating the booms. According to Brzezinski (1989, p. 67), 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."<sup>4</sup>

Leo Aron (1989, pp. 30-31), who formerly lived in the Soviet Union, writes 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 people are below the poverty line, and 40 percent 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 percent 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, and 30 percent of Soviet hospitals do not have indoor toilets. Half the nation's elementary schools lack central heating, running water, or sewage systems.

According to Brzezinski (1989, p. 238), in 1983 there was one car for every 1.8 Americans, 4.4 Japanese, 2.5 Germans, and 2.8 Italians, but only one for every 14.2 Soviets, 5.8 Czechs, and 10.8 Poles. He stated, "It is a startling fact that blacks own more cars per capita in

<sup>3</sup>See generally Brzezinski (1989).

<sup>4</sup>See generally Brzezinski (1989) and Shelton (1989). For some interesting insights into the operation of the Soviet economic system, see Soviet leader Mikhail Gorbachev's recent book (1987, pp. 251-302). Specifically, note his criticisms of central planning (pp. 279-85) and his conclusion (p. 284) that a "serious restructuring is required in planning work."

South Africa than do citizens in the Soviet Union.” In October 1989, the *San Diego Union* (1989, p. A2) 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.”

The introduction of capitalist programs has had remarkable results. 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” (Brzezinski 1989, p. 165). “This agricultural rebirth stimulated growth in the output of Chinese rural industry, which increased by a staggering 400 percent between 1981 and 1986 and which grew by a further 36 percent in 1987 alone” (Brzezinski 1989, p. 166).

Capitalism’s accomplishments are well illustrated by the state of the U.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 an average of about 3.6 percent, the biggest increase occurring in 1988 in the amount of 4.4 percent and the lowest in 1986 at 1.1 percent.<sup>5</sup> Moreover, during this period the economy was strong, registering a record length of prosperity. It grew at an average annual rate of about 3 percent, and unemployment decreased from 9.5 percent to an historically low rate of 5.4 percent.<sup>6</sup> This impressive record is in large measure attributable to the high level of production that existed during the 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 that the United States should be wary of using economic restrictions that have not worked in the communist countries. Thus, one major failing of the communist system has been master planning. On a micro level, mas-

<sup>5</sup>See Council of Economic Advisers (1989, p. 24). 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 2 percent per year increase in the official price index would be the equivalent of stable prices (“An Interview with Milton Friedman” 1989, p. 7).

<sup>6</sup>See Economic Report of the President (1990, pp. 294, 301) and Council of Economic Advisers (1989, p. 12). For comparison purposes, the author selected the said 7-year period of this nation’s economic history because the Reagan administration (then in power) sought to achieve the capitalist objectives of less taxation, less regulation, and less spending.

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

### The President's Commission on Housing

Eliminating master planning is a theme common to the recommendations for reform of land use regulation as proposed by President Reagan's Commission on Housing. The President appointed the 30-member commission in 1981 to seek ways to increase the supply of housing and lower its cost. The commission's report<sup>7</sup> 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 government interests.

The report contains more than 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,<sup>8</sup> Reagan's Commission (*Report* 1982, pp. 177–82) 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. Deregula-

<sup>7</sup>The recommendations on regulations are contained in Section IV of the *Report of the President's Commission on Housing* (1982) [hereinafter called *Report* 1982], beginning on page 177. The author of this article was a member of the commission, serving as chairman of the Regulations Committee.

<sup>8</sup>See the President's Commission on Urban Housing, *A Decent Home* (1969) and the Report of National Commission on Urban Problems to the Congress and to the President, *Building the American City* (1968, p. 20). The latter states, "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."

tion not only would remove the wrongs and abuses, but also would better serve the public interest.

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 (*Report 1982*, p. 200) identified broadly as limited to protecting health and safety, remedying unique environmental problems, preserving historical resources, and protecting investments in existing public infrastructure resources. More specifically, "vital and pressing governmental interests" include requiring adequate sanitary sewer and water services and flood protection, ensuring 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.

The commission's recommendations (*Report 1982*) 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.<sup>9</sup>

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.<sup>10</sup> The proper role of government is to protect the public from harm and not to prohibit or diminish production, competition, and creativity.

### *Protecting Private Rights*

Residents often complain when new development increases traffic and pollution of air and water, and when it decreases open space.

<sup>9</sup>The commission adopted this recommendation without any dissent.

<sup>10</sup>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 (*Report 1982*, p. 202 n.13).

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 enclosures 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 special benefits to certain residents. As a New York judge observed many years ago in *Bove v. Donner-Hanna*,<sup>11</sup> one who chooses

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

In *Edwards v. California* (314 U.S. 160 [1941]), the U.S. Supreme Court struck down a California statute that 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 (at 173) held that 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." The Court (at 174) noted that indigent nonresidents were deprived of the opportunity to exert political pressure on California lawmakers in order to obtain a change in policy. The same also occurs in growth control situations.<sup>12</sup>

The Pennsylvania Supreme Court in *National Land and Investment Co. v. Easttown Township Board of Adjustment*<sup>13</sup> viewed the matter of limiting development as one of individual liberty:

<sup>11</sup>*Bove v. Donner-Hanna Coke Corporation*, 236 A.D. 37, 40, 58 N.Y.S. 229, 232 (1932).

<sup>12</sup>It has been held that state laws that deny newly arrived indigents welfare benefits during their first year in the state inhibit the indigents' exercise of the right to travel. Thus, such laws are unconstitutional according to *Shapiro v. Thompson* (394 U.S. 618 [1969]). Growth controls operate similarly and may fail similar constitutional examination.

<sup>13</sup>419 Pa. 504, 532, 215 A.2d 597, 612 (1965). The right involved in *National Land v. Easttown* has been identified by one federal judge as the right to travel. 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).

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.

Erecting barriers to travel and occupancy interferes with a free society's ideals of mobility and opportunity. Without a vital and pressing justification, growth control lacks equitable or philosophical roots in a legal system that is 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 (*Report* 1982, p. 200) concluded, "Exclusion is clearly not an acceptable governmental interest."

### *Costs and Benefits of Development*

Some people reject growth on a utilitarian basis: It does not pay its way; therefore, growth raises taxes. Many studies have been conducted to determine the costs and benefits of new development, and the results are mixed. The problem with such studies is they are necessarily incomplete and misleading—they are unable to quantify many advantages that 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 most important industries in the nation.

Some people demand that in addition to paying for directly related costs, new developments should also pay for all indirect costs, such as 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, both new and old. Congested roads may become more congested with the arrival of newcomers, but the problem is not solely attributable to them: It results from 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 the city, he or she is entitled to all benefits and burdens of residency—the use of facilities as well as the responsibility of paying for those 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 encourage 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, relatively few children; 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 potential 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.

## Planning and Politics

Areawide land use controls arrived in this nation in 1916 in the form of the New York zoning resolution, the country's first zoning ordinance. This modest ordinance contained three use districts: residential, commercial, and unrestricted; five classes of height districts; and three classes of area districts.<sup>14</sup> New York now has about 70 zoning districts and a host of other controls never conceived of by the framers of its original ordinance. A similar story applies to other cities.

Small, modest ordinances grow into very complex and complicated ones. One reason is, of course, the change in conditions, techniques,

<sup>14</sup>See Toll (1969, pp. 172–87).

and thinking that occurs over the years and that is reflected in our laws. But there are two other explanations for the uncontrolled growth of zoning. The first is that zoning has been the story of unrealized expectations. To date, we have had six or seven different zoning systems or strategies in this country. Each has been introduced with what has turned out to be greatly inflated rhetoric as to what it would accomplish. Toll (1969, p. 181) describes the reception that New York's 1916 zoning resolution obtained:

The most unusual thing about the new law was the passionate optimism with which it was received, not only locally, but throughout the nation. This spirit swept far beyond the young planning profession and the business community. McAneny [President of the Board of Aldermen] called the law "the greatest single achievement in city planning in America," and "the greatest thing New York City . . . has ever done. . . ." For *World's Work* it opened "a new era in urban civilization." *Outlook* hailed it as "one of the most progressive and forward-looking steps for the protection of its future development that has been made by any American city." Veiller, the hard-bitten, rather cynical reformer, said: "The situation as I see it is the most hopeful one the city planning group has ever had to face. I repeat, we are standing on the edge of a great change in living conditions in America. We are going to revolutionize conditions in a generation. . . ."

Each zoning system, in turn, has for the most part failed to meet the expectations created by that rhetoric. The result, every time, is a new effort at the drawing boards, producing more and increasingly severe rules and regulations that, experience suggests, are not likely to be more successful than the previous ones.

Another reason for the proliferation in zoning regulations is that the process is basically one of resolving differences among various special interest groups in the community. No matter how perfect the zoning plan, it will help some people and hurt others. Soon after passage of the ordinance, the losers, experience shows, start doing those things that will make them winners. Owners will seek to rezone their property to increase its value. Homeowners and conservationists will lobby to "downzone" property, and civic groups will move to make their reforms. The courts may also effect significant changes. Before long the original plan will be largely reduced to history because of innumerable amendments grafted to it.

The dominant factors in zoning have been public pressures and political influences—the factors to which officeholders who control zoning will respond. Matters such as efficiency, demand, and environment have been subordinate and often nonexistent considerations unless they coincide with political pressures.

Public planning of land use is highly subjective and lacks those standards and measurements that are requisites of a scientific discipline. 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 an adherence to special goals or values, or perhaps an understanding that relatively few possess. Zoning experience is replete with instances where planners have 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; they have not been responsible for decisions in locating and developing residential, commercial, or industrial projects. Even if they once had been, their information about prices, materials, innovations, trends, and consumer desires and preferences must necessarily now 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 to achieve success. Master planning inevitably will forbid developers to build where they want to and will permit them to build where they do not want to.

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

The question arises: Can the widely recognized problems of land-use regulation be solved by elevating the level of control from local to state and federal authorities? The simple answer is that political pressures, moral and legal corruption, and bad laws are not confined to local government. A second answer comes from the experience of regulation in this country. That record has been an extremely poor one. Of the numerous studies made of regulatory agencies, many have been printed in the *Journal of Law and Economics*, published by the University of Chicago Law School. A former editor, Ronald Coase (1975, p. 169), concludes as follows:

The main lesson to be drawn from these studies is clear; they all tend to suggest that the regulation is either ineffective or when it has a noticeable impact, that on balance the effect is bad, so that consumers obtain a worse product or a higher priced product or both, as a result of the legislation. Indeed, this result is found so uniformly as to create a puzzle; one would expect to find in all these studies at least some government programs that do more good than harm.

Accordingly, the history of zoning and other economic regulation in this country provides very strong support for limiting regulation of land use pursuant to the vital and pressing standard previously discussed.

### State Environmental Regulation

In recent years, considerable attention has focused on imposing state regulation to prevent development in areas considered environmentally sensitive. One major problem is defining environmentally sensitive land. Thus, land that is miles from the California coast was included in the territory controlled under that state's coastal initiative. However, regardless of the language or intent of its sponsors, it is not likely that such legislation will or can prohibit development within the target areas. In all probability, what will happen is much more of what is already occurring under local zoning: less development, more land for urban purposes, and increases in real estate prices and rents. Relatively few critical areas would be preserved in their natural setting.

There are two basic reasons for this. First, there are the "taking" and due process provisions of federal and state constitutions that limit the extent to which private property can be regulated. This paper's next section will discuss recent U.S. Supreme Court decisions in this area. Second, the regulatory process tends to resolve controversies through some compromise formula, an approach that would be reinforced in this situation by the said constitutional provisions.

The history of California's coastline regulation, established in 1972 by public initiative, discloses how land use controls would probably operate in areas designated as environmentally sensitive. In 1973, more than 6,200 permit applications were received by the six regional commissions given permit power under this law. Of those applications, about 5,200, or 83 percent, were granted in whole or in part. In 1974, of the approximately 4,700 permit applications received, some 4,400, or 94 percent, were approved in whole or in part. Such figures do not fully reflect the regulation's impact, however.

To obtain a better understanding of what these numbers mean, consider Bruce Johnson's analysis (1974, p. 18) of the operation of the Santa Barbara Coastal Commission, on which he served. During the first 14 months of that commission, it approved 95 percent of the applications received for single-family dwellings, but it allowed only 60 percent of the single-family units requested on these applications. While 77 percent of the multifamily applications received approval, only 51 percent of the units applied for were accepted.

Accordingly, we may conclude that if a developer applies for a permit to build 100 units on his five-acre tract adjoining the Pacific Ocean, he will, after considerable delay, red tape, political maneuvering, and possibly a nervous breakdown, have his request whittled down to say, around 60 units. That is what is referred to in regulation as "balancing."

The five acres in our example will still remain in private ownership and will not normally be accessible to the public, except possibly for an easement to the coastline that would be required, but would have more theoretical than practical value. It is questionable that better views would be provided since the buildings might also have to be aesthetically compromised. The question that now presents itself is what happens to the 40 units that were disallowed? One possible answer is that those, along with other disallowed units, represent unsatisfied demand and will, in time, cause greater or more rapid development of the coast, something entirely inconsistent with the aims of the initiative. It is, of course, possible that the 40 units will never be built, in which case society will have lost the benefits of considerable private expenditures benefiting business, employment, tax revenues, and housing supply, and there will be less housing at higher cost.

Possibly those 40 units may find their way into existing vacant land within a developed city. But they will reduce the land available for other city projects. Another alternative is that the disallowed units will increase demand for building in rural, undeveloped areas at the expense either of other environmentally sensitive land, or of land used or suitable for agriculture, grazing, and mining. In this case the result will be more spread and sprawl, exactly those horrors from which regulation is supposed to protect us. But this consequence is not an unusual one these days. Slow- and controlled-growth policies have caused development to leapfrog the areas so restricted and to sprawl and spread farther and farther into areas that are or should be used for other purposes.

An article in the *Texas Monthly* (Burka 1977, p. 109) describes the situation very succinctly. It concludes the following about the growth policies of the Austin (Texas) City Council:

The irony is that the most anti-growth council in Austin history may have done more to bring about urban sprawl than did any of the pro-developer councils that preceded it. Over 75 percent of the homes built in the Austin metropolitan area last year were outside the city's extraterritorial jurisdiction.

The relation of these experiences to other proposed statewide land use controls should be apparent, and much more than just the California coastline would be involved. Development would take place, but with less intensity of use; while there would be more open space, it would be privately owned and not normally accessible to the public. The proposed state controls would accomplish more of what the proponents say they want to prevent; instead of conserving a precious resource, more of it will be misused and wasted.

Developers have not been blind to regulatory dynamics. An article in the *San Diego BCA Builder* (Waite 1975, p. 10) advised its readers on how to cope with public proceedings: "It is generally advisable to be prepared to give something up. Don't go into the public hearing with a bare minimum proposal. Be ready to barter something away."

Many developers try to beat the game by asking for more than they really want, which frequently means the entire process accomplishes little more than wasting the public's time and money, increasing development costs, and further undermining the government's credibility.

### Land Use Law

In two decisions issued in the past few years, the U.S. Supreme Court significantly limited zoning powers. *First English Lutheran Church v. County of Los Angeles*<sup>15</sup> held that the landowners are entitled to compensation when a regulatory ordinance denies them all use of the land, notwithstanding that the purpose of the law is to protect the public health and safety. Compensation is required even if the denial of use is only temporary. *Nollan v. California Coastal Commission*<sup>16</sup> held that for a land use regulation to be valid, it must substantially advance a legitimate state interest. The court has also ruled in recent years that a land use regulation can effect a taking if it denies owners the economically viable use of their land.<sup>17</sup> Together, these decisions place a burden on land use regulators to provide considerable justification for their rules, perhaps at times even on

<sup>15</sup>482 U.S. 304 (1987).

<sup>16</sup>483 U.S. 825 (1987).

<sup>17</sup>*Agins v. Tuburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978).

the order of a vital and pressing standard. It is clearly not enough to achieve regulatory validity for government merely to assert that it is implementing the police power.

In *Nollan*, the Court struck down the California Coastal Commission's requirement that the Nollans convey to the public an easement paralleling the coast. The Court reasoned that such an easement did not substantially advance the alleged state interest of making the coast accessible physically or visually to the public. "Substantially advance," according to the Court, means that an essential nexus exists between the means chosen to advance the end and the end itself; compliance with the standard will be carefully scrutinized—it is far "more than an exercise in cleverness and imagination."

### The Personal Environment

Needlessly consuming land obviously limits the supply of that resource. 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.

For most people, the home is where the major part of life is spent. Its characteristics greatly influence the quality of one's life. Similarly, a better neighborhood and greater convenience to work and shopping are most significant environmental goals.

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

Frieden (1979) discusses three proposals to develop major housing projects in Northern California opposed by, among others, environmental groups. These projects were originally intended to provide more than 25,000 units, but the developers could obtain permission to erect only about 3,500. 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 the result of the requirements imposed by governmental authorities.

Another consequence of antidevelopment policies was described in the *San Diego Union* (1988, B11). 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." Bayard Rustin (1975, p. B3), 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.

The indirect effects of antidevelopment policies will also be pervasive. Environmental conditions throughout a housing market will suffer. These practices will (a) curtail the filtering process upon which great numbers of people depend for better housing conditions, (b) generally raise the cost of shelter, (c) cause worse environmental conditions for many or most apartment dwellers within that housing market, and (d) 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. In the mid-1960s the Survey Research Center at the University of Michigan studied this process in 17 metropolitan areas. The results (Lansing et al. 1969) show that, on the average, construction of one new unit makes it possible for a succession of 3.5 moves to occur, each move being to different and probably better housing. New construction thus benefits more people indirectly than directly: 2.5 moves to existing housing and only 1.0 move to new housing.

The survey (Lansing et al. 1969, pp. 41, 68) showed that more than one-third of all people who move are likely to be in the lower- and moderate-income categories. Thus, for every 1,000 new housing units built, there are more than 3,500 relocations, of which 333, on average, are by poor families and 933 are by moderate-income families. The survey (pp. 19-20) also showed that while most construction occurs in the outer portions of a metropolitan area, those moves extend to older areas near the city's center. Because the nation's worst environmental conditions exist in these areas and for these lower-income levels, conditions will further deteriorate if filtering is reduced. In the United States, housing subsidy programs have done little to alleviate these problems; improvement necessitates a greater housing supply in the private market. For government

to elevate the living standards of 1,000 families would require enormous expenditures.<sup>18</sup>

Those of higher income who are ineligible for subsidized housing and who cannot afford new housing similarly depend 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.

If government curtails construction in a housing market, prices will increase and competition will decrease.<sup>19</sup> In the case of apartments, rents will be raised either directly through the amount actually charged or indirectly through reduction in services, repairs, maintenance, and improvements (probably, in many instances, through a combination of all or most of these.<sup>20</sup> Higher rents will cause more doubling up and will increase density within areas containing these buildings. These conditions will be intensified as the filtering process is halted or reduced. The result will be much poorer housing conditions for many people and a further deterioration of marginal or older buildings and areas. Buildings will remain in service that otherwise would be removed.<sup>21</sup> More people will pay more for the same or lesser quality housing.

As I have previously observed, the antidevelopment pressures may curtail much construction, but they cannot stop it all. The demand

<sup>18</sup>I am told by builders that in 1989, the cost of construction of a 1,000-square-foot, moderately equipped apartment in San Diego was about \$50,000. Accordingly, construction of 1,000 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 percent to 20 percent) for this purpose. Among other things, such requirements erode development feasibility, thereby limiting production of houses. For an analysis of such zoning restrictions—usually referred to as “inclusionary zoning,” see Ellickson (1982, p. 135).

<sup>19</sup>See the discussion by Frech (1982, p. 259) about economic impact of the rules promulgated by the California Coastal Commission, which controls development along California’s coast. 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 the growth controls in Petaluma, California, would operate to limit housing supply and increase prices in the region.

<sup>20</sup>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 (1975).

<sup>21</sup>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, business people seek government regulation to achieve personal advantage.

for new housing will remain largely unabated; housing will be forced to locate in places of least resistance, where opposing political pressures are absent or limited. The result will be a greater proliferation or scattering of housing and of all problems that come with urban sprawl.

Similarly, density restrictions reducing yield per acre will cause housing to spread out. These restrictions will necessitate installing more streets and other facilities and creating greater burdens and inconveniences for more people. Obviously, a two-acre minimum lot size will generally require installing 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.

A study<sup>22</sup> of infrastructure costs for 1980 in Westchester County, New York, shows that as density decreases, these costs dramatically increase:

			Cluster
Lot Size	1 acre	½ acre	2 units/acre
Lot Width	125 feet	25 feet	35 feet
Infrastructure Costs	\$30,125	\$18,075	\$8,435

Infrastructure costs include costs for streets, curbs, lighting, sidewalks, sanitary sewer, and water lines.

## The Experience of Houston

Houston, Texas, is the only major city in the United States that has never adopted zoning.<sup>23</sup> 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 conclusion is not entirely accurate, it is more than offset by the economic and social rewards emanating from the

<sup>22</sup>See Urban Systems Research and Energy (1982, p. 71), *Report* (1982, p. 203, Table 15.1, n.20).

<sup>23</sup>Siegan (1972, p. 25) states that Houston is also 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 6,555 against zoning. In 1962 when there was no such restriction on voting, the vote again went against zoning, 70,957 to 54,279; approximately 48.5 percent of those qualified voted. To date, no other vote has been held on this issue. Houstonians retain, of course, the option to impose zoning if they wish.

absence of unnecessary government restraints over the development of property.<sup>24</sup>

How have these benefits occurred without zoning controls? The answer is that Houston does have land use controls, but they 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 (Siegan 1972, pp. 26–27, 30–31).

Houston also controls development through subdivision, building, traffic, and housing regulations that do not appear to differ appreciably from those of other cities in its region. Most cities in the region use either the Southern Standard Building Code or the Uniform Building Code, with modifications. Both were drafted by private industry organizations. However, Bjornseth (1983, pp. 43–44) explains that Texas law prevents counties from adopting and enforcing building codes, and city governments' extraterritorial jurisdiction does not include any power to enforce building codes beyond city limits.

The contrast between Houston's controls and zoning is clear: Unless the property is subject to an enforceable restrictive covenant, the city exercises minimum control over the uses that will be made of and on the 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. Certain uses will develop only in certain places. Gas station and fast-food franchises, plus most other major commercial developments, provide an obvious illustration; regardless of where they are permitted, they will locate only on heavily trafficked streets.<sup>25</sup>

Thus, major business and commercial uses generally will be absent from residential or local streets that constitute 80 percent of total street mileage within Houston, and probably about the same elsewhere. In areas of Houston no longer subject to restrictive covenants

<sup>24</sup>See generally Siegan (1972) and Jones (1980). Jones was formerly director of city planning in Houston. According to Carreau (1981, p. 5A), when Jones appeared in 1981 before a public hearing of President Reagan's Commission on Housing, Jones said, "Zoning is archaic. It makes the marketplace respond to outmoded ideas."

<sup>25</sup>On the rare occasion when this does not occur, the life of the enterprise will be very short.

(to be discussed later) or in which covenants were never imposed, these local streets contain relatively few commercial uses, probably no more than 5 percent within a specified area. The bulk of these commercial uses are home occupations and businesses that serve area residents and, therefore, contrary to much conventional thinking on the subject, are probably compatible with the area.<sup>26</sup>

There is also a great tendency for industrial uses to group and concentrate separate from residential uses. A comparison of maps showing industrial locations in metropolitan Houston to similar maps of Los Angeles or Dallas (cities to which Houston is often compared) suggests that the proliferation of industry in Houston is probably no greater than in other metropolitan areas. There may even be less dispersal, although the large territories involved and the differing definitions of industry make measurement very difficult. This pattern is generally confirmed by land use maps of other nonzoned Texas cities: Pasadena, Wichita Falls, Laredo, and Baytown.<sup>27</sup>

It is generally too costly in terms of land prices and potential residential hostility for heavy industry to locate near new residential subdivisions (Siegan 1972, pp. 62–65). In Houston, plants and factories that are contiguous to and that 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.

<sup>26</sup>These conclusions are based on surveys (Siegan 1972, pp. 36–42) made in December 1969 of three substantial areas of Houston that had never been or were no longer restricted: Denver Harbor (950 structures), Montrose (450 structures), and 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 expired in 1950.

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 (Siegan 1970, pp. 71, 91 n.42.) Houston’s appearance has long been a subject of considerable controversy. For a favorable view of this aspect of the city, see Huxtable (1976a, 1976b). At that time, Huxtable was the architecture critic of the *New York Times* and a Pulitzer Prize winner.

<sup>27</sup>See the following for maps: Bernard Johnson Engineers (1964, pt. 7, p. 32); Marmon, Mok & Green (1967, p. 77); Texas Highway Department (1964, fig. 9); Wichita Falls, Texas, (1964, fig. 9).

Substantial areas in and around Houston exhibit a minimum demand for multiple-family, industrial, and commercial development. These areas provide land for single-family occupancy. Most single-family 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 building only houses with specified characteristics within their subdivisions.<sup>28</sup> Because many of the earlier restrictive covenants in Houston were limited in duration or were legally insufficient or not enforced by owners, zoning would probably have kept more areas for single-family occupancy (Siegan 1972, p. 33). As it happens, zoning would thereby have impeded development both of much housing and of nonhousing facilities, which did occur subsequently within the city.

Studies of zoning have shown that market mechanisms reduce the impact of uses that are regarded in zoning theory as adverse to property values (Crecine, Davis, and Jackson 1967, p. 79; Maser, Riker, and Rosett 1977, p. 111; Reuter 1973, p. 313; Stull 1975, p. 535). The same phenomenon is evident in Houston where, of course, no zoning ordinance is available to advise purchasers as to potential use of adjoining land. Typically, land on the perimeter of a residential subdivision will sell for far less than that located in the interior when 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 covenants created subsequent to World War II are much more durable than those in the past and seem to offer a reasonably practical solution to the conflicting desires of allowing for change and yet maintaining stability. Most post-World War II covenants contain an automatic extension provision (Siegan 1972, pp. 34–35). They provide for an initial duration period of 25–30 years, and an indefinite number of 10-year automatic extension periods. Agreement on the part of 51 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 10-year period. Under this provision, a majority of homeowners can control the destiny of their subdivision.

<sup>28</sup>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.

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.<sup>29</sup> 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.<sup>30</sup>

For homeowners, restrictive covenants serve the same purpose of maintaining exclusivity as does zoning. While similar in this respect, the covenants otherwise vary greatly from zoning both in application and operation; 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 that is far removed from their subdivision. On the other hand, developers or owners and their lenders impose covenants only on their subdivisions 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 row houses. As a result, probably no more than 15–20 percent of the land in Houston is subject to restrictive covenants. Under zoning, every square inch of the city's land would be regulated.

Restrictive covenants are a market device to maximize property value. 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 adverse effects on many.

<sup>29</sup>In early 1990, some community and political leaders in Houston called for the adoption of zoning, charging in part that the city had been lax in enforcing restrictive covenants. I believe there is substance in these charges. In addition, these accusations spread fear among homeowners and may lead to the impositions of new land use regulations. For information on the city's power to enforce the covenants, see Susman (1966, p. 741); Baylor Law Review (1969, p. 307); Houston Law Review (1972, p. 816).

<sup>30</sup>Ordinances as of 1972 are set forth in Siegan, (1972, pp. 26–31). Additional regulations are reported in *New York Times* (1982, p. A12). The city has also in recent years passed ordinances prohibiting "undesirable" uses such as sexually oriented businesses, junk yards, and helicopter pads in or near residential areas.

*Houston Compared to Dallas*

When one wants to quantify the results of zoning, it is useful to consider the experience of Houston and its environs. By comparing Houston with a similar area that has imposed zoning, one can estimate the consequences of regulation. The most obvious area for comparison is Dallas. Houston and Dallas are approximately 230 miles apart and share similar economic profiles.<sup>31</sup>

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 a relatively moderate character. It is far less severe than zoning regulation 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 (e.g., subdivision, building, minimum housing, and traffic) do not differ appreciably.<sup>32</sup>

Until the fall of world oil prices in the early 1980s, both areas had for many years experienced a very high housing demand. There is no evidence that the spectrum of this demand between the two areas varied significantly. The similarity of economic statistics over the years supports this conclusion. 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. Land use regulation appears to be the major factor accounting for this difference since its presence in Dallas likely restricted apartment production there. As a general

<sup>31</sup>For comparisons of Houston and Dallas over the 1960–70 period, see Siegan (1972, pp. 100–3). Similar relationships appear in the 1980 census figures (U.S. Department of Commerce 1980b, pp. 45–21.) One difference is that the median income in 1979 was about 10 percent higher in the Houston SMSA than in the Dallas–Fort Worth SMSA. This difference does not affect any Houston–Dallas comparisons contained in this article.

<sup>32</sup>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 cost 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 (U.S. Department of Labor 1972–79). 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 1982). Because of Houston's favorable attitude toward development, the difference between building costs in Houston and unincorporated areas of Harris County are probably in the low single-digit area. As of 1980 Houston used the 1970 Uniform Building Code, and Dallas used the 1979 Uniform Building Code, with each imposing its own modifications.

matter, zoning is much more restrictive toward multiple-family than single-family dwellings.

The comparisons below are between Harris County, which contains Houston, and the Dallas SMSA. Harris County's population was 12 percent less in 1970 and 17 percent less in 1980 than that of the Houston SMSA. About three-quarters of the SMSA's housing starts occurred in that county. This comparison uses Harris County and not the Houston SMSA because the figures come from the same source as those for Dallas SMSA; this source, unlike others, separates townhouses and condominiums, which, for purposes of this analysis, should be regarded as multifamily housing (Siegan 1983, pp. 720, 728 n.1). This source does not provide statistics for the Houston SMSA.

The portion of the Houston SMSA that is excluded by using Harris County figures produces about 50 percent multifamily housing; therefore, the SMSA would show somewhat less difference from the Dallas SMSA in the category of construction. Multifamily housing in Tables 1 and 2, accordingly, includes townhouses (not identified as

*TABLE 1*  
MULTIFAMILY AND SINGLE-FAMILY HOUSING STARTS IN  
HOUSTON AND DALLAS AREAS, 1973-80

	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

*TABLE 2*  
PERCENTAGE OF MULTIFAMILY AND SINGLE-FAMILY  
HOUSING STARTS FOR HOUSTON AND DALLAS AREAS,  
1973-80

	Harris County (%)	Dallas SMSA (%)
Multifamily Starts	58	46
Single-Family Starts	42	54

to rental or sale) and condominiums. (Tables 1 and 2 are reproduced from Siegan 1983, p. 728.) Inasmuch as multifamily housing occupies much less land than single-family dwellings, Houston has used considerably less land than Dallas for housing purposes.<sup>33</sup>

This difference in multifamily output probably accounts for rents in Houston being lower during the 1973–80 period than in Dallas. The Bureau of Labor Statistics (U.S. Dept. of Labor 1972–79) provides the most comprehensive rent comparisons for the two areas in its annual estimates of living costs at three income levels for a four-person family and a retired couple. For 1972–79, inclusive, these estimates show that Houston SMSA rents were the same or lower in all categories. Totaling all these figures on an unweighted basis, the Dallas SMSA rents were about 13 percent higher than Houston SMSA rents. For the other years for which comparable figures are available for both SMSAs, 1966–69, inclusive, the difference in rental prices was about 15 percent (Siegan 1972, p. 112).

Support for these findings comes from the *Eton Journal* surveys of 1979, 1980, and 1981 apartment rentals in the nation's 16 most significant real estate markets. For units located in the city, Dallas rents were 14 percent higher than Houston's in December 1980 and 16 percent higher in March 1981. For units identified as "suburban," Dallas area rents were 17 percent higher in December 1980, 25 percent higher in March 1981, and 11 percent higher in May 1981. In January 1979, Dallas rents were 5 percent higher in both city and suburban sections and 12 percent higher in both sections in January 1980 (Siegan 1983, p. 729).<sup>34</sup>

<sup>33</sup>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, in 1978–81 the Houston SMSA produced many more new residential units per 100 existing households than the Dallas–Fort Worth SMSA or the U.S. average. Chicago Title (1980) and Pfister (1982, p. 12) show the following units per households:

	Houston SMSA	Dallas– Ft. 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 (1982, p. 12) and figures for 1978 and 1979 are contained in Chicago Title (1980). The 1966–69 figures are in Siegan (1972, p. 112).

<sup>34</sup>Notwithstanding these statistics, the 1980 census shows that the median contract rent for Houston SMSA was \$256 and for Dallas–Fort Worth SMSA, \$239; rent was \$258 and \$244, respectively, for the urbanized areas (U.S. Department of Commerce 1980a, pp. 45–9 to 45–10). The evidence that has come to my attention and herein reported

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 (6–7 percent) of any city surveyed in both January 1979 and 1980 (Siegan 1983, p. 729).<sup>35</sup> This finding is not surprising, because Houston frequently has had large vacancy rates resulting from its high productivity.

Comparable price statistics for single-family dwellings do not appear to be available. Available home prices show a different pattern from apartment rentals. The Federal Housing Administration (FHA 1960–75) has annually published prices and other data relative to sales of existing and new homes that it has insured under its Section 203 program. 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 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. Thus, the population of Dallas in 1980 was 904,078, while that of the Dallas SMSA was 1,949,000 and the Dallas–Fort Worth SMSA was 2,960,000. For 1980, Houston's population was 1,594,086 and that of the Houston SMSA was 2,887,000 (Siegan 1983, p. 730 n.11).<sup>36</sup>

I am aware of only one study concerning residential price differences in Dallas and Houston. Richard Peiser (1982, p. 30) observed that when similar houses in equivalent locations were compared, prices were about \$4,000 to \$10,000 less expensive in Houston. He attributes this difference largely to the higher price of land in Dallas, which was brought about by zoning and other regulations in that city.

A study at the Urban Land Institute (Dunau 1981) determined land prices and rates of their increase between 1975 and 1980 for 30

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leads me to discount the 1980 census figures as revealing the actual differences in rent between the two cities.

<sup>35</sup>The 1980 census (U.S. Department of Commerce 1980a, pp. 45–9 to 45–10) shows the rental vacancy rate for the Houston and Dallas–Fort Worth SMSAs as 14.7 percent and 10.4 percent, respectively. For the urbanized areas, the figures were 14.5 percent and 10.5 percent.

<sup>36</sup>The original figures are taken from FHA (1960–75) annual editions and Bureau of Census (1981).

TABLE 3  
LAND PRICES AND RATES OF INCREASE, 1975-80

SMSA	Improved Lot		5 yr. % Increase	Raw Acreage		5 yr. % Increase
	1980	1975		1980	1975	
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

SMSAs. Table 3 shows the prices and percentage of increases for Dallas and Houston SMSAs.

Housing cost generally should be cheaper in the absence of regulation. President Reagan's Housing Commission (*Report* 1982, p. 180) concludes that unnecessary zoning and related requirements may often elevate the price of housing by 25 percent or more.

Economics professors Lloyd Mercer and W. Douglas Morgan (1982, p. 189) conducted a study of Santa Barbara County Housing and found that development restrictions accounted for more than 27 percent of the increase in real housing prices during 1972-1979.

Sogalyn and Sternlieb (1972) 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 sheathing and size of foundation cinderblock) would also lower selling prices, but not to the same degree as would altering zoning policies.

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 percent to 33 percent. In Shreveport, Louisiana, demonstration housing units had a sales price of \$52,850 while homes in a comparable suburban project with conventional regulations and processing sold for \$70,000. In Hayward, California, the demonstration units ranged in price from \$53,000 to \$65,000. Comparable units in the area sold for \$79,500 to \$97,500. In all instances, the builders sought to obtain a normal profit margin (Bjornseth 1983, p. 44).

*Low-Cost Housing*

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 projects were built in minority neighborhoods containing 16 or more detached units.<sup>37</sup> 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 offered unusually inexpensive rental housing, which was, in all likelihood, superior to that which the tenants last occupied.

Because Houston imposes no restriction as to size and type, the market for new houses is very flexible. As mortgage rates rise, for example, the developer can reduce the size of units to limit prices. In many suburbs of Dallas, on the other hand, where zoning regulates the size and type of dwelling, 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, thereby denying many potential consumers an opportunity to purchase housing (*Report 1982*, p. 204).

**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 the major concern, the tightly zoned, strongly exclusionary suburbs would be 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 additional observations. The absence of regulation in that city affords great opportunity for builders and developers to satisfy consumer demand. Human resourcefulness and inventiveness thrive in Houston because of the absence of their enemy, gov-

<sup>37</sup>At that time, single-family detached units typically ranged in density in the United States between one and five units per acre (Council on Environmental Quality 1974).

ernment 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. 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.

## Conclusion

Zoning practices seriously burden the use and development of land. Consider the fate of the last 40 acres of vacant land that remain in a zoned community where all other land has been fully developed. Assume the zoning on the acreage has not been finalized (that is, it is in a holding classification). The decision as to how this tract 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 classify the property after hearing from all interested parties and their planners, lawyers, and other representatives. These parties include owners, neighbors, local civic or homeowners' groups, political organizations, school and park boards, labor groups, perhaps the Chamber of Commerce, 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 no difficulty in producing a planner to prove "conclusively" that its position is the only correct one.

How the debate will come out will depend on who or what is best able to influence or pressure or even pay for the vote of 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, homeowners, civic groups, or 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. The land will, thereby, satisfy the predominant consumer demand. This example assumes, of course, that the city will still exercise controls under the vital and pressing standard previously discussed.<sup>38</sup> Thus, as the

<sup>38</sup>It also assumes that in a zoned area the prudent investment expectations of owners of adjoining and nearby property will be protected. Consider in this respect, the following recommendation of Reagan's Housing Commission (*Report* 1982, p. 201):

Houston and Dallas comparisons reveal, a high demand for apartments is much more likely to be satisfied in the absence than in the presence of zoning.

The latter alternative will provide, 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.

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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.

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