LOCAL LAND USE CONTROLS: AN IDEA WHOSE TIME HAS PASSED*

*Orlando E. Delogu***

I. INTRODUCTION

The suggestion that local land use control powers are not working well—that they may not be susceptible to modest but useful reforms or modifications and thus ought to be more drastically altered or abandoned altogether—is not new. Beginning nearly twenty years ago with Richard Babcock's publication of *The Zoning Game*,[1] the literature and case law in the field is rife with express and implied suggestions that too much land use control power has been given to local governments.[2] More recently Professor Jan Krasnowiecki suggested we abolish zoning,[3] and the New Jersey court in its latest *Mount Laurel*[4] decision underscored the almost overwhelming difficulty of addressing what are really state and regional land use issues on a municipality by municipality basis. Local land use control powers are being abused at worst and too restrictively utilized at best, leaving area-wide problems unresolved.[5] Alternative mechanisms,

---

* This is the final article in a three-part series addressing land use issues. The first, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, was published in 32 MAINE L. REV. 29 (1980). The second, *The Dilemma of Local Land Use Control: Power Without Responsibility*, was published in 33 MAINE L. REV. 15 (1981). This research, undertaken in 1983, was made possible by a summer research grant from the University of Maine School of Law which the author gratefully acknowledges. The assistance of the faculty and staff of the Northwestern School of Law of Lewis and Clark College, where the author taught during the summer of 1983, is also appreciated. Finally, appreciation must be expressed to James N. Katsiaficas and John C. Nivison, student research assistants.

** Professor of Law, University of Maine School of Law; B.S. 1960, University of Utah; M.S. 1963, J.D. 1966, University of Wisconsin.

1. R. BABCOCK, THE ZONING GAME (1966).

2. *See generally* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447 (1981); Pulliam, *Brandeis Brief For Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U.L. REV. 435 (1983); Williams, *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROBS. 317 (1955).

3. Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980). *See also* Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

4. Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983), particularly 92 N.J. at 212-13, 456 A.2d at 417.

5. *See generally* Delogu, *The Dilemma of Local Land Use Control: Power Without Responsibility*, 33 MAINE L. REV. 15 (1981); Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789 (1977); Note, *State Intervention into Local Land Use Regulation—A Proposal for Reform of Minnesota Legislation*, 63 MINN. L. REV. 1259 (1979).

the private market and private control measures, coupled with state-level or regional land use control measures and harm avoiding performance standards seem better calculated to meet our needs.[6]

It is ironic that as courts, commentators, and land use experts become more dissatisfied with both the underlying theory and the actual implementation of local land use control prerogatives, the popular perception of many citizens and locally elected officials of an almost inherent right to exercise land use control powers at the local governmental level grows unabated. Local land use control powers are an almost unassailable article of faith embodied in such catch phrases as "home rule," "local control," and "participatory or grass roots democracy."[7]

This irony is compounded by the fact that local land use decision-making often ignores and severely diminishes a range of collateral

---

6. *See* B. SIEGAN, LAND USE WITHOUT ZONING (1972); Ellickson, *supra* note 3; Karlin, *Zoning and Other Land Use Controls: From the Supply Side*, 12 SW. U.L. REV. 561 (1981); Kmiec, *supra* note 2, at 66. *See also* THE REPORT OF THE PRESIDENT'S COMM'N ON HOUSING (advance ed. 1982) [hereinafter cited as PRESIDENT'S COMM'N ON HOUSING] particularly chapter 13, The Need for Regulatory Reform, and chapter 15, Deregulation at State and Local Levels. The report noted:

> The record of regulation over the past decade suggests that the dominance of community interests has restricted both development and choice and has raised costs. The balance should be shifted; instead of more regulations, we need fewer. The Commission believes that the marketplace is often a better mechanism than public regulation for determining what housing should be built and where.

Id.

7. *See generally* S. SEIDEL, HOUSING COSTS AND GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE (1978):

> Government regulation of the residential development process has increased rapidly over the past several years both in the scope of its coverage and the magnitude of its impact. While many of these regulations are aimed at positive objectives— preserving the environment, making homes safer, reducing sprawl, etc.—all too frequently these regulations, as they are implemented, result in significantly increasing the price and reducing the number of new housing units. In many cases this result is intentional: a community manipulates its regulations to prevent the construction of moderately priced housing. But even where exclusion is not the intent, by requiring units which are more energy-efficient, which will stand forever, and which are environmentally unobtrusive, the final selling price of the home must necessarily be beyond the means of all but the wealthy.
>
> . . . .
>
> In each area of housing regulation which we have examined, government intervention was responsible for increasing costs. In some cases it was clear that the magnitude of these cost increases was relatively small, while in other cases it was apparent that a significant increase was created. Although some circumstance or necessity justified the passage of such government regulations, it was the inefficiencies of the administrative processes and sometimes the misuse of this power for illegitimate ends which was responsible for inflating costs.

Id. at 1, 304. *See also* B. SIEGAN, *supra* note 6.

rights which usually command considerable attention and respect. For example, local land use controls tend to stifle, and make more costly, private "free market" development decisions. These controls cut against the grain of our historical penchant to allow people (property owners) the freedom to use their property as they choose.[8] They also tend to produce results which are either unequal or unfair on their face, or which leave obvious and important larger social issues (such as where to put a regional sanitary land fill or low income housing) unresolved.[9] The inconsistency between the claimed right to exercise local land use control powers and the actual exercise of these powers in a manner disruptive of other individual and societal rights and needs ought not to continue.

The thesis of this Article is quite simple: local land use control powers, as we know them, have outlived their usefulness and should largely, if not totally, be withdrawn from municipalities. Free market forces coupled with and modified by a range of state and regional land use controls focusing on harm avoidance and the meeting of realistic state or regional performance standards are a preferable substitute for traditional local land use decisionmaking.[10]

---

8. *See, e.g.*, Appeal of Girsh, 437 Pa. 237, 263 A.2d 395 (1970):

> We must start with the basic proposition that absent more, an individual should be able to utilize his own land as he sees fit. Although zoning is, in general, a proper exercise of police power which can permissibly limit an individual's property rights, it goes without saying that the use of the police power cannot be unreasonable.

Id. at 241 n.3, 263 A.2d at 397 n.3 (citations omitted). *See also* National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) ("we must also appreciate the fact that zoning involves governmental restrictions upon a landowner's constitutionally guaranteed right to use his property, unfettered, except in very specific instances, by governmental restrictions" *Id.* at 522, 215 A.2d at 607).

9. *See, e.g.*, PRESIDENT'S COMM'N ON HOUSING, *supra* note 6:

> Government regulations can unnecessarily restrict housing choices by limiting locations where construction can occur, by driving up the cost of housing and thereby placing new housing beyond the financial reach of increasing numbers of people, and by arbitrarily placing absolute limits on the amount and type of housing built. Location limitations may arise from such land-use policies as zoning, growth controls, and farmland preservation policies, which either prohibit housing development in certain areas or direct growth away from some areas and into others. Prohibitions on multifamily housing or mobile homes restrict the choices available to consumers, as do requirements that multifamily housing include units with only a few bedrooms.

Id. The tone and substance of these findings are nearly identical to those of the DOUGLAS COMM'N, BUILDING THE AMERICAN CITY, REPORT OF THE NATIONAL COMM'N ON URBAN PROBLEMS (1968) [hereinafter cited as DOUGLAS COMM'N REPORT] and the KAISER COMM'N, A DECENT HOME, REPORT OF THE PRESIDENT'S COMM. ON URBAN HOUSING (1969).

10. *See generally* Kmiec, *supra* note 2; Lefcoe, *supra* note 2; Pulliam, *supra* note 2. *See also* L. KENDIG, S. CONNOR, C. BYRD & J. HEGMAN, PERFORMANCE ZONING

It is incorrect to say that there is no role for local governments and citizen groups to play in land use decision-making. The appropriate local role, however, is a limited one—one that does not give local government express or *de facto* veto power over any (or every) proposed development activity within its particular jurisdiction. The local role properly involves providing information, raising questions, and monitoring compliance with development approvals (perhaps conditioned) granted by higher governmental bodies. These alternative, important, but distinctly lesser, local governmental and citizen roles in land use decision-making will be outlined in some detail. They are offered not as a sop or make-weight for land use control powers presently exercised by local instrumentalities, but as an appropriate realignment of rights and duties between the public and private sectors and between local governments and higher levels of government with respect to land use decision-making.[11]

Whether we have the courage to move in the suggested directions remains to be seen. Nothing one sees is very encouraging in this respect, but one thing is clear—the disruptions, inequities, unfairness, and failures of our present patchwork system of local land use controls are increasing.[12] The costs are mounting. Important rights and problems are ignored by the current process. An increasing number of our fellow citizens (not just courts, scholars, and land use experts) are calling for change.[13] The time for serious consideration of pro-

---

(1980); B. SIEGAN, *supra* note 6; C. THUROW, W. TONER & D. ERLEY, PERFORMANCE CONTROLS FOR SENSITIVE LANDS: A PRACTICAL GUIDE FOR LOCAL ADMINISTRATORS (1974); Karlin, *supra* note 6; McDougal, *Performance Standards: A Viable Alternative to Euclidean Zoning?*, 47 TUL. L. REV. 255 (1973).

11. The PRESIDENT'S COMM'N ON HOUSING, *supra* note 6, called for a "restoration of the proper balance" between private property interests and governmental regulation. *Id.* Though suggesting that regulatory reform requires action at all levels of government, the commission was most critical of municipal land use and building regulations. A "realignment" along the lines suggested, with primary emphasis on market oriented land use decision-making, is the fundamental conclusion of Siegan. B. SIEGAN, *supra* note 6, at 247.

12. There is an irony in that even our best intentioned remedial devices often fail to produce the desired result. *See, e.g.*, Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167, 1215 (1981)("Inclusionary zoning, as usually practiced, is a misguided undertaking that is likely to aggravate the housing crisis it has ostensibly been designed to help solve."). *See also infra* note 75 and accompanying text.

13. For example, in October, 1981, the Maine State Planning Office issued a report which recognized that notwithstanding an acute need for low income housing, there was a clear trend in over 120 municipalities making it difficult, if not impossible, for manufactured housing to locate in the municipality, and that there was a significant cost differential between conventional housing and manufactured housing which placed the latter within the economic reach of a majority of Maine citizens while the former could be afforded by less than 25% of Maine families. MAINE STATE PLANNING OFFICE, SUMMARY OF ISSUES RELATED TO MUNICIPAL REGULATIONS OF MANUFACTURED HOUSING (Oct. 1981). The report, prepared at the direction of two legislative committees studying aspects of the manufactured housing problem, ended on the following note: "Municipal failure to make a good-faith effort to change existing re-

posals such as those offered in this Article is at hand.

II. Some False Premises

The view that we cannot get along or govern effectively without the exercise of traditional local land use control powers is predicated on a number of premises and assumptions which today are simply not true. Whether these fundamental premises were ever correct, whether they were ever empirically verified, or whether they were merely intuitive and only partially accurate, becoming less valid over time or falling victim to changed conditions, seems irrelevant. What is important is that although each of these premises is largely inaccurate, they continue to be believed. The myths linger on and get in our way.

For example, it is widely asserted that local planning, zoning, and subdivision control will produce attractive, ordered, least-cost public and private development—the city beautiful. No less an authority than Lewis Mumford writing almost fifty years ago asserted:

> Planning involves the co-ordination of human activities in time and space, on the basis of known facts about place, work, and people. It involves the modification and re-location of various elements in the total environment for the purpose of increasing their service to the community; and it calls for the building of appropriate structures—dwellings, industrial plants, markets, water works, dams, bridges, villages, cities—to house the activities of a community and to assist the performance of all its needful functions in a timely and orderly fashion . . . . To the extent that such activities are focused within definite regions, consciously delimited and utilized, the opportunities for effective co-ordination are increased.[14]

But if Mumford could state the theoretical, he was an even more astute observer of the reality. Barely two pages after the above passage he noted:

> All such "plans" are inefficient and embarrassing when they are carried out: they are at their best when they are still on the drafting board. Too often, as in so many beautiful city planning and zoning schemes in the United States, they are piously docketed in the appropriate file, and something radically different is done from day to day by the powers that be. Planning, in the sense of making

---

strictions could demonstrate to the Joint Standing Committee that a legislative solution is the only alternative for dealing with this issue." *Id.* at 8. In the face of continued municipal intransigence on this issue, the Maine Legislature adopted An Act to Permit the Location of Manufactured Housing on Individual House Lots. 1983 Me. Legis. Serv. ch. 424. While this act does not place manufactured housing on parity with conventional housing, it does minimize the potential for municipal regulatory discrimination and it opens up a broader range of locational options. More importantly, it makes the point that changes (legislative, if necessary) are in the offing. People must be housed affordably.

14. L. Mumford, The Culture of Cities 373-74 (1938).

> idle pictures and diagrams, of covering all the tough knots of reality with coats of aesthetic paint, of making the wish a substitute for the thought, has justly earned the derision of hard-headed, intelligent people. Similarly, attempts to impose a limited order of reality upon the future actions of men . . . are often more mischievous in their fake order than the purely empirical provision for the day's needs would be.[15]

Unfortunately, Mumford's initial aspirational statement today colors popular thinking to a far greater degree than does his hard-headed assessment of reality. Others, however, have concurred in Mumford's more realistic assessment of local planning and land use controls. Babcock, in *The Zoning Game* said:

> But the chaos in land-use planning is not the result of uncontrolled individual enterprise. It is a result of a combination of controls and lack of controls, of over-planning and anti-planning, enterprise and anti-enterprise, all in absolute disarray. I doubt that even the most intransigent disciple of anarchy ever wished for or intended the litter that prevails in the area of local land-use regulation.[16]

A second incorrect assumption relied upon to justify local planning and zoning asserts that mixed land uses are inherently unsafe, undesirable and destructive of the fabric of a community, and can best be guarded against by those closest to any proposed development. These views gained unwarranted support and legal credibility in *Village of Euclid v. Ambler Realty Co.*[17] The Court, after noting the several districts created by the village zoning ordinance, found "no difficulty in sustaining" height restrictions, building materials and construction method limitations,[18] and the separating of industrial activities from other land uses. The *Euclid* Court then noted that:

> The serious question in the case arises over the provisions of the ordinance excluding from residential districts, apartment houses, business houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded.[19]

After recognizing that the Supreme Court had never addressed this question, and that the "decisions of the state courts are numerous and conflicting,"[20] the Court, without developing any rationale of its

15. *Id.* at 375-76.
16. Babcock, *supra* note 1, at 12.
17. 272 U.S. 365 (1926).
18. *Id.* at 388-90.
19. *Id.* at 390.
20. *Id.*

own and without citing any persuasive outside authority, threw its weight behind what it asserted was the majority state view—that separation is to be preferred:

> [T]he exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. Some of the grounds for this conclusion are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to location of stores, shops and factories.[21]

The Court, then, seemingly troubled by its naked assertions supported only by equally naked state court decisions which contained similar conclusions, cited (without any specific references) unnamed planning reports and experts as follows:

> The matter of zoning has received much attention at the hands of commissions and experts, and the results of their investigations have been set forth in comprehensive reports. These reports, which bear every evidence of painstaking consideration, concur in the view that the segregation of residential, business, and industrial buildings will make it easier to provide fire apparatus suitable for the character and intensity of the development in each section; that it will increase the safety and security of home life; greatly tend to prevent street accidents, especially to children, by reducing the traffic and resulting confusion in residential sections; decrease noise and other conditions which produce or intensify nervous disorders; preserve a more favorable environment in which to rear children, etc.[22]

These dicta have taken on a life of their own. In the face of countless individual experiences and studies which undercut, disprove, or at least significantly discount the contexts in which, and the degree to which these dicta have validity, they continue to be believed by many. For example, almost every major urban revival in the last twenty years involves an interesting and extraordinarily diverse range of mixed uses—Atlanta's Peachtree Center and Colony Square areas, Baltimore's waterfront redevelopment and Charles Center areas, Boston's Fanueil Hall and related North End and waterfront redevelopment areas, Philadelphia's Independence Mall and Society Hill redevelopment areas, the Georgetown area in Washington, D.C., Battery Park in New York City, and the Old Port area in Portland,

---

21. *Id.* at 391.
22. *Id.* at 394.

Maine.[23] The list could be extended considerably. A recent publication by the Urban Land Institute, *Mixed-Use Developments: New Ways of Land Use*,[24] not only advocates most forcefully a mixed-use approach to urban revitalization but also documents some eighty-seven projects in cities large and small in every corner of the country where this approach is being utilized successfully.

Even casual observation of many large and small European cities, which in most instances have been in existence several hundred years longer than even the oldest U.S. cities, underscores the point being made. It is their diversity, their heterogeneous mixed-use character, that makes them interesting and that prolongs their existence. In Europe this myth that diversity of land use is bad and that separation of uses is good never caught on. Mixed uses—walking streets, town centers that combine shops, offices, public spaces and residential living arrangements, and even light industrial and commercial areas that have shops, pubs, and workers' residences in close proximity—are the norm.[25] Instead of following these examples, we in this country often fell victim to a more sterile planning rhetoric. An early observer and critic of this unfortunate tendency was Jane Jacobs. Over twenty years ago in *The Death and Life of Great American Cities*,[26] she noted in a chapter entitled "Some myths about diversity":

---

23. *See, e.g.*, Blatman, *The Misuse of Mixed-Use Centers*, 13 REAL ESTATE REV. 93 (1983) ("It is no accident that New York, Boston, Toronto, Montreal, San Francisco, Seattle, and Vancouver elicit the positive responses they do from visitors. To walk through those cities is to experience the sometimes comforting disorder of urban life, the new, the old, and most important, the unexpected . . . . [We] must preserve and recreate the best of this vitality." *Id.* at 95).

24. R. WITHERSPOON, MIXED USE DEVELOPMENTS: NEW WAYS OF LAND USE (1976). *See also* WEBBER, ORDER IN DIVERSITY: COMMUNITY WITHOUT PROPINQUITY, IN CITIES AND SPACE 23 (1963).

25. *See, e.g.*, Lefcoe, *The Right to Develop Land: The German and Dutch Experience*, 56 OR. L. REV. 31 (1977). Lefcoe notes:

> [In Germany] shops and offices were permitted nearly anywhere, even in prime residential zones, so long as they generated no disturbing noises or smells and were not unsightly. Because space was viewed as a scarce resource, local governments were early afforded a free hand in trying to squeeze as many diverse uses into a locale as could be accommodated comfortably.

Id. at 40. Addressing the situation in the Netherlands, Lefcoe quotes an urban sociologist, Professor W.E. Heinemeyer of the University of Amsterdam:

> Amsterdammers want a closely interwoven pattern of streets and squares . . . where there is a great variety of possibilities for doing things one does not have to do, like shopping, going to films and plays, sitting on terraces, looking around, wandering about . . . , a place where one can be out and at the same time be at home, where it is a pleasure simply to be there . . . . One can call it the "forum nature of the inner city," [sic] and this is something so precious that no administration must be indifferent to it.

Id. at 49.

26. J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961).

> "Mixed uses look ugly. They cause traffic congestion. They invite ruinous uses."
>
> These are some of the bugbears that cause cities to combat diversity. These beliefs help shape city zoning regulations. They have helped rationalize city rebuilding into the sterile, regimented, empty thing it is. They stand in the way of planning that could deliberately encourage spontaneous diversity by providing the conditions necessary to its growth.
>
> Intricate minglings of different uses in cities are not a form of chaos. On the contrary, they represent a complex and highly developed form of order . . . .
>
> [S]upposed disadvantages [of diversity] are based on images of unsuccessful districts which have not too much, but too little, diversity. They call up visions of dull, down-at-heel residential areas, pocked with a few shabby, shoestring enterprises. They call up visions of low-value land uses, like junk yards or used-car lots. They call up visions of garish, sprawling, unremitting commerce. None of these conditions, however, represents flourishing city diversity. On the contrary, these represent precisely the senility that befalls city neighborhoods in which exuberant diversity has either failed to grow or has died off with time. They represent what happens to semisuburbs which are engulfed by their cities but fail, themselves, to grow up and behave economically like successful city districts.
>
> Flourishing city diversity, of the kind that is catalyzed by the combination of mixed primary uses, frequent streets, mixture of building ages and overheads, and dense concentration of users, does not carry with it the disadvantages of diversity conventionally assumed by planning pseudoscience . . . .
>
> [Alleged] disadvantages are fantasies which, like all fantasies that are taken too seriously, interfere with handling reality.[27]

A third incorrect assumption or premise upon which local land use controls are grounded asserts that private development controls (e.g., market forces and restrictive covenants) are either non-existent, too weak, or inherently unfair and that public controls bound by the rule of law are necessary to protect diverse public and citizen interests.[28] Both sides of this equation seem open to challenge. His-

---

27. *Id.* at 222-23.

28. This point was addressed precisely by Ellickson, *supra* note 3. Ellickson concluded:

> The most prevalent systems of land use control in the United States are neither as efficient nor as equitable as available alternatives. Detailed mandatory zoning standards inevitably impair efficient urban growth and discriminate against migrants, lower classes, and landowners with little political influence. The elimination of all mandatory zoning controls on population densities, land use locations, and building bulks is therefore probably desirable. The alternative proposed in this article relies primarily on a variety of less centralized devices [covenants and improved nuisance rules] to internalize the external costs of unneighborly land use activities.

Id. at 779.

torically, before there was zoning (and to some extent today), developments were controlled not only by the economics of the marketplace but by covenants which often more effectively imposed many of the types of controls which modern zoning and subdivision ordinances would impose.[29] These devices are examined in considerable depth by Bernard Siegan in his insightful book, *Land Use Without Zoning.*[30] He notes:

> Economic forces tend to make for a separation of uses even without zoning. Business uses will tend to locate in certain areas, residential in others, and industrial in still others. Apartments will tend to concentrate in certain areas and not in others. There is also a tendency for further separation within a category; light industrial uses do not want to adjoin heavy industrial uses, and vice-versa. Different kinds of business uses require different locations. Expensive homes will separate from less expensive ones, townhouses, duplexes, etc. . . . When the economic forces do not guarantee that there will be a separation, and separation is vital to maximize values or promote tastes and desires, property owners will enter into agreements to provide such protection. The restrictive covenants covering home and industrial subdivisions are the most prominent example of this.[31]

More recently, planned unit developments, cooperative and condominium developments, time-share and mall-type developments all impose significant and far-reaching land use and property management controls on purchasers and users of property within a particular project.[32] These are monitored and enforced, and admit of some flexible readjustment through such mechanisms as owner-tenant bylaws, homeowner and tenant associations, and time-share agreements. In many states the description and delineation of project characteristics and controls gives rise to enforceable rights in vendees and users of property within the project once approved plans and plats are recorded.[33] The limitations imposed in the above types

---

29. *See generally* J. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 279-92 (1962); 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW §§ 153-54 (1975) (for discussion of nuisance and restrictive covenants); Note, *Exclusionary Zoning and Equal Protection,* 84 HARV. L. REV. 1645 (1971). For an extended discussion of the practical application of covenant and nuisance rules as an alternative to land use controls, see B. SIEGAN, *supra* note 6, at 23-76, which describes the Houston experience of over 50 years of reliance on these alternative devices. Note too the extended bibliographic references in B. SIEGAN, *supra* note 6, at 23-76.

30. *See also* B. SIEGAN, OTHER PEOPLE'S PROPERTY (1976); Siegan, *Non-Zoning in Houston,* 13 J. L. & ECON. 71 (1970).

31. B. SIEGAN, *supra* note 6, at 75.

32. *See generally* Maine Condominium Act, ME. REV. STAT. ANN. tit. 33, §§ 1601-101 to 1604-118 (Supp. 1983) (the act contains extensive provisions which invite the creation of explicit and detailed declarations and bylaws and allow the amendment of same if and when changed conditions arise).

33. *See, e.g.,* Callahan v. Ganneston Park Dev. Corp., 245 A.2d 274 (Me. 1968).

of developments often go well beyond what could be imposed by public bodies exercising the police power. Obviously, then, these often extensive controls are both wanted by and acceptable to developers and purchasers of property in these projects. Investment and peaceable use are protected. The controls must be fair to all or the market would not accept them—there is little, if any, coercive power here. And finally, deeds and collateral instruments are often carefully drafted to insure enforceability.[34]

As for the argument that local public controls (limited by constitutional norms and statutory safeguards) are necessary to protect diverse public and private interests, it should be noted that society survived and balanced these sometimes competing interests for many years before the advent of modern local land use controls.[35]

The court protected the purchaser of a lot who relied on an approved and recorded plot and subdivision plan—the developer was not permitted to make changes in the street layout which would diminish the value of the property and be counter to the expectations of the purchaser.

34. *See* Ellickson, *supra* note 3. Ellickson notes:

> Existing property law provides for enforcement of many agreements of this type, including covenants, leases, easements, and defeasible fees. Covenants serve as a representative example of these consensual transactions between landowners; this category encompasses affirmative and negative obligations and is perhaps the most prevalent type of private agreement between neighbors.
>
> . . . .
>
> For example, when a developer drafts covenants that will bind people who move into his subdivision, market forces prompt him to draft efficient ones. Covenants will enhance the developer's profit only if they increase his land values by more than the cost of imposing them. His land values will rise only if his home buyers perceive that the covenants will reduce the future nuisance costs they might suffer by an amount greater than the sum of their loss of flexibility in use and future administrative costs. The developer will suggest, therefore, only those covenants that provide each purchaser with a reduction of nuisance costs greater than the purchaser's loss in flexibility plus his enforcement cost plus a pro rata share of the developer's administrative costs. Not all conflicts between neighbors can be solved by covenants, but covenants generated by market forces will tend to promote efficiency.
>
> In addition to promoting efficiency, covenants will not usually cause unfair wealth transfers among landowners. Absent fraud, duress, and the like, a party will not agree to a contract that he perceives as unfair. Thus, assuming equal bargaining power and information, consensual covenants will not involve inequitable gains or losses to any party.

Id. at 713-14. *See also* B. SIEGAN, *supra* note 6, at 34.

35. *Cf.* J. BEUSCHER, P. WRIGHT & M. GITELMAN, LAND USE: CASES AND MATERIALS (2d ed. 1976).

> Long before the modern era of "comprehensive" zoning, courts in the haphazard fashion of our case law and through loose doctrines of private and public nuisance were mitigating against the worst effects of unplanned, topsy-like development of English and American communities. Thousands of discordant land uses have been reviewed by courts since the law of "nuisance" began to take shape soon after the Norman Conquest.

Some major municipalities and countless smaller cities and towns survive quite well today with few, if any, such controls.[36] There is growing evidence that, as exercised, local land use controls, rather than balancing and protecting diverse interests in an inclusionary manner, actually keep out whatever is unwanted or threatening to some local interest.[37] Magnifying the problems of exclusion is the unwillingness of courts to come down hard on the exclusionary tendencies of municipal governments. Even when courts have found exclusion or some other impermissible municipal conduct, fashioning an appropriate remedy has not been easy.[38]

The latter point is brought home painfully in the most recent *Mount Laurel* case in which the court notes: "After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance."[39] In short, the argument that private land use control mechanisms do not exist and that public (translated to mean "lo-

---

Id. at 38. *See also* Comment, *The Municipal Enforcement of Deed Restrictions: An Alternative to Zoning*, 9 HOUS. L. REV. 816 (1972).

36. See B. SIEGAN, *supra* note 6, at 24, which describes the City of Houston and several other nearby municipalities of varying size that get along nicely without zoning. The capital of Maine, Augusta, also got along until quite recently (1983) without zoning. By any measure—income, employment, land values, quality of life—Augusta has not suffered by having foregone zoning to this point.

37. *See generally* R. BABCOCK & F. BOSSELMAN, EXCLUSIONARY ZONING: LAND USE REGULATION AND HOUSING IN THE 1970'S (1973); Marcus, *Exclusionary Zoning: The Need for a Regional Planning Context*, 16 N.Y.L.F. 732 (1970); Comment, *Exclusion of Community Facilities for Offenders and Mentally Disabled Persons: Questions of Zoning, Home Rule, Nuisance, and Constitutional Law*, 25 DE PAUL L. REV. 918 (1976); Comment, *Exclusionary Zoning of Community Facilities*, 12 N.C. CENT. L. J. 167 (1980); Note, *Excluding the Commune from Suburbia: The Use of Zoning for Social Control*, 23 HASTINGS L. J. 1459 (1972).

38. *See generally* Mytelka & Mytelka, *Exclusionary Zoning: A Consideration of Remedies*, 7 SETON HALL L. REV. 1 (1975); Rubinowitz, *Exclusionary Zoning: A Wrong in Search of a Remedy*, 6 U. MICH. J.L. REF. 625 (1973); Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1694-1708 (1978). Before relief may be fashioned, however, judicial reluctance to come to grips with these issues must be overcome. *See infra* notes 52-57 and accompanying text. *See also* Comment, *Exclusionary Zoning: Its Development, Effects and an Analysis of Challenges in Selected Forums*, 8 N. KY. L. REV. 349 (1981):

> Unfortunately for the cause of open housing, efforts to strike down exclusionary zoning barriers have had virtually no success in the federal courts. Since *Village of Euclid v. Ambler Realty Co.*, the courts have generally treated zoning ordinances as valid legislative exercises of state police power. Thus plaintiffs who challenge exclusionary zoning ordinances as violative of their equal protection rights under the Fourteenth Amendment find the federal courts deferring to local legislatures, treating the ordinances as presumptively valid, and willing to subject the ordinances only to the "rational basis" or "reasonable relation" test.

Id. at 365-66 (footnotes omitted).

39. Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 198, 456 A.2d 390, 410 (1983).

cal") land use controls are thus necessary is simply not borne out by fact or reason. The proposition that local land use controls are subject to effective judicial review to prevent misuse likewise is a myth. Many would concur in these conclusions—the most blunt, Siegan, for example, has stated:

> It is time that we apply the clear and unmistakable lesson of the past fifty years: zoning has been a failure and should be eliminated! Governmental control over land use through zoning has been unworkable, inequitable and a serious impediment to the operation of the real estate market . . . .
>
> In attempting to solve certain problems of land use and development, zoning has created many greater problems for our society. When zoning restricts the operation of the real estate market, it also restricts the supply of housing . . . .
>
> It is absurd and tragic that the national goals of stimulating more and better housing and a desirable housing environment are being frustrated by local goals of limiting housing . . . . Governmental land use regulations at any level mean that politics and political power will continue making decisions for reasons that have minimal or no relationship to the best and most efficient use of the land, and that precious resource will continue to be wasted. In the absence of most governmental controls, the private sector is much more likely to utilize the land to provide better for the environmental and material needs of the people.[40]

A fourth incorrect premise impliedly or expressly advanced to justify local land use controls is the assertion that most, if not all, land use issues are local in character and therefore best dealt with by that level of government. Nothing could be further from the truth. The provision of housing (particularly multi-family and low income housing), a type of development involved in many local land use control disputes, is widely perceived as a state and national problem.[41] Developments of any scale, whether commercial, industrial, or involving public facilities, almost certainly have at least regional impacts.[42] Development activities of any type which have infrastruc-

---

40. B. SIEGAN, *supra* note 6, at 247.

41. *See generally* R. Babcock & F. Bosselman, *supra* note 37; L. SAGALYN & G. STERNLIEB, ZONING AND HOUSING COSTS: THE IMPACT OF LAND USE CONTROLS ON HOUSING PRICE (1973); S. SEIDEL, *supra* note 7; Branfman, Cohen & Trubek, *Measuring the Invisible Wall: Land Use Controls and the Residential Patterns of the Poor*, 82 YALE L.J. 483 (1973).

42. *See generally* ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONAL DECISION MAKING: NEW STRATEGIES FOR SUBSTATE DISTRICTS (1974); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, REGIONALISM REVISITED: RECENT AREAWIDE AND LOCAL RESPONSES (1977); Godschalk & Brower, *Beyond the City Limits: Regional Equity as an Emerging Issue*, 15 URB. L. ANN. 159 (1978):

> In recent years federal policy, as reflected in legislative and administrative requirements, has been the primary catalyst for institutionalizing a regional perspective. In early 1964, only five federal programs had planning

ture implications—schools, transportation, sewerage, and water supply—again almost certainly have regional, if not statewide, impacts.[43] Building and construction safety is much less likely to be achieved by local building and safety codes than by more uniform and complete state and national codes.[44]

These arguments do not suggest that development activities do not have a local impact. They do, but there are larger, more significant impacts at regional and state levels, and sometimes development activities have national implications. It follows, then, that local governments should not have the degree of unfettered power that they do have to place development where they will, to increase the cost of development to the degree they wish, and to delay or exclude development types they do not like. Higher levels of government interested in and affected by development activities must be accorded a greater degree of recognition and control over the development process.

---

requirements for an area-wide perspective. As of 1972, there were at least twenty-four such programs, representing approximately $8.6 billion in federal aid expenditures. By 1976 there were thirty-two federal programs supporting substate regional activities.

These programs reflect federal recognition that effective management of urban facilities and natural resources must transcend political boundaries. For example, HUD's planning program under section 701 of the Housing Act of 1954 now requires areawide comprehensive planning that includes, at a minimum, adopted and certifiable housing and land use elements. Another example is section 208 of the Environmental Protection Agency's Water Quality Management Planning Program, which implements the objective of the Water Pollution Control Act Amendments of 1972 to restore the chemical, physical, and biological integrity of the nation's water by 1985 through facilitating the development and implementation of areawide waste treatment management plans. Additional areawide programs address urban development, rural development, economic development, and the provision of public services and facilities, including open space, transportation, solid waste, health, manpower, and law enforcement.

Id. at 161-62 (footnotes omitted).

43. Courts too have recognized the need for and desirability of regional approaches to land use control. *See, e.g.*, Vickers v. Township Comm'n, 37 N.J. 232, 181 A.2d 129 (1962) (Hall, J., dissenting):

> [Municipalities] would be well advised to plan with adjoining communities, especially for joint public services and facilities. Intercommunity planning is also best able to accommodate those categories of uses that ought not to be excluded everywhere, but which may be more desirably located in one municipality rather than another. Unfortunately, our statutory provisions for voluntary regional planning boards . . . have been little used, if at all.

Id. at 254, 181 A.2d at 141. *See also* Southern Burlington Cty NAACP v. Township of Mount Laurel, 67 N.J. 151, 188-84, 336 A.2d 713, 732 (1975), *appeal dismissed*, 423 U.S. 808 (1975).

44. Many have come to feel that local building and safety codes do nothing more than protect local building trade groups from competition and inhibit the development and broader use of new construction materials and methods. *See* S. SEIDEL, *supra* note 7. *See also* C. FIELD & S. RIVKIN, THE BUILDING CODE BURDEN (1975).

A fifth incorrect premise asserted to justify local land use controls would argue that excesses or problems which actual experience bring to the fore can be adjusted by some combination of internal mechanisms (e.g., the variance and action by the zoning board of appeals)[45] and external responses (e.g., corrective legislation and judicial review). The theory is acceptable enough. In practice, however, these self-correcting measures simply have not worked. One author concluding his assessment of zoning administration in Maine noted, "the evidence suggests that variances are issued indiscriminately and that zoning boards are not cognizant of the limits to their authority."[46] A broader assessment, which somewhat sympathetically sought to outline the difficulties of land use management generally, including the difficulties of variance administration, began by recognizing the consensus view with respect to zoning boards and the issuance of variances:

> Few legal institutions have been more consistently and vigorously criticized than zoning boards of adjustment, whose major function is to consider applications for variances. Commentators, while not denying that variances are a necessary "flexibility device," assert that the boards grant relief too freely, flouting the law by following their own permissive inclinations rather than the stricter standards laid down by the courts.
>
> . . . .
>
> Critics contend that, by departing from these standards, the boards have usurped legislative prerogatives, undermined public confidence in zoning, deceived persons who buy land without knowing about nearby variances, denied equal treatment to applicants, permitted destruction of neighborhoods, subverted comprehensive plans, and endangered our democratic institutions.[47]

Whether one goes backward or forward in time, the views expressed above are echoed almost universally by planners and land use lawyers and tend to be borne out by the few empirical studies that have examined these issues.[48]

---

45. Before the ink was dry on the earliest zoning ordinances, this view found expression in law reviews. *See* Baker, *The Zoning Board of Appeals*, 10 MINN. L. REV. 277, 308 (1926)("In conclusion, we can say that the board of appeals has been rendering a valuable service to zoned cities. It has preserved the constitutionality and popularity of the zoning ordinance and, more than that, it has made the law capable of being enforced. The hope for the zoning of the future lies largely in the work of the board of appeals."). *See also* Sumner, *The Board of Adjustment as a Corrective in Zoning Practice*, 13 NAT'L MUN. REV. 203 (1924).

46. Comment, *Administration of Zoning in Maine*, 20 MAINE L. REV. 207, 234-35 (1968).

47. Bryden, *The Impact of Variances: A Study of Statewide Zoning*, 61 MINN. L. REV. 769, 770, 773 (1977).

48. *See, e.g.*, Dukeminier & Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 322 (1962)(Drawing on empirical evidence gathered from 17 months of observation in the early 1960's of the Lexington, Kentucky

As to whether corrective legislation and/or judicial review have curbed misuse and shortsighted use of land use control powers, the evidence again seems clear—they have not. One of the nation's foremost land use planning scholars, Frederick H. Bair, Jr. put it most succinctly:

> A thoughtful reader of Bassett's classic work on primitive zoning will be shocked at how little seems to have been learned since it was written. About 1915, when much of the urban crisis in New York City was blamed on an unwise mixture of conflicting land uses, our present form of zoning began to take shape. The first crude zoning provided for diminishing segregation from the "top" down. Most exclusive was the single-family residence zone, protecting the rich from association with the poor. At the other end of the scale, there was no segregation to amount to anything. Single-family residences, tenements, stores, warehouses, and boiler factories were permitted in the industrial district, where the poor could mix as much as they pleased.
>
> Before this new control device could be tested by experience, it was widely "sold" around the country, much in the manner of present-day urban renewal. Progress on the municipal scene was measured in terms of how many additional cities had zoning each year, rather than by what was actually happening to cities.
>
> There was (and still is) little rational appraisal of whether zoning was doing what it was intended to do, and whether zoning was the best way of doing what had to be done. As shortcomings became obvious, efforts were made to change details (largely in the direction of increased segregation), but change wasn't easy: It was easier to copy than to understand and improve.
>
> Even today, with minor variations, we still imitate this regulatory device created for the nation's largest city almost 50 years ago, complete with all the crude complexities of a first effort at a complicated job.[49]

A further example of our failure to update, improve, or modernize the enabling legislative framework for exercising local land use control powers is found in the ignominious fate of the American Law Institute's Model Land Development Code.[50] After years of careful

---

zoning board of adjustment, these authors concluded "that the Board has not operated in such a manner as to assure citizens equal protection of the law. It has not . . . produced a pattern of consistent, sound, and articulate judgments. Nor have its operations assured the public that the comprehensive plan is not being thwarted through the variance device."). *See also* Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969); Bryden, *supra* note 47 (particularly n.4 at 771 containing an extensive bibliography, almost all critical, of variance procedure, administration, and empirical studies).

49. F. BAIR, PLANNING CITIES 274-75 (1970).

50. *See generally* MODEL LAND DEV. CODE (1975)(includes reporter's notes); D. MANDELKER, ENVIRONMENTAL AND LAND USE CONTROLS LEGISLATION 63-126 (1976); Babcock, *Comments on the Model Land Development Code*, 5 URB. L. ANN. 59 (1972); Bosselman, Raymond & Persico, *Some Observations on the ALI's Model*

drafting, redrafting, and discussion, and despite much scholarly support and a clear need, the Code has gone nowhere. In the more than fifteen years it has laid on the table (eight in finished form) only a handful of states have borrowed bits and pieces of ideas advanced in the Code.[51]

The courts have been equally unwilling to recognize and correct the excesses of municipal zoning law and administration. Judge Hall in his now classic dissent in *Vickers v. Township of Gloucester*[52] noted that reviewing courts apply too narrow a concept of general welfare. At the same time that they are willing to construe liberally municipal ordinances, they mechanistically apply

> the twin shibboleths of presumption of validity of municipal action and restraint on judicial review if the [plaintiff's] proofs do not overcome [the municipal ordinance] 'beyond debate.' The trouble is not with the principles—if we did not have them, governments could not well operate at all—but rather with the perfunctory manner in which they have come to be applied . . . . [O]ur courts have in recent years made it virtually impossible for municipal zoning regulations to be successfully attacked. Judicial scrutiny has become too superficial and one-sided.[53]

In Judge Hall's view the consequence of this ritualized judicial process "goes so far off the mark . . . as to point up in bold relief the necessity to pause for reappraisal, . . . to halt what I think has developed into a most improper trend."[54] But no such general reappraisal seems in evidence. With a handful of exceptions reviewing courts in recent years have leaned over backwards to sustain municipal land use controls even when municipal motives and the results produced by particular ordinances were highly questionable.[55] An example of the absurdity to which we are led is found in the case

---

Land Development Code, 8 URB. LAW 474 (1976).

51. One state which has borrowed heavily from the Model Code is Florida. *See* Pelham, *Regulating Areas of Critical State Concern: Florida and the Model Code*, 18 URB. L. ANN. 3 (1980); Pelham, *Regulating Developments of Regional Impact: Florida and the Model Code*, 29 U. FLA. L. REV. 789 (1977).

52. 37 N.J. 232, 181 A.2d 129 (1962).

53. *Id.* at 258, 181 A.2d at 143.

54. *Id.* at 256, 181 A.2d at 142.

55. In Maine, for example, see Penobscot Area Housing Dev. Corp. v. City of Brewer, 434 A.2d 14 (Me. 1981)(narrowly construed the term "family" so as to exclude group homes for the mentally retarded from the municipality); Warren v. Town of Gorham, 431 A.2d 624 (Me. 1981)(construed the town's zoning ordinance in a manner that distinguished between mobile and modular homes). It is generally conceded that no substantive differences exist so as to exclude the former from single family lots. *See also* Stewart v. Town of Durham, 451 A.2d 308 (Me. 1982)(preserved the town's 1976 near total exclusion of mobile homes from the community by construing the grandfather clause of the town's mobile home ordinance in a manner at odds with six years of town practice and obviously at odds with the intentions of the town in passing the ordinance).

County of Ada v. Henry,[56] sustaining an 80-acre minimum lot size. The majority opinion flows smoothly employing many familiar rubrics of the law. An incredulous dissenting judge is left to note:

> It is a strange West which we now have where a man of industrious nature is by a bureaucratic ordinance deprived of the right to build his own house on a ten-acre tract. And for what reason? Because it has been thought better that the law should be that a single dwelling be not erected on less than 80 acres! The proposition is basically so monstrous as to be undeserving of further comment.[57]

To summarize this point, the excesses of local land use controls are not readily correctable by variance mechanisms, revised enabling statutes, or judicial review processes. The errors and shortcomings of our initial approaches to local land use controls are largely preserved and sanctified. Thus, these errors and shortcomings become the norms out of which new and more threatening excesses spring.

III. The Hidden Agenda

More intolerable and socially damaging than the aforementioned incorrect premises upon which most local land use controls are predicated is the hidden agenda—the impermissible motives and objectives which to a greater or lesser degree permeate the enactment and administration of almost all local land use controls.[58] For example, zoning and subdivision control ordinances do not advertise themselves as fiscal planning tools, yet what has come to be called "fiscal zoning"[59]—making room for high-tax ratable land uses and keeping

---

56. 105 Idaho 263, 668 P.2d 994 (1983).

57. *Id.* at 268, 668 P.2d at 999.

58. *See, e.g.*, Lamb, *Housing Discrimination and Segregation in America: Problematical Dimensions and the Federal Legal Response*, 30 Cath. U.L. Rev. 363 (1981):

> Housing segregation is not a "natural development." Rather, it emerges largely from conscious and deliberate actions on the part of local governments, real estate interests, financial institutions, and white homeowners to keep minorities outside white community environs. And of course the problem is nothing new. Far from it. 'What is new is the scale of the phenomenon and the widespread public recognition of this reality and its disastrous consequences.'
>
> . . . .
>
> At the outset it should be emphasized that zoning, land use, and growth control planning are not inherently "bad." To the contrary, they are essential. However, they become "bad" when deliberately employed to have the effect of excluding those who could otherwise move into a community and wish to do so, but are denied that right.

Id. at 368, 379 (citation omitted). *See also* M. Danielson, The Politics of Exclusion (1976); A. Downs, Opening Up the Suburbs: An Urban Strategy for America (1973); L. Rubinowitz, Low-Income Housing: Suburban Strategies (1974).

59. Nowhere has the phenomenon of "fiscal zoning" been more carefully described and roundly denounced than in the Douglas Comm'n Report. *See* Douglas Comm'n Report, *supra* note 9. In the summary and introduction chapter the commission

out to the greatest extent possible high-cost service oriented land uses—is a widespread reality. In suburban and rural municipalities fiscal zoning sometimes takes the form of warding off almost all development activity. This form of zoning eliminates the need for new schools, roads, sewers, and other services so that property taxes can be kept low.

Only a handful of courts have had the courage to confront this issue. Almost twenty years ago Pennsylvania's highest court noted: "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 can not be held valid."[60] More recently the New Jersey court in its original *Mount Laurel* decision addressed these issues at some

---

noted: "Zoning was intended to control land development, but fiscal considerations often distort it, leading to economic and racial exclusion." *Id.* at 18. They further state:

> The problems of local government are greatly magnified because each political subdivision within the fragmented metropolis, relying primarily on the local property tax and facing heavy financial burdens, tends to lean inordinately on this splintered zoning power to boost its tax base. This is known as "fiscal zoning," the use of zoning to achieve fiscal objectives rather than purely land-use objectives. Fiscal zoning seeks to exclude from a jurisdiction any proposed development that might create a net financial burden and to encourage development which promises a net financial gain. Fiscal zoners try to strike a balance so the tax revenue which new development will contribute to local coffers will at least pay for the public services which that development will entail. The result of such practice is often serious economic and social dislocations.
>
> The most serious effect of fiscal zoning is the spate of exclusionary practices relating to residential development. The aim, of course, is to keep out the lower income groups, and especially large families which require significant public expenditures in education, public health and welfare, open space, recreational facilities, police and fire, and the like.
>
> . . . .
>
> Most communities want all cream and no skim milk. They want the best, not only in physical structures and facilities, but also in the economic levels of people who will become their future citizens. They are willing to accept some industry for their tax base, but it has to be the cream—the research type—and not heavy industry. Each community engages in "one-upmanship," attempting to outdo its neighboring communities. In the communities' race for the cream, they give little thought to a balanced community—to providing shelter for all economic levels that may wish to live in the community, for those who will teach in their schools, clerk in their supermarkets, and work in their industrial plants.
>
> The community rigs its master plan and accompanying zoning ordinance, making sure that it is almost impossible for low- and moderate-income families to move into the community by requiring large lots and reduced density, by prohibiting multifamily apartments, and by other excessive standards that price out poorer people.

Id. at 19. *See also* G. STERNLIEB, RESIDENTIAL DEVELOPMENT, URBAN GROWTH AND MUNICIPAL COSTS (1973).

60. National Land & Inv. Co. v. Kohn, 419 Pa. 504, 532, 215 A.2d 597, 612 (1965).

length:

> The township's principal reason in support of its zoning plan and ordinance housing provisions, advanced especially strongly at oral argument, is the fiscal one previously adverted to, i.e., that by reason of New Jersey's tax structure which substantially finances municipal governmental and educational costs from taxes on local real property, every municipality may, by the exercise of the zoning power, allow only such uses and to such extent as will be beneficial to the local tax rate. In other words, the position is that any municipality may zone extensively to seek and encourage the "good" tax ratables of industry and commerce and limit the permissible types of housing to those having the fewest school children or to those providing sufficient value to attain or approach paying their own way taxwise.
>
> . . . .
>
> We have no hesitancy in now saying, and do so emphatically, that, considering the basic importance of the opportunity for appropriate housing for all classes of our citizenry, no municipality may exclude or limit categories of housing for that reason or purpose. While we fully recognize the increasingly heavy burden of local taxes for municipal governmental and school costs on homeowners, relief from the consequences of this tax system will have to be furnished by other branches of government.
>
> . . . .
>
> Such restrictions are so clearly contrary to the general welfare as not to require further discussion.[61]

In short, most control measures which require extensive street, water, and sewer improvements, which create large minimum lot sizes, which set aside extensive areas for industrial and commercial uses, which establish significant set-back requirements, height limits, minimum square foot requirements, and, in some cases, bedroom number limitations, and which directly or indirectly prevent or limit the possibility for manufactured housing, low and moderate income housing, and most forms of multi-family housing, are fiscally motivated. These measures may address soils, public health and welfare, and environmental harms, but they are really seeking a favorable tax benefit-municipal cost ratio.

Another item on the hidden agenda might well be called the "us and them" issue. This is the power distribution issue, which asks the question: who is going to control this community—the old families which form an entrenched establishment of people who have lived here for some time and who have their roots here, or the newcomers? Local land use control tools which stop or significantly slow down the rate of growth have long been used to favor the former

---

61. Southern Burlington Cty NAACP v. Township of Mount Laurel, 67 N.J. 151, 185-86, 336 A.2d 713, 730-31, *appeal dismissed,* 423 U.S. 808 (1975).

over the latter.[62] In a democratic society with all of our pretentions one does not openly talk about control and keeping people out. That would be too blatant. We prefer euphemisms such as "orderly growth," "phased or timed development," or "growth matched to infrastructure capacity." The bottom line, however, is a not-too-rapid changing of the guard with plenty of opportunity for "our kind of people" to dictate the location, types, and quantity of development that will occur in the particular municipality.

Though there are few cases which speak directly to this point, the court in the previously cited *National Land & Investment Co.*[63] case concluded, after refuting a range of ostensible justifications for a highly restrictive municipal zoning ordinance:

> The brief of the appellant-intervenors creates less of a problem but points up the factors which sometime lurk behind the espoused motives for zoning. What basically appears to bother intervenors is that a small number of lovely old homes will have to start keeping company with a growing number of smaller, less expensive, more densely located houses. It is clear, however, that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary.[64]

---

62. A sad variation on this theme recently was reported on page 1 in the Mar. 4, 1984 issue of the Boston Globe. It involves an influx of newcomers in a town pulling the drawbridge up behind them by adopting large-lot and other restrictive zoning measures which price local housing beyond the reach of a preexisting, now outnumbered, indigenous population. The latter, or their children, are forced to leave; they cannot afford to stay. All this is done in the name of preserving the environment and protecting the quality of life. One might ask—whose life? This use of zoning power has provoked a court test in New Hampshire:

> In 1971, Carol and Ken Grant moved from Boston to this rural town of 2000. Eight years later, Carol was a member of the Board of Selectmen anxious to restrain Atkinson's growth by backing a zoning law that requires one-to-three-acre lots for each house.
>
> In 1981, with the town's population doubled, Carol Soares and her family say, they were forced to leave the area because of the boom and the new restrictive zoning in small towns such as Atkinson. Soares found housing 15 miles north in Manchester, a city of 90,000 that the New Hampshire native had never even visited.
>
> Now, in a court case that has been brewing for four years, Soares has sued Atkinson, claiming the town has adopted "exclusionary zoning" that purposefully keeps out all but the wealthy. Developer Peter Lewis, who wants to build moderate-income housing, has joined the suit.
>
> Soares' suit is being watched nervously by dozens of towns across southern New Hampshire that have adopted zoning requiring as much as five acres for a single home. The price of an acre in towns such as Atkinson has jumped from $3000 in 1971 to $20,000 today, according to real estate brokers.
>
> No matter who wins, the case surely will highlight the effects of what some call New Hampshire's rural gentrification.

Boston Sunday Globe, Mar. 4, 1984, at 1, col. 8.

63. 419 Pa. 504, 215 A.2d 597 (1965).

64. *Id.* at 533, 215 A.2d at 612.

More persuasive evidence of the existence of the attitudes described above may be discovered by personally attending local planning board, town, or city council meetings at times and in places where growth pressures are real and imminent, or where development proposals which will sharply increase population are on the table. One cannot help but observe the fact that the "locals" frequently do not want these newcomers; they are blunt about it, and they do not hesitate to suggest the use of police power controls to achieve their objective. Moreover, local officials all have access to lawyers who can put a legally permissible face on the real motives that are at work. Those planners and lawyers who regularly attend such meetings and participate in these processes, if permitted to speak off the record, would overwhelmingly confirm the argument presented. They, better than almost anyone, know that this unsavory aspect of the hidden agenda operates more frequently than we would like to admit.

A third unpalatable aspect of local land use controls is their almost overpowering tendency toward racial and economic segregation and exclusion. The land use equivalent of "whites only" and "poor people over there" can be observed in the pattern of controls adopted in many municipalities.[65] The direct use of zoning powers to exclude on racial grounds is today rare, although as the *Black-jack*[66] case suggests, not unheard of. Preferred instead is the indirect strategy of raising the cost of residential subdividing (utilizing many of the devices previously described). This has the effect of making it all but impossible for low income groups, which disproportionately include minorities, to locate in many municipalities.[67] So-called nice

---

65. This reality too was recognized over 15 years ago in the DOUGLAS COMM'N REPORT, *supra* note 9:

> The people in the slums are the symptoms of the urban problem, not the cause. They are virtually imprisoned in slums by the white suburban noose around the inner city, a noose that says "Negroes and poor people not wanted." It says this in a variety of ways, including discriminatory subdivision regulations, discriminatory fiscal and planning practices. In simple terms, what many of these practices add up to is a refusal of many localities to accept their share of housing for poor people.

Id. at 1. *See also* Note, *Exclusionary Zoning—City of Memphis v. Greene*, 8 BLACK L.J. 138 (1983):

> Subtle methods of discrimination masked by an assertion of local interests become the rule rather than the exception. The effect is exclusionary zoning which purposefully separates communities by race to enhance the rights of a few while denying the same rights to many others. As a result, the pattern of housing segregation in this country will flourish.

Id. at 143.

66. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974)(court struck down a zoning ordinance which was intended to and did operate in a racially discriminatory manner).

67. *See supra* note 58. *See infra* text accompanying notes 97-98. *See also* Branfman, Cohen & Trubek, *supra* note 41; Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

neighborhoods are thus left predominantly to white and middle class families, while the poor and minorities are left either in their part of town or in the central cities. We can act as if this is not so, but the described phenomenon has been observed by so many for so long that it cannot be credibly denied. Nearly thirty years ago Norman Williams, in a seminal piece dealing with planning law in a democratic society, noted:

> [S]egregation by economic groups in residential areas is not really a different problem from racial or ethnic segregation. Since most minorities are heavily concentrated in the lower-income groups, a successful policy of economic segregation will automatically bring about a very high degree of racial and ethnic segregation. In effect, economic segregation is not only the easiest but also the most effective form of racial and ethnic segregation; and so a high-rent housing project often turns up as an attempted "barrier" against expansion of a non-white area. A successful policy of economic, and therefore largely of racial and ethnic segregation, therefore provides in effect multiple protection against more democratic living.[68]

Through the 1960's and 1970's a range of law review commentators, national commissions, and presidential committees[69] adverted to these same conditions. One of them, in a terse preamble to a lengthy exposition of the problem, noted: "It is the authors' contention that staunch and unreasonable adherence to local zoning ordinances has caused and perpetuated racial and economic segregation."[70] The thesis seems amply borne out in the text. Still more recently the New Jersey court in its original landmark *Mount Laurel* decision began by noting:

> Plaintiffs represent the minority group poor (black and Hispanic) seeking such [affordable housing]. But they are not the only category of persons barred from so many municipalities by reason of restrictive land use regulations. We have reference to young and elderly couples, single persons and large, growing families not in the poverty class, but who still cannot afford the only kinds of housing realistically permitted in most places—relatively high-priced, single-family detached dwellings on sizeable lots and, in some municipalities, expensive apartments. We will, therefore, consider the case from the wider viewpoint that the effect of Mount Laurel's land use regulation has been to prevent various categories of persons from living in the township because of the limited extent of their income and resources.[71]

They then framed the legal issues as follows:

---

68. *See* Williams, *supra* note 2, at 330.

69. *See, e.g., supra* notes 9, 58, 65, and 67.

70. Aloi, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule*, 1 U. TOL. L. REV. 65, 65 (1969).

71. Southern Burlington Cty NAACP v. Township of Mount Laurel, 67 N.J. 151, 159, 336 A.2d 713, 717, *appeal dismissed*, 423 U.S. 808 (1975)(footnote omitted).

> The legal question before us, as earlier indicated, is whether a developing municipality like Mount Laurel may validly, by a system of land use regulation, make it physically and economically impossible to provide low and moderate income housing in the municipality for the various categories of persons who need and want it and thereby, as Mount Laurel has, exclude such people from living within its confines because of the limited extent of their income and resources.[72]

The court concluded that Mount Laurel could not exercise the police power in this manner. It extended its reasoning and order to include all other New Jersey municipalities similarly situated.[73]

The issue, of course, did not end here. The motivations that underlie this element of a municipality's hidden agenda are not so easily dissipated. A lengthy series of administrative and judicial proceedings unfolded culminating eight years later in what is generally referred to as the *Mount Laurell II* decision[74] in which an exasperated court saw the face of exclusion and the tenacity of its supporters much more clearly:

> We set forth in [Mount Laurel I] for the first time, the doctrine requiring that municipalities' land use regulations provide a realistic opportunity for low and moderate income housing. The doctrine has become famous. The *Mount Laurel* case itself threatens to become infamous. After all this time, ten years after the trial court's initial order invalidating its zoning ordinance, Mount Laurel remains afflicted with a blatantly exclusionary ordinance. Papered over with studies, rationalized by hired experts, the ordinance at its core is true to nothing but Mount Laurel's determination to exclude the poor. Mount Laurel is not alone; we believe that there is widespread non-compliance with the constitutional mandate of our original opinion in this case.[75]

But New Jersey is not alone in this regard. Thirty years and more of experience in all parts of the country testifies to the fact that municipally exercised land use control powers create and foster racial and economic segregation. This is undemocratic. It has and will continue to exacerbate tensions in society. It will not end of its own accord and does not even seem amenable to far-ranging and well-intentioned judicial orders. The conclusion seems clear—municipalities must be divested of these powers. If they are not, useful changes in housing patterns are unlikely to occur.

---

72. *Id.* at 173, 336 A.2d at 724.

73. *Id.* at 173, 190, 336 A.2d at 724, 733.

74. Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983)(This case represented the consolidation, for purposes of appeal, of six cases arising out of the original Mount Laurel decision; the six cases are cited in note 1 of the court's opinion. *Id.* at 199, 456 A.2d at 410. Each is discussed briefly later in the opinion. *Id.* at 202, 456 A.2d at 411-13.).

75. *Id.* at 198-99, 456 A.2d at 409-10.

A fourth unacknowledged objective of many local land use controls is keeping out whatever are perceived to be unwanted or undesirable land use activities. From power plants to junkyards, multifamily housing to mobile homes, prison facilities to homes for unwed mothers, the list of things that particular municipalities do not want is long and growing. These issues were addressed at some length in the second article in this three-part series[76] and will not be elaborated upon here except to note that the policy is both unwise and impermissible.

The exclusion of these socially necessary undertakings is seldom done directly. One is unlikely to find in any ordinance a listing of the activities that must find a situs somewhere else. That would be too candid. Such an approach might provoke legal challenge. It would also openly evidence both a certain ignorance (these are, after all, legal and essential pursuits, activities, and land uses in our complex society) and a beggar-thy-neighbor attitude (we do not want to deal with unsightliness or the complexities of difficult to locate facilities, but others can) that most municipalities will not admit to. Instead, when a municipality is confronted with a type of development it does not want or like and for which it has probably made no provision in its zoning ordinance, it talks about potential environmental harm, traffic problems, soil and water limitations, and neighborhood impact. The issues are studied, the administrative permitting processes become more attenuated, and valid sounding reasons for denying a rezoning or variance are fashioned.[77] Finally, the developer either caves in and tries again somewhere else or realizes that his only alternative is litigation—a costly and most unsure strategy for obtaining access to a particular municipality. Developers who go

---

76. *See* Delogu, *supra* note 5.

77. The phenomena described were recognized and discussed in the DOUGLAS COMM'N REPORT, *supra* note 9. It noted:

> Some of the most effective devices for exclusion are not discoverable from a reading of zoning and subdivision ordinances. Where rezoning is, in effect, necessary for many projects or where apartment development requires a special exception (as it does in some suburban communities), officials have an opportunity to determine the intentions of each developer with some precision. How many bedrooms will the units in his apartment house contain? What will be the rent levels? To whom does he plan to rent or sell? "Unfavorable" answers in terms of the fiscal and social objectives of such officials do not necessarily mean that permission will be denied outright. They may, however, mean long delays, attempts to impose requirements concerning dedications of land and provision of facilities over and above those which are properly required under the subdivision ordinance, and the like.

Id. at 216. *See also* Delogu, *The Misuse of Land Use Control Powers Must End: Suggestions for Legislative and Judicial Responses*, 32 MAINE L. REV. 29, 51 (1980) (dealing with delays and limitations imposed on developers by administrative processes).

elsewhere soon discover that there may be no place else to go because each town has similar land use control powers and a similar hidden agenda. This course of conduct, familiar to anyone who has worked within or observed local land use control processes, obviously does not serve the larger general welfare needs of the society. It is yet another misuse of local powers. Unfortunately, only a handful of courts have come to grips with this issue. Most agree with the conclusions reached in this Article. For example, the court in *Appeal of Girsh* stated:

> Nether Providence is a first-class township with a population of almost 13,000 persons and an area of 4.64 square miles. Approximately 75% of the Township is zoned either R-1 or R-2 Residential, which permit the construction of single-family dwelling units on areas not less than 20,000 and 14,000 square feet, respectively. Multi-unit apartment buildings, although not *explicitly* prohibited, are not provided for in the ordinance. The Township contains the customary commercial and industrial districts . . . . We hold that the failure of appellee-township's zoning scheme to provide for apartments is unconstitutional and reverse the decree of the court below.
>
> Appellee here has simply made a decision that it is content with things as they are, and that the expense or change in character that would result from people moving in to find "a comfortable place to live" are for someone else to worry about. That decision is unacceptable . . . .[78]

A fifth item on the hidden agenda is protection of what is euphemistically referred to as the "character of the community," the "amenity characteristics of the community," "open space," "rural character," or "aesthetic qualities." What is really meant to be protected is an existing status quo including community size, life style, patterns of development, and a range of present land uses. These are perceived to be desirable, wholesome, conducive to maintenance of the "good life," and somehow threatened by further development. It is feared these virtues will be lost if this idealized conception of the community is significantly altered, if change other than at a snail's pace occurs. The fact that the community may have changed markedly over the previous 5-10-25-50 years, and that change is inevitable and probably healthy is ignored in the community's haste to preserve itself in something close to the present form. Also ignored are the consequences of this municipal decision on neighboring communities, on the larger society, and on our espoused democratic values. The needs and aspirations of those who would move into the community are counted for naught.

Here too, only a few courts have had occasion to address these issues. Pennsylvania's highest court in a truly remarkable opinion

78. 437 Pa. 237, 239-40, 244, 263 A.2d 395, 396, 398 (1970).

already cited, *National Land & Investment Co.*, put it quite succinctly:

> The township finds itself in the path of a population expansion approaching from two directions.
>
> . . . .
>
> It is not difficult to envision the tremendous hardship, as well as the chaotic conditions, which would result if all the townships in this area decided to deny to a growing population sites for residential development within the means of at least a significant segment of the people.
>
> . . . .
>
> . . . the township urges us to consider the historic sites in the township and the need to present them in the proper setting. We are unmoved by this contention since it appears to be purely and and simply a makeweight.
>
> . . . .
>
> Closely related to the goal of protecting historic monuments is the expressed desire to protect the "setting" for a number of old homes in Easttown, some dating back to the early days of our Commonwealth. Appellants denominate this goal as following within the ambit of promoting the "general welfare" . . . . However, it must always be ascertained at the outset whether, in fact, it is the *public* welfare which is being benefited or whether, disguised as legislation for the public welfare, a zoning ordinance actually serves purely private interests.
>
> . . . .
>
> There is no doubt that many of the residents of this area are highly desirous of keeping it the way it is, preferring, quite naturally, to look out upon land in its natural state rather than on other homes. These desires, however, do not rise to the level of public welfare. This is purely a matter of private desire which zoning regulations may not be employed to effectuate. . . . The fourth argument advanced by appellants, and one closely analogous to the preceding one, is that the rural character of the area must be preserved.
>
> . . . .
>
> The township's brief raises (but, unfortunately, does not attempt to answer) the interesting issue of the township's responsibility to those who do not yet live in the township but who are part, or may become a part, of the population expansion of the suburbs. Four acre zoning represents Easttown's position that it does not desire to accommodate those who are pressing for admittance to the township . . . .
>
> 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.[79]

---

79. 419 Pa. 504, 519, 528-32, 215 A.2d 597, 605, 610-12 (1965). *See also supra* notes 8, 60 and 64.

In summary on this point, "no growth" or "slow growth" strategies aimed at preserving the status quo are impermissible and widespread but difficult to unmask. Municipal planners and lawyers have become adept at couching the community's real objectives in more appropriate language—in a consideration of factors to which courts historically have accorded municipalities wide discretion presupposing good faith and adherence to broad constitutional norms and limitations on the exercise of police power. But municipalities pursuing their hidden agendas are not operating within these principles. There is no good faith, no forbearance out of respect for the constitution or a larger sense of the term "general welfare." There is only parochialism—in appropriate legal language, an abdication of larger responsibilities, and a misuse of police power.

No one who has listened over a period of time to town and city council meetings at which land use policies are being discussed or who has sat in at planning board meetings and public hearings addressing land use issues can doubt the truth of the arguments presented. They cannot have failed to hear the populist rhetoric which at times goes so far as to assert a right to keep people out or to achieve other of the previously described hidden agenda objectives. The same meetings invariably produce a politician or two more than willing to pander to these instincts. There is an assumed belief that if the citizens or their elected representatives vote to approve any or all of these misuses of power that somehow the municipal course of conduct is legitimized.[80] Fortunately, constitutional

---

80. This proposition was given unwarranted credibility in the reasoning and dicta of the United States Supreme Court in James v. Valtierra, 402 U.S. 137 (1971)("Provisions for referendums demonstrate devotion to democracy, not to bias, discrimination, or prejudice." *Id.* at 141). The Court went on to note:

> The people of California have also decided by their own vote to require referendum approval of low-rent public housing projects. This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decisionmaking does not violate the constitutional command that no State shall deny to any person "the equal protection of the laws."

Id. at 142-43 (footnote omitted). This language has unfortunately been read by many to mean that any land use control measure passed by municipal officials or by a vote of the people is ipso facto constitutional. That is not what the Court said nor what it meant. What the Court permits is participation by the electorate through initiative or referendum processes in land use decisions—the Court assumes that the underlying substance of the land use controls or policy issues subject to voter approval is constitutionally valid. If it is not, the fact that it was passed by the voters will not save it. In other words, if an entire electorate voted to pass a zoning ordinance that barred blacks from the community, it would not stand for a moment. The use of a valid process for an invalid (an unconstitutional) end is not sanctioned by *Valtierra*. *See also* City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976); Comment, *The*

rights are not so easily abrogated. Their vindication may be delayed by these tactics but they are not often permanently lost.

We can act as if these attitudes, the underlying motivations characterized as the "hidden agenda" do not exist, but that will not change the reality. They do exist. They can be observed operating to a greater or lesser degree in almost every municipality. They have shaped local land use controls almost from the beginning. If this cannot be demonstrated in each case by formal proof it is only because we have made the burden of proof of those who would challenge local land use controls all but insurmountable.

The validity of this Article's assertions is borne out by the decisions of the handful of courts that have confronted these issues and by the growing number who criticize how local land use control powers are in fact being exercised.[81] Further evidence is found in the ubiquitous effects the misuse of local land use control powers gives rise to: a national housing shortage, housing costs made artificially high by unduly stringent land use controls, white suburbs and black inner cities,[82] the stunted development of the manufactured housing

---

Initiative and Referendum's Use in Zoning, 64 CALIF. L. REV. 74 (1976); Note, *The Proper Use of Referenda in Rezoning*, 29 STAN. L. REV. 819 (1977); Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427, 1528-42 (1978)(addressing the issues of due process and decision-making by the electorate through initiatives and referenda).

81. *See, e.g.*, KAISER COMM'N REPORT, *supra* note 9; DOUGLAS COMM'N REPORT, *supra* note 9; REPORT OF THE PRESIDENT'S COMM'N ON HOUSING, *supra* note 9; A. DOWNS, *supra* note 58; Rubinowitz, *supra* note 38; S. SEIDEL, *supra* note 7; B. SIEGAN, *supra* note 6; Sager, *supra* note 67; Aloi, Goldberg & White, *supra* note 70; Ellickson, *supra* note 3; Karlin, *supra* note 6; Kmiec, *supra* note 2; Krasnowiecki, *supra* note 3; Lefcoe, *supra* note 2; Mytelka & Mytelka, *supra* note 38. The list could be made infinitely longer but that is not the point. The real question is—what should be done? Most observers of the scene still hold out hope for reform. A handful, but a growing number, of critics believe reform is not possible—more drastic measures are necessary.

82. *See generally* PRESIDENT'S COMM'N ON HOUSING, *supra* note 6; DOUGLAS COMM'N REPORT, *supra* note 9; S. SEIDEL, *supra* note 7. The DOUGLAS COMM'N REPORT noted:

> The Commission believes that housing costs can and must be reduced . . . . Costs . . . can be cut if large-scale or industrialized production is combined with the most progressive existing products or techniques. To do this, we must also remove the barriers to large-scale distribution brought on by restrictive building codes and practices, subdivision regulations, and zoning ordinances.
>
> . . . .
>
> Costs could be cut by . . . [r]emoving zoning practices . . . which restrict land supply and raise the cost of site improvements through excessive large-lot zoning . . . . More objective standards for site improvements and subdivision regulations could also reduce some excessive costs now required. A major reform in the system of building codes would both permit new and less costly products and processes to be used and could provide uniformity of codes over metropolitan and state areas.

Id. at 16-17.

industry, the enclaves of economically stratified groups (rich here—poor there) in the society, and the inability to find a place for so many socially necessary and useful activities. Viewing these effects produces a sense of frustration. That frustration impelled the highest court in New Jersey to state with more hope than conviction: "To the best of our ability, we shall not allow it to continue . . . . The obligation is to provide a realistic opportunity for housing, not litigation."[83]

We must also realize that the likelihood of a more vigilant and far less deferential state and federal judiciary is not great. If we are to address the problem, more radical and direct legislative steps are necessary. The thesis of this Article is that it is time to withdraw from local governments the power to make land use control decisions. That step alone offers hope that the problems arising from fifty years of misuse of local land use control power can begin to be corrected.

IV. THE INHERENT DEFECTS

Quite apart from incorrect premises and hidden agendas which prevent local land use control mechanisms from effectively serving the society, we must also be aware of a range of inherent defects which local planning and zoning at its best is incapable of addressing. Foremost among these is the traditional requirement that land use controls be "in accordance with a comprehensive plan."[84] Yet the municipality, the repository of planning and land use control powers, is by definition a non-comprehensive jurisdictional entity. No matter how broad its programmatic thinking or how well-intentioned it may otherwise be with respect to land use matters, its capacity to shape events stops at the town line. A single metropolitan area which for all intents and purposes, particularly with respect to planning and zoning, ought to be viewed as an interrelated whole may consist of dozens or even hundreds of municipalities each pursuing in their own microcosmic way so-called comprehensive planning.[85] It is wishful thinking to believe that the sum of the parts will produce sensible metropolitan-wide land use strategies. It will not

---

83. Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 199, 456 A.2d 390, 410 (1983).

84. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955); Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899 (1976). An argument that the comprehensive planning process is unable to keep up with the dynamics of the marketplace and thus ought not to be unduly relied upon in fashioning or sustaining land use controls is advanced in Tarlock, *Consistency with Adopted Land Use Plans as a Standard of Judicial Review: The Case Against*, 9 URB. L. ANN. 69 (1975).

85. A classic treatment of this subject addressing the problems of metropolitan New York City makes the point in R. WOOD, 1400 GOVERNMENTS (1961). *See also* Kaplan, *The Balkanization of Suburbia*, HARPER'S MAGAZINE, Oct. 1971, at 72.

and it has not.

Some states have addressed these problems by clothing municipalities with some extra-territorial powers;[86] other states have created regional planning entities intended to bridge the difficulties described.[87] The former can only enlarge a single municipality's capacity to act comprehensively in slight degree. The latter, regional planning mechanisms, though much talked about in the literature, by courts, and by planning experts, are almost non-existent in any meaningful or effective sense of the word.[88] Despite some effort through the 1960's and 1970's by both the federal government and state governments to foment regional instrumentalities into being they are almost a dead letter today. Strong regional planning and land use control instrumentalities are too threatening to the autonomous decision-making powers of local governments, and for this reason more than any other they have been steadfastly resisted. The bottom line remains—we still lack really comprehensive planning as a predicate to the enactment of local land use controls.

A second inherent defect in land use controls exercised at local governmental levels is the inability at the local level to equitably allocate in a "least harms" context socially necessary but undesirable land uses. There is no assurance that a municipality acting responsibly in finding suitable space for a range of such uses (e.g., a sanitary landfill or a juvenile detention center) will call forth a similar level of responsibility on the part of their municipal neighbors, thereby spreading the risks and costs associated with these activities. In fact, Hardin, in his classic work *Tragedy of the Commons*,[89]

---

86. *See generally* 3 P. ROHAN, ZONING AND LAND USE CONTROLS § 20.02 (1984) (outlining various state approaches to extraterritorial reach).

87. These are almost always voluntary institutional arrangements and that is their weakness. *See, e.g.*, ME. REV. STAT. ANN. tit. 30, §§ 4511-4523 (1978 & Supp. 1983). *See also* Godschalk & Brower, *supra* note 42.

88. *See* Godschalk & Brower, *supra* note 42. They note:

> The number of regional councils able to deal effectively with regional equity issues is greatly outnumbered by the number of regional councils that have done little or nothing on this front.
>
> . . . .
>
> The realities of the local political process ensure that any attempts by state or federal governments to increase regional council authority will be resisted by local governments who feel a threat to their automony.

Id. at 197.

89. Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968)(dealing with appeals to conscience to achieve social objectives, the unworkability of such approaches, and a preference for a system which equitably allocates undesirable land uses through social arrangements and mutual coercions. *Id.* at 1251-52). *See also* Comment, *Developments in the Law—Zoning*, 91 HARV. L. REV. 1427 (1978):

> Moreover, voluntary inclusionary zoning poses a striking example of the "commons problem": localities are deterred from undertaking meaningful inclusionary programs in the absence of a general legal duty on *all* communities to allow low-income development because of the realization that scat-

would argue that precisely the opposite municipal conduct is almost certain. The result is that a responsible government (often a central city) will be further put upon by less responsible municipal neighbors to receive other more or less undesirable land use activities and facilities. There is no way out of the dilemma. Given the realities, municipal self-interest predominates. Without an allocative mechanism at state or sub-state (regional) levels each municipality, fearful of being overreached, finds it easier to utilize its land use control powers to keep out as many of these undertakings as possible. The net result is obvious and can be seen in all parts of the country—a growing range of necessary land using activities finds it difficult, if not impossible, to locate anywhere. The underlying premise of zoning—"a place for everything"—is stood on its head and for these land uses the premise becomes "no place anywhere." It is absurd, and within our present system of local governmental exercise of land use control powers there is no end to the absurdity.

A third inherent limitation on the local exercise of land use controls is the inability of local controls to address larger environmental problems. The latter, whether involving air or water pollution, noise abatement, ground water protection, or hazardous and toxic waste disposal invariably transcend municipal boundaries.[90] A single municipality, even if it desires to grapple with these matters, has neither the technical capacity, the financial wherewithal, nor the jurisdictional reach to develop sound strategies to do so. More frequently the local exercise of land use control powers gives rise to or exacerbates environmental problems. The suitable placement of an industrial zone or a town dump from one municipality's point of view may cause air pollution or aquifer pollution problems in neighboring municipalities (depending on wind direction, soils, the direction of groundwater movement) which the first community has little incentive to care about.[91] Moreover, zoning's historical propensity to

---

tered efforts will only enhance the comparative desirability of nonparticipating communities.

Id. at 1633.

90. *See generally* Mandelker & Rothschild, *The Role of Land-Use Controls in Combating Air Pollution Under the Clean Air Act of 1970,* 3 ECOLOGY L.Q. 235 (1973); Lamm & Davison, *The Legal Control of Population Growth and Distribution in a Quality Environment: The Land Use Alternatives,* 49 DEN. L.J. 1 (1972); Comment, *Coastal Land Use Development: A Proposal for Cumulative Area-Wide Zoning,* 49 N.C.L. REV. 866 (1971); Comment, *supra* note 89, at 1578-1624 (dealing with environmental land use regulation).

91. *See, e.g.,* Breiner v. C & P Home Builders, Inc., 536 F.2d 27 (3d Cir. 1976) (the court held that a municipality had no duty to protect the land in adjacent municipalities); *but see* Scott v. City of Indian Wells, 6 Cal. 3d 541, 492 P.2d 1137, 99 Cal. Rptr. 745 (1972)(the court recognized that citizens of nearby municipalities have standing to challenge the zoning decisions of a municipality that affect their property); Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954) (the court held that comprehensive planning requires municipal officials to consider

cluster industrial activities in industrial zones or parks inevitably serves to concentrate both air and water emissions from individual plant facilities, often exceeding the local capacity of the ambient air and adjacent waterbodies to receive and neutralize these wasteloads. Not only are the costs of pollution control higher in these circumstances but pollution damage (to persons and property) in the vicinity is also more likely.

Courts have long recognized both the municipality's and the judiciary's limited capacity to solve problems of this sort. For example in *Boomer v. Atlantic Cement Co.*, a prudent court noted:

> It seems apparent that the amelioration of air pollution will depend on technical research in great depth; on a carefully balanced consideration of the economic impact of close regulation; and of the actual effect on public health. It is likely to require massive public expenditure and to demand more than any local community can accomplish and to depend on regional and interstate controls.
>
> A court should not try to do this on its own as a by-product of private litigation and it seems manifest that the judicial establishment is neither equipped in the limited nature of any judgment it can pronounce nor prepared to lay down and implement an effective policy for the elimination of air pollution. This is an area beyond the circumference of one private lawsuit.[92]

A fourth inherent defect in locally applied land use controls lies in the negative character of such controls. At their worst local land use controls can prevent all but a few things—favored development types—from happening; at their best the most that a system of local controls can do is to create a climate in which a broader range of private developers and development activities may operate. Without more, however, they cannot guarantee that developers will in fact build desired and necessary projects within this broader framework. While the latter situation is to be preferred over the former, it must be seen that there is no affirmative dimension to local land use control mechanisms. Better zoning in other words does not in and of itself build needed housing. Nowhere was this more fully perceived than in the most recent *Mount Laurel* decision.[93] The court there, in order to remedy widespread and longstanding exclusionary zoning practices, ordered a two-step process—first, the removal of land use control barriers, to be followed by a range of affirmative municipal actions calculated to enhance the probability that low and moderate income housing would be built in a given community. In summary the court noted:

---

the effect of proposed development on nearby property even though it may lie in an adjoining municipality).

92. 26 N.Y.2d 219, 223, 257 N.E.2d 870, 871, 309 N.Y.S.2d 312, 314 (1970).

93. Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 456 A.2d 390 (1983).

> In order to meet their *Mount Laurel* obligations, municipalities, at the very least, must remove all municipally created barriers to the construction of their fair share of lower income housing. Thus, to the extent necessary to meet their prospective fair share and provide for their indigenous poor (and, in some cases, a portion of the region's poor), municipalities must remove zoning and subdivision restrictions and exactions that are not necessary to protect health and safety.[94]

This was step one, but the court realized that removal of local land use barriers alone might not give rise to what it termed "a realistic opportunity for the construction of lower income housing."[95] It reasoned:

> [T]he individuals [developers] may, for many different reasons, simply not desire to build lower income housing. They may not want to build any housing at all, they may want to use the land for industry, for business, or just to leave it vacant. It was never intended in *Mount Laurel I* that this awesome constitutional obligation, designed to give the poor a fair chance for housing, be satisfied by meaningless amendments to zoning or other ordinances. "Affirmative," in the *Mount Laurel* rule, suggests that the *municipality* is going to do something, and "realistic opportunity" suggests that what it is going to do will make it *realistically* possible for lower income housing to be built. Satisfaction of the *Mount Laurel* doctrine cannot depend on the inclination of developers to help the poor. It has to depend on affirmative inducements to make the opportunity real.[96]

The court then went on to lay out the requirements of step two—the affirmative dimensions of its remedial order. These are largely beyond the scope of this Article and will not be discussed but included the creation of housing subsidies, the fashioning of inclusionary and incentive zoning devices, mandatory set-asides, and the facilitating (perhaps even building) of public housing and non-profit housing ventures.

The basic proposition, however, bears repeating—the inherent defect in any system of local land use controls is its lack of an affirmative dimension. The closer we come to controls at their best, the *Mount Laurel* court's step one, the better off we are, but removal of land use barriers is no guarantee that developers will build what may be needed. Some commentators have argued, consistent with views expressed in this Article, that if we could move even this far (to step one), market forces would enable developers to go a long way toward meeting the New Jersey court's affirmative (step two)

94. *Id.* at 258-59, 456 A.2d at 441.
95. *Id.* at 259-60, 456 A.2d at 442.
96. *Id.* at 260-61, 456 A.2d at 442.

expectations.[97] A recent law review piece drew the economic and legal realities into sharp focus:

> In California, the prices of homes have doubled, tripled, and even quadrupled within the past six years. Rents have increased at a similar pace, and early in 1980 the vacancy rate was placed at less than one percent. Inflation may have contributed to this phenomenon but cannot fully account for it. The main cause is a shrinking supply of housing relative to demand. Because there are no real shortages of labor, material, or land, had market forces been permitted to operate without restraint, the supply of housing would have kept up with demand. Instead, supply and demand notions were shelved for political decisions to "manage and control growth"—euphemisms for regulations that artificially and deliberately limited the construction of housing. Given a growing demand for housing of all kinds, a policy decision to limit the supply must inevitably drive prices upward. In California, the limitations were great. It was predictable that price increases for homes and rentals would be correspondingly great.
>
> The most effective way of limiting the supply of housing is to give to government a general power to control the use of land . . . . The process is called *zoning*. Its stated purpose is regulation that would separate incompatible land uses and protect against present and anticipated environmental harms. But whatever its stated purpose, zoning functions censoriously by imposing and legitimizing prior restraints on the use of land. As a result, genuine monopoly effects are created—less production of housing and prices influenced upward. . . . Through zoning laws, government has, in fact, become the sponsor of exclusion and discrimination and the instrument through which supply is curtailed and price increased.[98]

It follows then that if exclusionary zoning laws could be eliminated, developers would not have to be prodded. A more normal marketplace would create its own incentives. Supply would more nearly match demand. Lowered developer costs would further expand the supply of housing with the net result being a reduction in housing prices with all of the attendant social and economic benefits this direction of movement would give rise to. These arguments too are largely beyond the scope of this Article and will not be pursued further; the points are raised only to underscore the extraordinarily negative character and consequences of local land use controls as we have come to know them.

An argument is sometimes made that an affirmative character is imparted to local land use controls by a municipality's willingness to be flexible in a bargaining sense with developer-proposed zoning amendments, variance requests, and formulas for cost sharing of site

97. *See, e.g.*, Karlin, *supra* note 6.
98. *Id.* at 561-64 (footnotes omitted).

improvements. Such flexibility can be very troublesome.[99] It cannot rightly be characterized as an affirmative dimension of local land use controls if some developers obtain favorable treatment and others do not on the basis of ill-defined standards and shifting criteria for rezoning and granting variances. A rezoning in such circumstances merely changes the rules of the game in a manner attractive to a particular developer. He may build, but only because he has gained an unfair advantage over his competitors. What is called flexibility is often nothing more than arbitrary and capricious conduct.[100] It may be enjoined, but when it is not, such conduct does violence, both to the reliance expectations of those property owners in proximity to the benefitted developer, and to principles of equity and fairness which should underlie land use decision-making. Moreover, even a benefitted developer must realize that today's gains may be lost tomorrow by operation of the same processes. Viewed in this light flexibility has no virtue—it is just another negative aspect of local land use controls.

V. An Alternative Strategy

The thesis of this Article set out in the Introduction—that local land use control powers have outlived their usefulness and accordingly should be totally withdrawn—seems justified on the basis of any or all of the major arguments advanced: that such controls are predicated on incorrect premises; that such controls are frequently utilized to achieve a "hidden agenda," a range of impermissible ends; and that such controls are inherently incapable of addressing some important land use issues.

The number of problems that local land use controls either create or exacerbate and the concomitant social overhead costs are so great

---

99. *See generally* 1 P. Rohan, *supra* note 86, at §§ 5.01-04[6]; Shapiro, *The Case for Conditional Zoning*, 41 Temp. L.Q. 267 (1968); Comment, *Contract Zoning: A Flexible Technique for Protecting Maine Municipalities*, 24 Maine L. Rev. 263 (1972); Note, *Conditional Zoning in Texas*, 57 Tex. L. Rev. 829 (1979); Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L. Rev. 897 (1965).

100. Conditional, contract, and spot zoning are certainly not impermissible per se. However, their potential for abuse has both divided commentators and caused courts to scrutinize carefully (and skeptically) exercises of these zoning tools. The textual and footnote discussion and citations in 1 P. Rohan, *supra* note 86, at §§ 5.01-04[6], make this abundantly clear. *See also* 5 P. Rohan, *supra* note 86, at §§ 38.01-85[3]. The objection to these devices, even in contexts where they are narrowly sustainable, is that they permit a use of property subject to conditions and restrictions other than those generally applicable to other developers and property in the vicinity. This unequal treatment inevitably provides the benefitted party with a windfall, is seldom accomplished with full and complete notice to the larger community, is totally discretionary and thus may or may not be repeated should similar conditions and circumstances arise in the future, and at least suggests that legislative acts (exercises of the police power) are bargained-for commodities. The alleged advantages of flexibility in land use control seldom offsets this array of negative characteristics.

that one is tempted to argue that if we did nothing more than repudiate local land use controls in toto, leaving the whole land use development process to the decision-making of the marketplace, we could hardly be worse off.[101] Appealing as it may be to argue this proposition, we need not go to this extreme. This Article, to be sure, endorses a total withdrawal of all local land use control powers, but this withdrawal presupposes fashioning at the state governmental level a broad and effective range of performance standards addressing all of the potential harms which development activities give rise to, and the creation of a system providing for state or sub-state (regional) review of major development proposals. The latter would insure that proposed developments are suitably sited, capable of meeting performance standards, and appropriately conditioned (if approved) to minimize potential harm to the public's health, safety, and welfare.

It is not possible to anticipate and to lay out all of the details which will insure the workability of this proposed alternative strategy. Moreover, developing the details, while not unimportant, does not seem the major task or a task of great difficulty. Gaining acceptance of the major premises of the alternative strategy, and most importantly, removing land use control powers from local governmental levels—that will be the rub. If the broad outline is accepted, we can fashion the details necessary to make the new strategy work. Having said this, it is nonetheless possible and probably useful to set forth some of the details, best guesses, and underlying rationales of the proposal being advanced.

A. What Local Land Use Control Powers Should Be Withdrawn?

This is a case where "all" means "all." It will not do to divest local governments of zoning powers while leaving them free to control subdividing, to fashion local performance standards (building codes) or to create any one of several other police power controls that will allow the existing pattern of local control of the development process to remain largely intact. The power to adopt zoning ordinances, subdivision control ordinances, official maps, building codes, height and setback controls, architectural review boards, or any specialized ordinances dealing with planned unit development, mobile homes, transferable development rights, or historical districts, must be withdrawn by repeal of state enabling legislation upon which such ordinances are predicated and/or by modification of "home rule" powers which underlie such ordinances.[102]

---

101. *See generally* B. SIEGAN, *supra* note 6; Karlin, *supra* note 6, at 566 ("It cannot be emphasized too strongly that the zoning, not simply the abuse, produces the distorting effects." (emphasis omitted)).

102. This simply recognizes the correct legal status of municipal govern-

Gone too, and unnecessary at this point, would be the zoning board of appeals and the whole concept of "variance."[103] The local building permit process as we now know it would also be gone. The role of the building inspector would be limited to enforcement of state level performance standards, such other state level land use standards and limitations that may be created, and enforcement of conditions incidental to state review of major development projects located within the municipality. The planning board and any technical staff could be maintained, but only to serve the data gathering and informational needs which the provision of the remaining broad range of municipal functions and services (other than land use control) might require. Finally, the capacity of municipal governments to indirectly affect development processes by an unreasonable refusal to extend streets, sewer and water lines, by unreasonably refusing to participate, as necessary, in the provision of public housing and by other means would also have to be monitored.[104] Appropriate state legislation may need to be fashioned to address these secondary levels of obdurateness. In short, we must begin with a clean slate—no local controls over the development process.

B. What Marketplace Reactions And Controls Are Likely To Emerge?

The most recent report of the President's Commission on Housing[105] concluded that government regulations, principally local land use controls, have a substantial negative impact on the cost and availability of housing. Specifically, the Commission found:

> Regulation can hinder the efficient operation of the marketplace by denying consumers a wide range of housing choices and denying owners and developers the freedom to use property efficiently; overregulation has hampered the production of housing, particularly for people of average or lower income;
>
> Regulation has unnecessarily pushed up costs in some localities by as much as 25 percent of the final sales price; and
>
> Regulation often limits flexibility in housing construction, both by inhibiting the substitution of available materials, labor, land,

---

ments—they are not sovereign, they have no inherent powers, they are not independent units of government. They are subunits of the state possessed only of those powers delegated narrowly through specific enabling acts or more broadly by a grant of home rule power and then only for so long as those delegations remain unrepealed. *See* Inhabitants of Beals v. Beal, 150 Me. 80, 84, 104 A.2d 530, 532 (1954)("The rights, powers, liabilities, duties and boundaries of Municipal Corporations are within legislative control.").

103. Few will lament this latter passing. *See supra* note 48.

104. *Cf.* Robinson v. City of Boulder, 190 Colo. 357, 547 P.2d 228 (1976)(the city could not refuse to extend sewer and water lines to a proposed development as part of or a complement to its land use control and planning processes).

105. PRESIDENT'S COMM'N ON HOUSING, *supra* note 6.

> and capital in response to changes in relative prices, and by impeding the rate at which new products and building systems can be introduced.[106]

The *Mount Laurel* court noted that restrictive land use controls raised the price of new single family housing from $33,843 to $57,618.[107] Finally, as Karlin noted:

> The United States has no technical or intrinsic barriers that limit the construction of housing. The resources for extensive building are readily available, and developers are quite capable of providing whatever amount of housing is necessary to satisfy demand. In the absence of regulation, a person who wants housing and is willing to pay for it at the market price would be able to obtain it.[108]

The common and significant inference to be drawn from these diverse sources is that once the strictures of local land use controls are removed, the price of new housing and other types of development will fall; the supply will dramatically increase and over time the presently unmet demand for housing to a large extent will be satisfied.[109] The secondary or ripple effects almost certainly will benefit renters and purchasers of already existing housing. The total stock of housing will have increased and the overall supply and demand for housing will be more closely aligned at a lower average price, thus taking the pressure off of the rental and used home markets. The removal of local land use control restrictions also will benefit the manufactured housing industry in much the same manner and for the same reasons as just described.[110] The broader social implica-

---

106. *Id.*

107. Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 259 n.25, 456 A.2d 390, 441-42 n.25 (1983).

108. Karlin, *supra* note 6, at 561 n.4.

109. This view is widely shared. *See, e.g.*, S. SEIDEL, *supra* note 7; B. SIEGAN, *supra* note 6, at xvii ("I believe one means to achieve [safe affordable housing] is to eliminate one of the principle barriers to production, zoning, and thereby allow the real estate market greater opportunity to satisfy the needs and desires of its consumers."); Karlin, *supra* note 6 at 561 ("[H]ad market forces been permitted to operate without restraint, the supply of housing would have kept up with demand."). These views are embraced implicitly by all of the presidential study commissions that have examined these problems in recent years. *See supra* note 9.

110. In an Afterword to S. Seidel's volume on housing costs, S. SEIDEL, *supra* note 7, a co-author, K. Ford, looking at the spectrum of governmental land use regulations at the development and construction stage, concluded that 19.7% ($9,844) of the cost of a $50,000 conventionally built house "may be related to government regulatory excesses of one form or another." *Id.* at 335. If these more or less fixed regulatory costs in an absolute sense are applied to modern manufactured housing, which according to industry and Maine State Planning Office data range from $20,000-25,000, they obviously will both inflate and be a much higher percentage of the total cost for a unit of such housing. This obviously will impact most adversely on those least able to afford these "regulatory excesses" and most in need of low cost manufactured housing. It follows, then, that if these regulations were eliminated the final cost of manufactured housing would be lowered, the housing would be within reach of a

tions of more housing being available (without government subsidy) to more people at more affordable prices ought not to be lost sight of.

As for market constraints, it may be well to remember Siegan's observation: "Economic forces tend to make for a separation of uses even without zoning."[111] Developers are in business. They need to be able to produce a product that can be rented or sold in places and in quantities, and at prices that reflect the tastes, needs, and aesthetic demands of a buying public. By and large housing will not be put in industrial zones and industrial zones will not be located in scenic corridors. The marketplace, particularly the more competitive one envisioned, will not tolerate gross disparities from societal norms and expectations. There will be some changes—in density levels, in the location of certain land using activities, in design and materials, in the degree of mixed use, and in a variety of other ways that cannot be anticipated—but these changes will not necessarily be bad. Many, in fact, will be good, a much needed breath of life.[112] A new variety is precisely what is anticipated. We have for too long overestimated the capacity of the police power to fashion an efficient and orderly development process. We have underestimated the rationality and capacity of the marketplace to address these processes. The proposal being advanced will reverse this focus.

It is also well to remember that long before zoning we relied with some success on restrictive covenants, easements, and ownership agreements to fashion limitations and to provide protections and enforceable rights that some developers and purchasers of property desired. These devices have never been abandoned, although they have certainly been somewhat less used in recent years. It seems well within the mark to anticipate that if we move along the lines suggested, these tools and a host of modern variations (time-share agreements and condominium by-laws)[113] will be fashioned, dusted off, and made easier to utilize and enforce. Property teachers of the future might well enjoy discussing and expanding a new body of land use covenant law. A larger society which flourished before modern land use laws will readily learn to live on after the passing of these laws.

---

larger segment of the society, and demand for such housing would increase. *See* MAINE STATE PLANNING OFFICE, SUMMARY OF ISSUES RELATED TO MUNICIPAL REGULATION OF MANUFACTURED HOUSING (1981); MANUFACTURED HOUSING INSTITUTE, QUICK FACTS (1982).

111. B. SIEGAN, *supra* note 6, at 75.

112. That is the whole underlying thesis of Jane Jacobs, *supra* note 26. *See supra* notes 25-27 and accompanying text.

113. *See* Ellickson, *supra* note 3 as well as notes 28-34 and accompanying text; *cf.* Comment, *Time-Share Condominiums: Property's Fourth Dimension*, 32 MAINE L. REV. 181 (1980).

C. *What Is Meant By State Level Performance Standards?*

A performance standards approach to land use control is not new. Over thirty years ago Dennis O'Harrow published *Performance Standards in Industrial Zoning.*[114] More recent publications have suggested a performance standards approach at local governmental levels in lieu of traditional, so-called Euclidean zoning, both as a way of addressing particular environmental problems, e.g., noise, air emissions, sensitive (fragile) land areas,[115] and as a way of imparting both flexibility and a higher degree of imagination to local land use controls. A comprehensive 1980 publication on performance zoning defined the approach as follows:

> As used here, the term [performance zoning] refers to a technique in which uses are generally permitted as a matter of right in urbanizing areas. Performance standards, not districting, are employed to protect the public health, safety, and welfare . . . . The performance standards allow the landowner considerable freedom to develop property in several different ways. These standards are based variously on the concepts of carrying capacity and threshold of safety, as well as on principles designed to insure a suitable level of environmental quality.[116]

The emphasis, then, is not on districting or lengthy itemizations of permitted and conditional uses and special exceptions, but on harm avoidance and prevention of adverse externalities. The propo-

---

114. D. O'Harrow, *Performance Standards in Industrial Zoning*, AMERICAN SOCIETY OF PLANNING OFFICIALS, ADVISORY SERVICE INFORMATION REPORT #32 (1951). *See also* L. KENDIG, S. CONNOR, C. BYRD & J. HEYMAN, *supra* note 10; C. THUROW, W. TONER & D. ERLEY, *supra* note 10; McDougal, *supra* note 10.

115. *See* McDougal, *supra* note 10. He begins by stating that for whatever reasons, zoning "has not been an effective land-use planning device." *Id.* at 256. He suggests an alternative:

> Each use of land produces or creates certain by-products that may adversely affect the use of other land.
>
> . . . .
>
> The alternative under consideration would not establish a hierarchy of uses or establish use-districts. Instead, it would afford protection from undesirable by-products by imposing performance standards on each use of land. These performance standards would specify a maximum level of by-product production, to which each use of land must conform. The specific by-products a community would regulate include noise, smoke, noxious gases, fire hazards, wastes, dust and dirt, glare, heat, odor, traffic, electromagnetic emissions, radioactive emissions, aesthetics, psychological effects and vibrations. Communities would also control height and intensity of land use.
>
> Although these regulations could be expressed in broad or "primitive" terms, such as "no obnoxious noise, smoke, vibrations, odors, etc.," the preferable method is to specify the acceptable levels of performance in terms of available scientific data, whenever possible.

Id. at 258-60 (footnotes omitted).

116. L. KENDIG, S. CONNOR, C. BYRD & J. HEYMAN, *supra* note 10, at 281.

sal advanced in this Article embraces and would expand upon this approach. Every facet of development activity ought to be scrutinized: water, air, and noise emissions; building construction safety; fitness for purpose (warranty-type standards); parking, interior, and approach roads; soils, slope, and erosion; water supply; solid waste handling; and aesthetic considerations. Development would no longer be excluded or impinged upon by local land use controls. At the same time, however, development would not be permitted to impose harms or risks to the health and safety of the larger society or of individuals and property adjacent to a particular development site.

The proposal would shift the implementation role—the duty to proceed along the lines described from individual local governments—to the state level of government. This would insure statewide uniformity and a more in-depth development of the range of necessary standards. States are not without some experience in addressing responsibilities of this type. Most states already have in place a state-level planning agency with a technical staff familiar with the approach being suggested. Many states already have some statewide (plumbing, electrical, building) codes.[117] All states have some experience, pursuant to federal air and water pollution control laws, at fashioning statewide or sub-state (regional) ambient standards and point-source (individual development) emission standards capable of achieving the ambient standard.[118] These personnel, experiences, and existing models will need to be expanded under the strategy being proposed, but expansion is far easier than beginning without this facilitating background.

D. How Would State or Sub-State (Regional) Site Review of Major Development Proposals Work?

There is no single or best approach to this state level mechanism

---

117. The problem of course is that we have not moved far enough in this direction (the fashioning of state and national codes). We have far too many and too fragmented a system of local codes. *See* DOUGLAS COMM'N REPORT, *supra* note 9, particularly chapters 3 and 4 dealing with building and housing codes. In its summary the Douglas Commission tersely noted: "Building code jurisdictions are thousands of little kingdoms, each having its own way: What goes in one town won't go in another—and for no good reason." *Id.* at 21; S. SEIDEL, *supra* note 7. *See also supra* note 44.

118. See, *e.g.*, ME. REV. STAT. ANN. tit. 38, §§ 581-608 (1975) which establishes a statewide system for air pollution control including the fashioning of ambient and point-source emission standards within designated air quality control regions. Performance standards reflecting regional differences (rural as opposed to urban settings, coastal as opposed to inland differences, timberland as opposed to agricultural land differences) and differences between the harms emanating from industrial activity as opposed to residential or commercial undertakings would not seem to be conceptually much different from what Maine is now doing in these related areas of environmental concern.

designed to review and control proposed large-scale development activities which in most instances have sub-state (regional) impact and some potential for adverse environmental or land use consequences. The handful of states that have mechanisms of this sort in place seem firmly committed to them,[119] and though there is no uniformity, there are some similarities in approach that can be described. These mechanisms all focus on major development proposals, although some states define this term more broadly than others. They all require some showing of compatability with existing comprehensive plans, pollution control laws, and compliance with state or local subdivision and site infrastructure standards.[120] They all provide some type of hearing and public participation process in which local governments and citizen groups may raise concerns and be heard with respect to the proposed project. They all have some capacity to condition an approval, thereby reshaping original development proposals that have some troubling aspects to them but which the state reviewing agency does not really want to turn down.[121] Finally, they all provide some form of administrative and/or judicial review of the final administrative decision.

Beyond this, some of these state mechanisms preempt local land use controls by providing a type of "one window"[122] development

---

119. See, *e.g.*, ME. REV. STAT. ANN. tit. 38, §§ 481-489 (1978) which establishes a state level review of developments which "because of their size and nature are capable of causing irreparable damage to the people and the environment in their surroundings." *Id.* at § 481. Vermont has a similar mechanism which provides for both state and regional involvement in the review process. VT. STAT. ANN. tit. 10, §§ 6001-6091 (Supp. 1970).

120. See, *e.g.*, ME. REV. STAT. ANN. tit. 38, § 484 (1978), outlining a wide array of financial, technical, soils, traffic, and amenity standards that a development under review must meet.

121. *See, e.g.*, ME. REV. STAT. ANN. tit. 38, § 484 (1978) expressly authorizing the reviewing board to condition any development approval it may grant. This power was discussed and broadly sustained by Maine's highest court. *In re* Belgrade Shores, Inc., 371 A.2d 413 (Me. 1977).

122. Oregon's approach in this regard is interesting in that it neither preempts local controls, nor does it adopt a tolerant concurrent posture. Its legislation (viewed by many as extraordinarily farreaching), OR. REV. STAT. §§ 197.030 to 197.060 (1983), creates a Land Conservation and Development Commission (LCDC) charged with preparing and adopting a statewide system of planning goals and guidelines with which both local governments and state agencies are required to comply in assessing both public infrastructure expenditure proposals and private development proposals. Though some projects require LCDC permits and others may be enjoined by LCDC, enforcing consistency would seem to be an unresolved problem. *See* Fasano v. Bd. of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973); Willamette University v. Land Conservation and Dev. Comm'n, 45 Or. App. 355, 608 P.2d 1178 (1980); Morgan & Shonkwiler, *Urban Development and Statewide Planning: Challenge of the 1980s*, 61 OR. L. REV. 351 (1982); Morgan & Shonkwiler, *Statewide Land Use Planning in Oregon with Special Emphasis on Housing Issues*, 11 URB. LAW. 1 (1979). *Cf.* Granger & Wise, *A Critique of One-Stop Siting in Washington: Streamlining Review Without Compromising Effectiveness*, 10 ENVTL. LAW 457 (1980).

permitting process. Other state review mechanisms are intended to operate independently of (in addition to) whatever local reviews and permitting processes may exist. Some states focus their review only on developments proposed in or in proximity to fragile areas (sometimes characterized as "areas of critical state concern").[123] Some states put the burden on the developer to show not just compliance with specific standards but also to demonstrate a more generalized reasonableness of scale, compatability with the surrounding environment, and a rough preponderance of social, often translated into economic, benefit over cost.[124] Some states allow sub-state (regional) review bodies operating under general state guidelines to address these issues.[125] This lifts the permitting process for these larger-scale developments out of the hands of the most parochial, and perhaps the most malleable, level of government, but still keeps it within reach of the region that will be most affected. Such an approach also keeps the approval process out of the hands of state government, which in some parts of the country is trusted in land use matters little more than the federal government.

The makeup and operational mechanics of state or regional reviewing instrumentalities also varies widely. Some states employ full time boards while others have citizen boards. Some have technical staffs while others do not, and draw instead on line agencies of state government for input and technical backup. Some require preparation of state level impact statements[126] while other states have an application process more akin to local subdivision approval. Some have developed detailed guidelines for development approval while others rely on the broad language of statutory mandates and general harm avoidance critiera. These organizational differences do not alter the reality—state level review of major developments is more effective than local review would be.

The point being made is that mechanisms of the type suggested exist. They can be expanded in scope and should be utilized by more

---

123. *See generally* Pelham, *supra* note 51; Note, *supra* note 5.

124. See, *e.g.*, ME. REV. STAT. ANN. tit. 38, § 484 (Supp. 1983), which was recently amended to "permit the applicant to provide evidence on the economic benefits of the proposal as well as the impact of the proposal on energy resources." Query whether those opposed to a project may present contra evidence of direct and indirect social costs (negative economic effects).

125. This is Vermont's approach. *See supra* note 119. See also Minneapolis-St. Paul Metropolitan Council approach, MINN. STAT. § 473.122-245 (1977 & Supp. 1984) described more fully in Note, *Metropolitan Government: Minnesota's Experiment with a Metropolitan Council*, 53 MINN. L. REV. 122 (1968). *Cf.* C. HEIN, J. KEYS & G. ROBBINS, REGIONAL GOVERNMENTAL ARRANGEMENTS IN METROPOLITAN AREAS: NINE CASE STUDIES (1974).

126. *See generally* W. RODGERS, ENVIRONMENTAL LAW (1977); Pridgeon, Anderson & Delphey, *State Environmental Policy Acts: A Survey of Recent Developments*, 2 HARV. ENVTL. L. REV. 419 (1977); Note, *State Environmental Impact Statements*, 15 WASHBURN L.J. 64 (1976).

states than now utilize them. We have a body of experience with state review of major development proposals that we can learn from. Individual states can work out the details of state development review in whatever manner suits their particular size, need, and resources—that is not a problem. We do need to remember that the end of local land use controls should not and need not give rise to a period of excess. State level review of major development proposals is part of a system of public and private constraints that will enable us to avoid harm to legitimate public interests.

E. What Other State Land Use Limitations or Affirmative Measures (Particularly with Respect to Difficult to Locate Land Uses) May Be Necessary?

A useful but not an essential part of the alternative strategy being proposed would have the state undertake a range of land identification and control (perhaps little more than earmarking) measures. For example, the state is in the best position to identify and classify fragile or environmentally unique lands, e.g., wetlands, marshes, flood plains, coastal storm surge areas, aquifers, peat bogs, steep slope areas, geologic anomalies, animal or waterfowl nesting areas, etc.[127] A more stringent set of performance standards (than those generally applicable) could then be developed to limit the type and reduce the density of any development on or in proximity to these areas. In the same vein, the state may want to identify prime woodland, agricultural, or mineral lands and limit unrelated development on these lands.[128]

---

127. This is precisely the role contemplated in Article 7 of the American Law Institute's MODEL LAND DEVELOPMENT CODE, *supra* note 50. The commentary to Article 7 notes: "The state may designate areas of the state in which, because of their natural resources or the characteristics of development that has previously occurred, future development of any character becomes an issue of statewide concern." *Id.* at 253.

128. MODEL LAND DEV. CODE, *supra* note 50, at § 7-201, encourages precisely this approach:

> Section 7-201. *Designation of Areas of Critical State Concern*
>
> (1) The State Land Planning Agency may by rule designate specific geographic areas of the state as Areas of Critical State Concern and specify the boundaries thereof. In the rule designating an Area of Critical State Concern the State Land Planning Agency shall set forth
>
> (a) the reasons why the particular area is of critical concern to the state or region;
>
> (b) the dangers that might result from uncontrolled or inadequate development of the area;
>
> (c) the advantages that might be achieved from the development of the area in a coordinated manner;
>
> (d) general principles for guiding the development of the area; and
>
> (e) the type of development, if any, that shall be permitted pending the adoption of regulations under §§ 7-203 or 7-204.

The state may also want to preempt the random location of large private industrial and public or quasi-public facilities such as power plants, steel mills, airports, solid or toxic waste disposal facilities, and waste treatment plants.[129] The question is not whether public or private entities can find a site somewhere. In most cases they probably can, but is it the best site and not merely an available one?[130] Does it fit in with other state level thinking, planning, land use policies, and environmental objectives? The only way this can be assured is for the state to undertake at least to identify suitable sites for facilities of this sort.

This process of site identification could be extended to include any number of difficult-to-locate land using facilities and activities (junkyards, recycling facilities, rendering and fish processing plants, jails, mental hospitals, and group homes). The state might even need or want to consider acquiring such sites, improving and modifying them as necessary, and reselling them with appropriate conditions to developers involved in these respective undertakings.[131] Such sites could be presumptively deemed to meet any state or substate (regional) site approval process that might exist. This would make them more attractive and readily saleable to developers. Other sites for these large or difficult-to-locate undertakings (those found by developers acting on their own) could be required to meet stringent site suitability tests, if indeed they were not prohibited by the state altogether. A last advantage in having the state act in the manner described is that it could insure that no municipality would be unduly burdened with a large number of these relatively less desirable but socially essential developments. A rational spreading, an eq-

---

Id. at 257-58.

129. See MODEL LAND DEV. CODE, *supra* note 50, at §§ 7-301, 7-302, which contemplate and invite state involvement in locating major developments of the type outlined. The impact is not local; it is regional, if not statewide. The secondary and tertiary effects of such developments are often beyond the capacity of local governments, exercising traditional land use control powers, to address: state funds may need to be committed to meet infrastructure needs. *See generally* GOVERNOR'S TASK FORCE REPORT, ENERGY, HEAVY INDUSTRY, AND THE MAINE COAST (1972); Murray & Seneker, *Industrial Siting: Allocating the Burden of Pollution*, 30 HASTINGS L.J. 301 (1978); Comment, *Industrial Site Selection: Existing Institutions and Proposals for Reform*, 55 NEB. L. REV. 440 (1976).

130. The combination of high unemployment and low tax base has induced more than a few communities across the country openly to welcome large, hazardous, environmentally uncertain industrial undertakings. They are willing to trade long-run risks (which they hope will not materialize) for short-run gains. It is a strategy to which we as a nation ought not succumb.

131. Governmental acquisition, improvement, and resale of developable land with appropriate conditions intended to foster the type of development desired is widely practiced in Europe. *See generally* Lefcoe, *supra* note 25, at 34 n.16 ("Influenced by continental and particularly by Swedish experience, the British Labour Party has recently enacted legislation that would authorize local authorities to acquire a substantial portion of all land prior to awarding development permission.").

uitable sharing of more or less undesirable land using facilities and activities, could be fashioned.[132]

In short, the movement away from local land use controls does not mean that any use should be allowed to locate anywhere. The state can draw as many or as few circumscribing lines (in the nature of state level zoning, if you like) as it chooses. It can and should facilitiate the prudent location of large, unsightly, difficult to locate plants and activities in a safe and equitable manner.

F. What Local Responsibilities Remain?

The alternative strategy to land use control advanced in this Article reduces the quantum of control, changes the character and type of controls imposed, and shifts the locus of power from the municipal level to the state level of government. These changes do not mean, however, that there are no land use related responsibilities remaining at the local governmental level. Some planning capability to support traditional municipal service functions will be necessary. A building inspector or code enforcement officer will continue to be needed to insure compliance with state performance standards and conditions (if any) attached to developments approved pursuant to state site review processes. More importantly, municipalities should be involved in fashioning, expanding, and modifying as necessary state performance standards. They should be active participants and intervenors (when appropriate) in any site review mechanism developed. They also should actively cooperate with the state in identifying fragile or unique lands and areas more or less suitable for major, hazardous, and less desirable development types.

In addition to these advisory, participatory, and enforcement roles which can be as meaningful as individual municipalities choose, there are a number of affirmative development shaping and inducing roles that can be played. The quality of schools, water supply, sewers, and general infrastructure will have much to say about the type, quality, and location of development activity in a particular town. The decision to support an industrial park, a public housing agency, federal and state rehabilitation, and renewal programs will have a similar shaping effect.[133] These roles are both different from and similar to those historically played by local governments relative to

---

132. *See* Delogu, *supra* note 5, at 29-31.

133. *See* Delogu, *supra* note 77, at 52-56, 53 n.67. *See also* Note, *Control of the Timing and Location of Government Utility Extensions*, 26 STAN. L. REV. 945 (1974). The court in the most recent *Mount Laurel* case clearly understood the importance of these collateral municipal decisions, actions, and policies in overcoming past exclusionary land use practices. Its focus on a two-step approach to overcoming exclusion evidences a willingness to come to grips with these more difficult exclusionary tactics. *See supra* text accompanying notes 95-96. *See* Southern Burlington Cty NAACP v. Township of Mount Laurel, 92 N.J. 158, 258-78, 456 A.2d 390, 441-52 (1983).

land use and the development process. They are by no means unimportant. If used creatively and fully, free of any recrimination over lost local land use control prerogatives, they can with the unleashed energy of private developers, produce safe, sound, and orderly municipal growth.

VI. CONCLUSION

After more than fifty years of infatuation and experimentation with local planning and land use controls it is time to admit frankly that the whole sometimes noble but often tawdry effort has failed. We have created more problems than we have solved. A generation, perhaps two, of planners and land use lawyers has assumed the correctness and inviolability of underlying premises which are simply wrong. As problems have arisen land use experts have suggested reforms which failed to take into account the zeal and cunning imagination of local officials intent on using land use control powers to achieve impermissible ends. And finally there has been insufficient willingness to acknowledge the inherent limitations of local land use controls—they cannot deal with problems or opportunities that transcend municipal borders.

We can act as if this catalogue of error, excess, and miscalculation does not exist, but that will not change the reality. It does exist; almost everyone knows it and sees it. The empirical evidence mounts almost daily, as does public and private indictment and criticism of the system. Moreover, the time for reform is past. The reformers, with few exceptions, either cannot or will not act. The courts suffer from a combination of timidity and hardening of the judicial arteries. They are captive of their own rubrics. Legislatures are cowed by their fear of those whom they would serve and by cries for local control and home rule. Meanwhile local governments assume almost a sovereign's right to control local development and land use activities. They resist and temper any and all land use reform efforts as though loss of even the least power were tantamount to or would lead to the end of local government itself.

The only realistic course open requires a fundamental break with the past—the total withdrawal from local governments of the power to enact any and all land use control ordinances. In lieu of these ordinances a range of private, market oriented,[134] supply-demand

134. Moreover, reform of local land use controls, particularly zoning reform, presupposes that more local controls, better types of controls, and better administration will cure the problems outlined—nothing could be further from the truth. We need fewer, not more or better, local land use controls. We need to give the private marketplace more development latitude, more local land use decision-making power. The state must assume responsibilities it has long ignored; it must play a larger role in harmonizing land use conflicts. Three Presidential study commissions in the last 15 years have come to these same conclusions. *See supra* note 9. They are not startling,

factors, along with private control mechanisms (covenants, easements, deed restrictions), should be allowed to shape development activity. These would be coupled with an expanded array of state level performance standards and state or sub-state (regional) development review processes. In addition, state governments may want and need to identify and protect fragile land areas, prime farmland, and historically or physically unique areas or structures. This level of government may also want at least to identify and possibly to acquire and resell suitable areas for particularly difficult to locate land using facilities and activities.

This panoply of private and public initiatives and controls transfers a good deal of development decision-making from the public to the private sector. This is precisely what is intended. At the same time an adequate range of protections from harms incident to development activity is provided not by local governments but by a level of government—the state—that is and ought to be above the fray. The performance standards suggested should be meaningful and site review, rigorous. Emanating from the state level, they are more likely to be consistent, to address real harms, to be applied with a more even hand, to have an inclusionary rather than an exclusionary bias, and to be subject to more focused legislative, administrative, and judicial review processes. The thousand and one variations of local ad-hockery will be gone at a stroke. What will remain at the local level of government is the continued responsibility to provide the full range of municipal services traditionally provided, to undertake whatever level of planning is necessary and incidental thereto, and to participate in shaping and enforcing the previously described state level development controls. These responsibilities are fewer than local government's historical role in controlling land use, but

---

but at the same time we have not yet found the courage to move in these directions. These views were put more eloquently by R.H. Coase in a forward to Bernard Siegan's book:

> Mr. Siegan's work is clearly a very important contribution to the literature on zoning. But it has a wider significance. At the present time it is generally agreed that government regulation in many areas is failing. And yet the almost instinctive reaction to the situation is to ask for more, or a different kind of, government regulation. This attitude represents what Dr. Samuel Johnson called, when speaking of another enterprise, a triumph of hope over experience. Of course, it cannot be denied that, on occasion, more or a different form of government regulation may be required. But it would be wrong to restrict our vision and narrow unduly the range of alternatives between which we choose. What Mr. Siegan shows, and it is this which makes his study of interest to a much wider audience than those professionally concerned with zoning, is that the market can be used effectively to solve problems which it is commonly thought can only be handled by government regulation. It suggests that the market might be used more often than it is at present to deal with other social problems.

B. SIEGAN, *supra* note 6, at xv.

they are neither trivial nor unimportant. They are part of a new balance between the private sector, state government, and local governments in the development marketplace.

It is not possible to predict when, or even if, the mix of public and private land use control mechanisms advanced in this Article will begin to cure the problems the present system has created. The suggestions made, however, seem a necessary first step—a step in the right direction.[135] The mischief of fifty years cannot be undone overnight.

It is realistic to predict that state level controls and initiatives in addition to those advanced here will prove necessary. Modification of these proposals is acceptable, so long as we do not reinstitute any mechanism of local veto over development processes. It is also fair to predict that developers in a highly competitive housing industry will respond positively to the greater freedom and the wider range of development opportunities which these proposals give rise to.[136] This response, coupled with the normal working of supply and demand forces, must produce some betterment, some improvement—more housing at lower cost and a rekindling of what Jane Jacobs called "exuberant diversity."[137] Perhaps that is all one can hope for.

---

135. The views expressed in this Article are premised on the assumption that we will do more by doing less. The suggestions made offer a necessary break with the past. They agree with Edward Banfield's conclusions in THE UNHEAVENLY CITY. Speaking of the problems of the cities, he said: "They will not, however, be 'solved' by programs of the sort now being undertaken or contemplated. On the contrary, the tendency of these programs will be to prolong the problems and perhaps even make them worse." E. BANFIELD, THE UNHEAVENLY CITY 255-56 (1968).

136. *See supra* text accompanying notes 97-98. *See also supra* text accompanying notes 105-112.

137. As befits a Presidential Commission viewing many of the same problems examined in this Article, the Douglas Commission had larger hopes and aspirations for recommendations (also similar to many advanced in this Article) it was prepared to characterize as a "tall order." They ended their summary and conclusions thus:

> If there is a sense of urgency and even alarm in our report and our recommendations, it is because the Commission saw the cities of our country firsthand and listened to the voices of the people.
>
> . . . .
>
> The States must have an expanded role, especially in getting sites, providing for low-income housing, and in breaking down the barriers of codes and zoning.
>
> . . . .
>
> We must ease the tension between central city and suburb, between rich and poor, and especially between black and white. Too few have recognized how these basic democratic issues are related to local government structure and finance, to zoning policies, land and housing costs, or to national housing policies. The recommendations we make in these areas are a test of our most fundamental beliefs.

THE DOUGLAS COMM'N REPORT, *supra* note 9, at 30-31.