Metropolitan Growth, Suburban Enclaves, and the Yick Wo Laundry—Will they be the Roots of Disorder in America?

by James R. Cooper

In January of 1977 for eight consecutive nights record numbers of Americans—130 million of our people—viewed a TV program based on Alex Haley's *Roots.* Scholars have already begun to analyze this phenomenon. Dr. Gilbert Parks, staff psychiatrist at Topeka State Hospital, Kansas said, " 'Roots' epitomized every American's fight for personal freedom and prosperity. That was its appeal . . . Even though the show highlighted one particular family's struggle for freedom, it was a story of everyone's fight—not only for freedom, but for freedom and a higher standard of living."

This article is about a nationwide fight which is ongoing. It is quiet, but deadly serious: quiet because true to American tradition it is being fought in our courts; serious because its uncertain outcome will profoundly affect our republic's democratic system for better or for worse. The fight is to open the metropolitan suburbs to the lower-income classes.

Americans have discovered and rediscovered that riot in the streets solves nothing, arouses fear in those who hold power, and only delays resolution of conflict. In the 1970s we have lived in a time of relative domestic tranquility as the urban poor and those below middle-income test the usefulness of the legislative process and judicial review as means for redress of their asserted wrongs. These underdogs cannot be ignored any more than this nation could ignore labor's demands that management be brought to the conference table for collective bargaining.

James R. Cooper is a professor of real estate and urban affairs at Georgia State University, Atlanta and has been a faculty member of the Wharton School of the University of Pennsylvania, and the universities of Illinois, Wisconsin and Pittsburgh. Dr. Cooper has published numerous articles and is the author of *Real Estate Investment Analysis.* He is a member of the bar of the United States Supreme Court.

As in the past, whenever social injustice occurs in the United States, diverse groups find themselves working with former opponents as we seek the way toward conflict resolution. Today, the Urban League, regional homebuilders' associations, Realtors, the NAACP, blue ribbon metropolitan leadership councils, and large-scale developers find themselves working in concert to solve a national problem which our suburbs are trying to evade. It is certain that our population will grow by no less than 41 million persons by the year 2000, and may grow by 50 million. Current demographic trends indicate that birth control methods are being used more effectively by the upper-income classes. Thus a much higher percentage of our new population will be either born poor or be the elderly who have become poor due to inflation.

The places where our lower-income classes will live is a matter of critical importance. Providing housing for families with incomes below the national median has been a chronically difficult problem for decades. Ever since Senator Robert Taft sponsored a National Housing and Slum Clearance Act in 1949, the U.S. Congress has stated that decent housing for every American in a good living environment is a bi-partisan national goal. Now, after a period of neglect (1972-1976), it appears we are about to embark on another national effort to confront the problems of decent housing at convenient locations for our metropolitan area housing-deficit families.[1]

In our last noble effort, the National Housing Act of 1968, we were forewarned that the housing programs for low and low moderate-income families would require six million acres of new land on the fringes of our metropolitan areas and that social and political barriers stood in the way. One of the many reasons the programs created by the Act (Sec. 235 and Sec. 236) foundered was the lack of suitable sites, especially on the urban fringes. We now seem to be tending toward forms of subsidy (e.g. housing allowances) which will prefer the use of the existing stock and encourage dispersal of the lower-income classes by way of providing them with housing vouchers which will enable the "deficit families" to find their own location under open equal opportunity housing regulations.

A central theme of this article is to show that though our state courts are doing what they can to solve the conflicts arising from the effort of our suburbs to prevent low and low moderate-income housing from being erected in their midst, the results are not only diverse but even contradictory. Meanwhile, the U.S. Supreme Court under the leadership of Burger, Powell, Rehnquist, and Stewart are not only doing all they can to avoid these land use disputes, but worse may be leading many people into using the law as a regressive means to prevent the nation from achieving the bi-partisan goal of a decent home for every American family.

This article points out ways in which laymen could have a beneficial impact on the way the public interest is exercised to shape public policy in the area of land use. It will present economic and social facts intended to belie some of the myths which are now motivating suburban people and which have been a part of the established law.

BREAKDOWN OF THE STABLE NEIGHBORHOOD

MYTH: Neighborhood homogeneity will continue to be the primary way Americans stabilize life styles and property values.

It is apparent that there are significant forces now at work which are bringing traditional attributes of neighborhood homogeneity to an end. *First*, the U.S. Census recently reported that 20% of couples in the age 40-55 bracket are not married but are living together. The high rate of divorce has not only increased the number of people who remarry, it has also brought to our society an increasing number of people who appear to prefer cohabitation to remarriage even though it is easier to obtain a divorce than before. These couples are discreetly infiltrating all kinds of neighborhoods but especially the suburban areas because they tend to be more affluent than the average. *Second*, the Harvard-MIT Urban Studies Center has documented that the 1970s have brought about a sharp increase in the headship rate of nonmarried households. In effect, young and old people are organizing themselves into housekeeping units without cohabiting in the modern sense of the word, which implies sexual relationships. In the case of the elderly on fixed incomes, this is probably, in part, due to the pressure of declining purchasing power because of our tacit national policy on inflation. In the case of the young, it is a way of gaining freedom and privacy to carry out their life style which may be substantially different from their older relatives. More recently, households of non-marrieds are being formed to spread the impact of soaring utility costs. The inflationary effect of salaries and wages is also a factor for some occupational classes. As declining family sizes begin to affect the housing market, we can expect the 4-6 bedroom houses in single-family detached neighborhoods in our suburban areas to be converted to duplexes if the law allows (more often it prohibits); and if not, then their use will be converted to informal congregate living. The patriotic duty of energy conservation may even enable these new kinds of households to claim ethical justification for conduct which was suspect if not abhorrent only a few decades ago.

In the *Village of Belle Terre v. Boraas*[2] six students at SUNY Stoneybrook on Long Island rented a house in the village from its owners in apparent violation of the village's zoning ordinance. The village has 700 people on a total land area of less than one square mile. It has restricted land use to one-family dwellings, excluding lodging houses, boarding houses, fraternity houses, and multiple-dwelling houses. The word "family" has statutory definition in the ordinance. In summary it is defined as a single housekeeping unit containing one or more persons related by blood, adoption, or marriage, but also includes households of one or two persons who maintain a home.

Thus, the village ordinance did permit an unrelated couple or an "odd couple" to live together or cohabit. The plaintiff owners argued that if two unmarried people can constitute a "family," there is no reason why three or four may not, for purposes of complying with the ordinance. The village of Belle Terre's ordinance was found constitutional, upholding their peculiar definition of a "family." In an opinion which is hardly a model of clarity, Justice Douglas wrote for a 7-2 majority. The students' landlord had attempted to make some

very significant challenges to the village ordinance: that it interfered with a person's right to travel, to migrate, and to settle within the state; that the ordinance expressed the social preference of the residents for groups that will be congenial to them; that social homogeneity is not a legitimate interest of government; that the restrictive use interferes with the newcomers' rights of privacy. The opinion imperiously waved these issues aside by saying,

> ". . we find none of these reasons in the record before us. It (the ordinance) is not aimed at transients . . . It involves no fundamental right guaranteed by the Constitution.
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> "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs . . . it is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."

The court's avoidance of the question of fundamental rights is disappointing. At a time of swiftly rising construction costs, pressures on municipal tax bases, and energy shortages, this paean of praise to the single-family detached dwelling on a large lot (where yards are wide) doesn't speak well for the court's wisdom on prescience.

Justice Marshall stood alone in his willingness to discuss whether or not the students' fundamental rights were affected by the ordinance. Marshall claimed the ordinance unnecessarily burdened the students' First Amendment rights of freedom of association and the constitutional right to privacy. He felt that these constitutional rights should extend not only to political rights but also to those which pertain to conduct or to social and economic benefits such as the selection of one's living companions. He felt the right to establish a home was part of the liberty guaranteed by the 14th Amendment. He closed by commenting that our Constitution, in his opinion, secures to the individual freedom of choosing how one would satisfy his intellectual and emotional needs within the privacy of the home:

> "The instant ordinance discriminates on the basis of just such a personal lifestyle choice as to household companions. It permits any number of persons related by blood or marriage, be it two or twenty, to live in a single household, but it limits to two the number of unrelated persons bound by profession, love, friendship, religion, political affiliation, or mere economics who can occupy a single home . . . The town has, in effect, acted to fence out those individuals whose choice of lifestyle differs from that of its current residents."

Some states, when faced with ordinances similar to Belle Terre, have held that the ordinance was unauthorized by the state zoning enabling act[3] or that the similar ordinance was violative of the state constitution.[4] It would seem that, since the U.S. Supreme Court has eschewed the question of diversity of life-style raised by Belle Terre, an attorney might advise a developer that the constitutionality of such a local ordinance barring group housing is a matter for the specific state jurisdiction until the Supreme Court faces the question in a proper test, advice which wouldn't be particularly helpful.

The *third* force that is changing our traditional view of a stable neighborhood as one which is relatively homogeneous, is the imminent mixing of economic classes. The lower economic classes will surely insist on access to more and more of the metropolitan area which the suburbs have prevented to date.

DISPERSING THE POOR TO THE SUBURBS

The strangely convoluted opinion of the U.S. Supreme Court in *Gautreaux v. the Chicago Housing Authority and HUD* points the way to HUD and housing authority involvement in the dispersal of poor blacks to the suburbs of our metropolitan areas. As Americans in the North, the South, and other parts of the nation have shown hostility to the continued use of school-busing as a method of racial integration, they have thus unwittingly opened the way to leased housing and housing allowances as the more feasible alternative way to alleviate the effects of segregation. Whatever method is chosen, efforts must be made to educate the public.

The first problem is to overcome the peculiar propensity of the media to foster an image of the urban poor as a stereotype promiscuous black welfare mother of two, or more, with a shadowy male figure in the background. It is, and has been for years a totally misleading picture. Two-thirds of the urban poor are white. As Wellesley Professor of Economics Carolyn Shaw Bell stated in a recent letter to *Business Week*,

> ". . . Poor white familes outnumber blacks by more than two to one. Among poor families headed by women, more black mothers (22%) work and earn income than do white mothers (6%). It follows that the bulk of aid to dependent children recipients are white. In 1974, 2.8 million white families received public assistance compared to 1.5 black families. *Business Week's* "typical family" on the cover is the wrong color."[5]

As a professor who teaches housing economics, every term I find the students quite surprised to find the true incidence of poverty as set forth in Anthony Downs' CED pamphlet *The Urban Poor.*[6] The most ominous statistic is that about 44% of the urban poor are children under the age of 18, and that they constitute a steadily growing proportion of all those under age 18. Obviously, we are being hard pressed by fact for a solution to the problem of the ill-housed who live in the poverty enclaves.

ELIMINATING POVERTY ENCLAVES—A TOP PRIORITY

The poverty enclaves are at the same time made up of unusually high percentages of substandard, aged, deteriorated housing, as one would expect of older neglected inner-city neighborhoods. There are actually large numbers of stable middle-class families in these poverty neighborhoods with typical middle-class aspirations who are quelled into despair by the street atmosphere." In Edward Banfield's words, ". . . for those working and middle-class slum dwellers, life in the slums is a daily battle to preserve life, sanity, and self-respect."[7] It comes as no surprise that the upward-striving members of the poverty enclave will seek a change of neighborhood at the first oppor-

tunity. Nor should it be a surprise that under conditions of race discrimination prevailing up until the late 1960s this led to expansion only of the fringes of the poverty enclaves. Decentralization has been a very selective phenomenon limited largely to better educated, more affluent whites and to the more skilled with better paying jobs. Thus the shibboleth, "the white noose of the suburbs," tells only one-third of the story, for it has also been an exclusion of the white poor and lower middle-classes of all ethnic types.

The distance of this separation between income classes has grown from a few blocks the other side of the tracks in 1900, to many miles at the outward end of an expressway. We have now become aware that the vitality of our nation's cities depends on our capacity to cope with the locus of the home, family cycles, personal ambitions, in effect the myriad goals and aspirations of all the individuals who make up our urban society today and, perhaps more importantly, the children who will be our citizens in the next generation. Until now we have given very low priority to the condition of our inner cities in our budgeting allocations. Expenditures for one kind of war weapon often exceed all our community development grants. We hunt enemies abroad while unrest and insecurity breed at home.

A CASE OF UNEQUAL ACCESS

MYTH: All Americans have equal protection before the law and the privileges of immunities of American citizenship; thus, we all have the right and opportunity to have open housing without discrimination based on race, color, creed, national origin, sex, or age.

The economic costs of litigation effectively bar access to the courts for the vast majority of our middle and lower-class Americans. Thus aggrieved parties experience social injustice (refusal to lease, to issue building permits, to grant variances in zoning, etc.) without having a peaceful way to redress the wrong done. In a totalitarian state this would be a generally accepted way of life. The grievance festers more in our nation because we are taught we do have equal access to the law. The experience of Dorothy Gautreaux and others who were black tenants and applicants for public housing in Chicago is instructive.

In 1966 *Gautreaux*, and others, charged both HUD and the Chicago Housing Authority with intentionally maintaining existing patterns of residential separation of races by tenant assignment and site selection procedures. After three years the federal district court, in 1969, found with Gautreaux and issued an injunction against CHA restraining the unconstitutional practices and ordered CHA to remedy the past effects by providing that future sites would be in the "General Housing Area" (less than 30% non-white) of the city of Chicago. After many hearings the case reached the U.S. Circuit Court of Appeals, for the second time, in June of 1974. It appears that the "white man's burden" of the 19th century has been replaced by the "black man's burden" of the 20th century. The costs of these delays, the use of thousands of man-hours of high quality legal talent, are measured only in part by money, but certainly the Gautreaux litigation costs must be comparable to the hun-

dreds of thousands of dollars expended on anti-trust cases. Those who finance the defense of every citizen's political and civil rights must do so out of their own pocket or, possibly, by seeking donations. This may sound like hot rhetoric. Let the words of Justice Clark, sitting on the case, speak for themselves:[8]

> ". . . anyone reading the various opinions of the District Court and of this Court quickly discovers a callousness on the part of CHA and HUD towards the rights of blacks, underprivileged citizens of Chicago, that is beyond comprehension.
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> ". . . Given the eight-year tortuous course of this case . . . we believe the relief granted (compelling CHA to find sites for 1500 units in the 'general housing' area of the city of Chicago) is much too little and much too late in the proceedings.
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> ". . . we are obliged to conclude that on the record here it is necessary and equitable that any remedial plan to be effective must be on a suburban or metropolitan basis . . ."[9]

After eight years (1966-1974) of litigation it would appear that Gautreaux was to have open housing. But HUD, under Carla Hills, had yet another appeal. Two more years elapsed before the U.S. Supreme Court made the questionable claim it had affirmed in Justice Clark's 7th Circuit Court of Appeals opinion. The CHA had not appealed the Clark decision. Justice Stewart delivered the opinion:

> "HUD has been judicially found to have violated the Fifth Amendment and the Civil Rights Act of 1964 in connection with the selection of sites for public housing in the city of Chicago.
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> ". . . the relevant geographic area for purposes of HUD's housing options is the Chicago housing market, not the Chicago city limits. That HUD recognizes this reality is evident in its administration of a federal housing assistance program through 'housing market areas' . . . encompassing 'the geographic area "within which all dwelling units . . ." are in competition with one another as alternatives for the users of housing.' (See Department of HUD 'Techniques of Housing Market Analysis')
>
> "HUD has discretion regarding the selection of housing proposals.
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> "The Housing and Community Development Act of 1974 significantly enlarged HUD's role. Under Sec. 8 lower-income housing programs HUD may contract directly with private owners to make leased housing available and HUD has acknowledged that local government approval is no longer explicitly required as a condition of the program's applicability to the locality.
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> "In most cases the 1974 Act grants the local government the right to comment on the application."

It is at this point in the opinion that Stewart uses his forensic skill to appear to affirm the Clark opinion but at the same time to deal a crippling blow to a metropolitan solution to construction of such housing in suburban areas.

Returning to Stewart's opinion for the court:

> ". . . the local governmental units retain the right to comment on specific assistance proposals, to reject certain proposals that are inconsistent with their approved housing assistance plan and *to require that zoning and other land use restrictions be adhered to by builders.*" (italics supplied)

STATE ZONING SOVEREIGNTY

To the uninitiated it would appear we have now established a new national policy requiring HUD to recognize the reality of metropolitan area-wide housing markets in carrying out the federal housing assistance plans, without abridging local home rule. In reality we are more likely to have a crazy-quilt of contradictory policy controlled by local actions which will be inconsistent with any uniformity of federal policy. This is because the Burger court has empowered each state to go its own way in developing doctrine in this area of land use control.

Thus in a state such as New York, which has an enabling act that permits the villages of Belle Terre to be an "island unto themselves," they could "zone-out" such a builder so long as it was not a response to the builder's proposal. In other words, the court certainly doesn't permit "Black Jack" zoning (that is, after the fact) but it has honored a plan for single-family detached housing which excludes multi-family, commercial, industrial, and other uses necessary for orderly metropolitan growth.

In Illinois the courts have substantially restricted the "assumption of validity" of the local governing body's zoning action which was enunciated by the U.S. Supreme Court in the 1926 case, *Euclid v. Ambler Realty Co.* The courts of Illinois will seriously consider a challenge to present zoning (e.g. from single-family residential to multi-family) if the existing zoning results in a substantially lower land value than the proposed classification.[10] Illinois courts have also been unsympathetic to large-lot zoning, a preoccupation of upper-middle-class suburbs.[11] They have invalidated three-acre minimum zoning for single family, ruling that it made development uneconomical and thus infeasible. In another case the Illinois courts invalidated zoning restrictions against multiple dwellings where the regulations allowed for only single-family to two-family use. They ruled in favor of the multi-family use which would allow for more housing at more varied prices to a wider segment of the market.[12]

ARLINGTON HEIGHTS: "A VILLAGE BEAUTIFUL" BEATS POOR LEGAL TACTICS

It could be argued that *Metropolitan Housing Development Corporation v. Village of Arlington Heights*[13] is a case of "bad facts make bad law," in that MHDC did not succeed in requiring Arlington Heights to change a single-family classification to multi-family in spite of the fact that it appears, on its face, to go against the line of Illinois cases cited and had "the incidental effect of discrimination." A review of the facts in the case shows that Arlington Heights had already zoned 60 tracts for the R-5 multi-family use sought and some of it was available to the plaintiffs. As Judge McMillen stated, "the weight of the evidence proves that the Village of Arlington Heights was motivated by a legitimate desire to protect property values and the integrity of the village's zoning plan." The "home-rule" prerogatives seem to have prevailed, but since we know that Illinois courts do support highest and best use economic analysis which could show the local community has improperly

zoned the land below its value, it should not be a matter of great concern. It appears more likely that the federal court was the wrong forum for getting at the question of rezoning the land to multi-family which, after all, is the result sought. Thus, we see that a major state, Illinois has gone a different way than New York and its "home-rule" protection of the "village beautiful with ample lots, blessings of family values, etc."

It appears reasonable to say that though the court seems to have given hope to metropolitan planning in *Gautreaux*, their reluctance to vitiate "home-rule" has done little to resolve the political conflict between those on the one hand who wish to enable a metropolitan area to grow as one urban economy, and on the other hand their adversaries, who feel that the rights and powers of the many political enclaves which have balkanized our metrocities should prevail. The Burger court's majority appears to be sleep-walking its way back to a bygone year when the court simply avoided what it labeled "political questions" as not justiciable on the ground that the legislature was the proper place to resolve such questions under our separation of powers system. Thus for decades, in the early twentieth century, cases challenging the malapportionment of voting power (by the failur to re-district) were held non-justiciable as late as 1946 by the U.S. Supreme Court.

The social injustice of the rural control of our state legislatures was having deleterious effects on our cities because such legislatures had little interest in urban problems. After 16 more years of inaction on the part of the states, a new court headed by Warren took action. *Baker v. Carr*[14] ruled that apportionment-districting-elections restrictions were indeed justiciable on their merits. The power had shifted; the advantages had gone to the suburban rings and not to the "older inner city." Though probably unintentional, the fragmentation of the metropolitan areas was strengthened by *Baker v. Carr*. The entry into the political thicket by the court has had its risks. In any event, it would be unwise to think that the Burger court's apparent retreat from "political questions" is an indication they are any less willing to experiment with their vast powers.

THE BURGER COURT EXPERIMENTS WITH STATE'S RIGHTS AND MAJORITARIANISM

The Burger court is engaged in another social engineering experiment. They are seeking to return power to the states and their local instrumentalities. An underlying theme of this article is that in order to accomplish this "states rights-majoritarian" objective the Burger court is placing new limits on "equal protection before the law" and the "privileges and immunities of the citizens." They do so under the guise of limiting the court's legislative activity, under the separation of powers concept, and under the cloak of "dual supremacy" and their resulting deferral to states' rights.

It seems the majority on the Supreme Court would prefer the bygone years when less than a half-dozen zoning cases had reached the high court in our first 175 years. The attitude seems to be that the states' courts should be able to handle these problems. In order for this to be a reasonable possibility the

state courts must feel free to apply the principles of judicial review to the legislative actions of municipalities enacting land use controls. Yet, since 1926 in the most famous of zoning cases, *Euclid v. Ambler Realty Co.,*[15] the U.S. Supreme Court has held to the doctrine of "presumptive validity." Under this rule of law, landowners, developers, Realtors, citizens, etc. were given the burden of proving that the ordinance was a violation of the police powers, so the tendency since *Euclid* has been for courts to feel constrained to hold the municipal zoning action a valid exercise of the state's police power under the enabling act. It takes a courageous court to take the action of the Oregon Supreme Court in the case of *Fasano v. Board of County Commissioners of Washington County.*[16] This case involved a challenge to the approval by the county commissioners of a zone change from single-family residential to "planned residential" which would allow mobile home parks. Nationwide, mobile homes now constitute 85% of the new single-family housing units selling for less than $25,000. The Oregon Supreme Court rejected the "presumption of validity" and ruled that the zoning board (county commissioners) had acted in a judicial manner rather than in the performance of their legislative function. The court established some important principles of judicial review which have drawn national attention:

1) The power to zone is conditioned on the comprehensive plan; therefore, any change in zoning must be shown to be in accord with the comprehensive plan. In making such a showing, it must be proved that:
   a) There is a public need for the change;
   b) Such a need is served by changing the zone of the particular property in question rather than other available property.
2) The burden of proof is on the party seeking the change, since it involves an exercise of judicial authority. The greater the change the more clearly it must be shown that it is in accordance with the comprehensive plan, that there is such a need for change, and that such need will best be met by the change.

Thus the court sought to extend the greater due process safeguards accorded to judicial proceedings, in spite of the fact it could result in delaying developments and would increase development costs through front-end litigation costs and imputed interest costs resulting from the delay. It is interesting to note that the court said,

> ". . . having weighed the dangers of making desirable changes more difficult against the dangers of the almost irresistible pressures that can be asserted by private economic interests on local government, we believe that the latter dangers are to be more feared."

Our nation's experience with the uses and abuses of the local use of the police power over the past one hundred years does suggest that we should proceed with caution and hesitate to give favorable judgment to acts of our local governments.

YICK WO AND THE LOCAL FOLKS

In 1886 some Chinese laundrymen revealed to us that the "local folks" do work in ingenious ways their discrimination to perform. In the famous case of *Yick Wo v. Hopkins,*[17] a statute provided that laundries in wooden buildings

(as distinguished from brick or stone) could not be carried on without a license. The classification itself appeared impartial and reasonable, but *in application* the licensing authority consistently refused licenses to Chinese applicants while granting licenses to non-Chinese applicants. Such an application of the statute (in the court's words), ". . . with an evil eye and unequal hand . . ." was held violative of the equal protection clause of our 14th Amendment. Note, however, the repetition of the difficulty of facing high economic costs of litigation. "A discriminatory purpose on the part of the building inspectors will *not* be presumed. The party challenging the application (or administration) must plead and prove clear and intentional discrimination."

It is possible that we have "old wine in new bottles." Urban officials who are pressing for urban growth management plans such as Petaluma, Ramapo, and Boulder may have discovered an apparently new way to exclude certain classes of persons who would be unwelcome in the area according to the lights of those who have the "gatekeeper function." It appears certain we will face tests of these new "growth management plans" which are constitutional, on their face, but are possibly being *administered* in a discriminatory manner.

LOCAL RULES CAUSE UNCERTAINTY AND DEVELOPMENT RISK

It should be obvious that we appear to be heading into a period where much uncertainty is being added to the already risky business of urban land development. Current conditions in the housing and land development industry are such that some see a depressed industry for many years. However, it would be a mistake to assume that real estate development will return to its former preeminence when and if its problems are solved. Recent developments in various widely separated urban areas such as Ramapo, Petaluma, and Boulder have had the cumulative effect of extending the lead time for a relatively simple, conventionally financed project from a few months to two or more years, with a commensurate increase in holding costs and in financial exposure during the planning period. The vesting of the zoning power in even the smallest municipality has resulted in widespread "shopping" by land developers. Now the adherents to the no-growth philosophy have upped the ante, and in some cases simply withdrawn their land from the bidding process, thus placing greater pressure on other land within their metropolitan areas. They do so through the use of highly sophisticated talents to maneuver and resist the normal patterns of growth of the metropolitan area of which they are part and parcel.

Though developers have been aggressive in attempting to satisfy market needs in communities reluctant to cooperate, the growing sophistication of these communities in using legal strategems to erect legal barriers to growth may stultify growth in metropolitan areas where it is most needed (those smaller than, say, Philadelphia). The skill with which these communities may be thwarting the normal migration patterns of a growing metropolitan area are

perhaps best characterized by the developer's experience in *National Land and Investment Co. v. Kohn.*[18] In that case the highest court of Pennsylvania struck down a four-acre minimum lot requirement in an undeveloped area as an invalid zoning without reasonable relation to the general welfare. Yet, when the developer returned to Easttown (the city with four-acre restriction) to offer a plan for development, he was informed that the new minimum was 3.9 acres and the community was ready to litigate again. Planning for the front-end costs of such vexatious litigation and adding the holding costs of the vacant land pending the end of such litigation is not economically feasible. Yet, these developers are not simply profit-motivated, they are trying to fulfill an actual need as our population grows in our standard metropolitan statistical areas (SMSAs).

Boulder, Colorado—City of the Future?

This city is famous for its repeated attempts to enact an ordinance which would prohibit population growth. As a proponent of the "no growth is good" philosophy it continues to find ways to inhibit growth through the use of the judicial, legislative, and administrative process. A case in point is *Lawrence B. Robinson, et al. v. City of Boulder.*[19] In June 1965 the city promulgated a "Program for Boulder's Planned Development" which directed the administrators of the city to use the city's water and sewer services to provide for orderly development of the city's fringe area. The city does not have the present capacity to serve all of the "service area" within its area of franchise. The city had the right to provide the water and sewage service to the land owned by Robinson, a developer. Robinson made application to the city requesting that the city extend water and sewage service, but Robinson was denied it. The request of Robinson was denied because the land development proposal was deemed to be not in compliance with Boulder's Interim Growth Policy. Development of Robinson's land was not planned, by public administrators, until the year 1990. Unfortunately, Boulder's Interim Growth Policy was *not* a model of free and open disclosure. In the words of the City of Boulder Growth Study Commission, November 1973:

> "The city of Boulder's current growth and development policies seem to be scattered in several places: part in the Boulder Valley comprehensive plan, part in planning procedures and regulations, part in ordinances, and *part in the minds of various city and county officials.* The effects of the combined policies and other forces at work are exclusionary, despite the city's willingness to assume its allocated share of the Denver region's low-income housing. A court test of the policies could easily rest on their exclusionary effects, rather than their unexpressed intent, however enlightened from a planning viewpoint."

The court held that in an area of established service (the neighborhood Gun Barrel Hill) the city has a duty to serve all persons within the area.

Thus Robinson, *a developer who apparently could afford the costs of litigation,* was able to obtain social justice in the face of Boulder's abuse of their utility franchise powers. The court took up some constitutional issues which aren't discussed here. It also found that the city's denial of service, until after

the year 1990, constitutes an unreasonable restriction on the use of the subject property and violates the due process clauses of the United States and Colorado Constitutions.

It is important to this article to emphasize that the nature of our adversary legal system is such that though Robinson got his permit approved it is possible there are other applicants to the Boulder water and sewage system who may be denied. This is because in spite of the clearly stated opinion of the court, Boulder has the power to force each specific case to litigate to establish their individual rights. This is the main thrust of the *Yick Wo v. Hopkins* case, mentioned previously. It is unconstitutional to administer regulations in such a way as to ignore the rule of law. Yet our adversary system of justice requires the aggrieved to have the wherewithal to pay the price of access to the courts. The system is in need of innovation.

City of Petaluma, California—Planning the Future?

The city of Petaluma's growth control policy sets forth certain fundamental policies among which are that the city adopt the following:

1) Petaluma Environmental Design Plan
2) Residential Development Evaluation system
3) Petaluma Housing Element
4) Official Statement of Development Policy

It is not possible within the space limitations of this article to provide sufficient detail of this elaborate plan. Without unduly speculating on the powers of discretion it should be clear that the possibility that the Petaluma plan's administration may be functioning as a gatekeeper for excluding "inharmonious" neighbors while welcoming with open arms fast-food operations and inharmonious industry, causes one to question whether there is a proper motive behind the limitation on residential use. Over time, communities such as Petaluma will probably build the record for another *Yick Wo* case by their haphazard management of the industrial and commercial sector, or by repeated denial of welfare motivated builders who want to construct low or low moderate-income housing.

The Town of Ramapo, New York—Legerdermain Replaces Candor

The most sophisticated controlled growth technique that has emerged is sequential development controls or development timing (SDCDT). This system adds the dimension of time to the spatial controls associated with zoning.

Some critics of this carefully drafted ordinance have contended it is fiscal zoning dressed in environmental clothing. Certainly, it is a masterpiece of forensic land planning.

The key element is that the point system created by the ordinance devolves upon the administrator's ministerial functions which could be an unconstitutional delegation of authority. It appears that they may have the power to

actually decide land use over time. Further, the entire plan is hinged on an 18-year capital improvements program. What is to prevent a slowdown or stoppage in the capital improvements program during this 18 years, or the switching around of the priority of capital improvements in ways that adversely affect certain developers while benefiting others? What is to prevent the creation and use of a capital improvements program which is so vague and general in its description as to make it possible for the administrators to do whatever they wish to do without public disclosure?

As a person who drafted capital improvements programs for a six-year period, aware of the capricious and political way we switched priorities from year to year to meet the wishes of changing elected officials, I am suspicious of the "realism" of this "scientific" sequential development control system. Perhaps the words of the Court of Appeals of New York have a prophetic tone, for I feel the American *process* of judicial review in regard to these sophisticated growth management plans is not completed. The Court of Appeals of New York said, in its Town of Ramapo decision:[20]

> ". . . What we will not countenance, then, *under any guise* is community efforts at immunization or exclusion . . . while even the best of plans may not always be realized, *in the absence of proof to the contrary* we must assume the Town will put its best effort forward in implementing the physical and fiscal timetable outlined under the plans.

Obviously, if they are *not* putting their best efforts forward then towns like Ramapo, Petaluma, and Boulder will find the administration of their managed growth plans won't wash clean in the *Yick Wo* laundry.

The problem is that this is not 1886; as Alvin Toffler has so eloquently set forth in his treatise, *Future Shock,* the pace of change is much faster today and it implodes upon us. It is quite possible that our modern electronic media, which spread the news so fast, will also sharpen the impatience of our lower and lower-middle classes. A not too fanciful flight of imagination causes this writer to see a scenario which could shake my firm beliefs in the ideals of our democratic representative republic. This scenario arises out of another trend of the Burger court which has some disquieting possibilities.

REFERENDUMS—THE THREAT OF RAMPANT PLURALISM?

The focus of our attention is the increased interest which the Burger court has shown in the popular referendum. Burger and his fellow "majoritarians" seem to believe in the benefits of direct governance far more than did our founding fathers. James Madison, one of the authors of the U.S. Constitution, warned against the devastating effect, especially in democracies, of inflaming mankind with mutual and ruinous animosity over matters of religious beliefs, political and civil rights, and political philosophy.[21] Because of this natural political readiness to love and to hate, Madison sought to mute and moderate these age-old kinds of political behavior by setting up a representative democratic republic in which coalitions of a "multiplicity of interests" would vie with each other to form the dynamic majority. Thus the

United States founded a novel system on the basis of a tranquil, modern politics of interest groups as distinct from a politics of class struggle. It is a grand plan which has worked surprisingly well. The durability of the American experiment during this century of ideological despotisms, wars, and demagogic leaders, is a testament to Madison's prudence. It is suggested that the Burger court is tampering with this foundation in their approach to the referendum.

Referendum in San Jose—James v. Valtierra[22]

In the early 1970s citizens of San Jose, California, and San Mateo County, localities where housing authorities could *not* apply for federal funds to provide low-rent housing, poverty citizens sought to test the constitutionality of a public referendum which had defeated the intentions of elected and appointed officials to apply for such aid to house urban "poor housing deficit families."

Since 1950, California has had a constitutional amendment (Article XXXIV) which requires a mandatory referendum for *all* low-income public housing projects. The article provides that no low-income housing project should be developed, constructed, or acquired in any manner by a state public body until the project is approved by a majority of those voting at the specific community's election. The citizen plaintiffs argued that the mandatory nature of the Article XXXIV referendum constituted unconstitutional discrimination because it hampers persons such as the plaintiffs who were eligible and desiring (needing?) public housing from achieving their objective, while no such roadblock faces other groups seeking to influence other public decisions to their advantage.

The majority of the court found the California Article XXXIV mandatory referendum constitutional. The article requires referendum approval for any low-rent public housing project, not only for the projects which will be occupied by a racial minority. According to the court, the record here would not support any claim that a *law seemingly neutral on its face* is in fact aimed at a racial minority.

Marshall in strongly worded dissent found that the mandatory referendum applied solely to people of low income, for XXXIV reads:

> ". . . any development composed of urban or rural dwellings, apartments or other living accommodations *for persons of low income,* financed in whole or in part by the federal government . . ."

Persons of low income are defined as:

> ". . . persons or families who lack the amount of income which is necessary . . . to enable the person, without financial assistance, to live in decent, safe, and sanitary dwellings, without overcrowding."

Article XXXIV of the California Constitution explicitly singles out low-income persons to bear its risk of losing the vote. *Publicly assisted housing developments to accommodate the aged, veterans, state employees, persons of moderate income, or any other class of citizens other than the poor,* need *not* be approved by referendum.

In a previous decision, *Douglas v. California,*[23] the court had stated, "The states, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' *as such* in the formulation and application of their laws."[24]

It is obvious that Marshall's dissent made clear that the court chose to subject Article XXXIV to no scrutiny whatsoever. Rather than overrule or explicitly limit the cases of the earlier court, which Marshall calls to our attention, the Burger court chose to avoid arousing the communication media by ignoring this tacit but major change in direction of our nation.

Thus the California suburbs may, if they wish, vote to exclude the domestics, sanitary workers, street sweepers, busboys, dishwashers, and other working poor that are essential to the efficient working of a metropolitan area.

Another Case for Majoritarianism: The Eastlake Referendum—Zoning Changes by the People

The Burger court has recently extended its adventure into what it sees as "popular democracy." In the *City of Eastlake v. Forest City Enterprises* (1976)[25] Chief Justice Burger delivered the 6-3 majority opinion. He was joined by Stewart, White, Rehnquist, Blackmun, and Marshall.

In this case the plaintiff acquired an eight-acre parcel of real estate in Eastlake zoned "light industrial" at the time of purchase. Meanwhile, the Eastlake city charter was amended to provide that any changes in land use agreed to by city council required a 55% approval by referendum.

Forest City Enterprises then picked up the burden of litigation costs and sought a judgment declaring the city charter provision an invalid and unconstitutional delegation of legislative power to the people. *While awaiting adjudication of the question,* Eastlake citizens voted to reject the proposed zoning change. The lower courts sustained the city charter provision. The expenses of litigation mounted as Forest City sought the opinion of the Ohio Supreme Court. Ohio's highest court ruled that the enactment of zoning and rezoning provisions is a legislative function (see *contra* the *Fasano* rule!) and that a popular referendum lacks standards to guide the voters *thus permitting the police power to be exercised in a standardless, arbitrary, and capricious manner.* In rendering the opinion the Ohio court relied on *Seattle Trust v. Roberge.*[26] The Burger court distinguished this case. In effect, a neighborhood has no reserved power to make legislative decisions but the people can, and in Ohio have, *reserved* to themselves the power to deal directly with matters which might otherwise be assigned to the legislature. The Burger court then lapsed into sonority, which the dissent felt obfuscated the primary issue:

> "The reservation of such power is the basis for the town meeting, a tradition which continues to this day in some states as both a practical and symbolic part of our democratic processes. The referendum, similarly, is a means for direct political participation, allowing the people the final decision, amounting to a veto power over enactments of representative bodies. The practice is designed to 'give citizens a voice on questions of public policy.'"

It should not surprise the reader that Burger then cited *James v. Valtierra*, the San Jose public housing referendum case. On the above basis the court held that the 14th Amendment had not been violated and overruled the Ohio Supreme Court.

Justice Stevens, joined by Brennan in dissent, supported the *Fasano* view that rezoning is an exercise of judicial authority and its propriety is subject to an altogether different test than the legislative act (see the *Fasano* discussion supra). Thus the majority of the Burger court has failed to hold that the rezoning decision is quasi-judicial in nature. They have totally ignored the rulings of a number of states. Due process procedures of judicial review are constitutional safeguards of our individual rights. The city of Eastlake avoided them by this "reservation of power to the people" according to the Burger majority.

In this modern world of rapid technological change we need the safe-guards against "majority rule" which Madison and our other founding fathers built into our representative republic. The actions of elected legislators and judges are subject to public review and scrutiny which guards against ignorance, fear, and prejudice. In the past, zoning laws made tallow-rendering plants and junk yards "prohibited uses" because of their potential to creat a nuisance. Modern technology, site design, and landscaping have made these essential urban uses tolerable to the point they can now be regulated rather than prohibited.

Today, genetic engineering presents us with the possibility of great benefits and threatens us with fearful catastrophe through the possibility of escape of redesigned bacteria which could be lethal. Cambridge, Massachusetts, demonstrated that an elected city council can deal with the very real problem of permitting a regulated genetic engineering laboratory in one local community. The Burger court's dabbling in land use referendums has made it possible for "the people" to prohibit uses such as genetic engineering (tallow-rendering plants and junk yards) in any local community with the sort of broad powers which exist in some of our states' enabling acts.

The next comment is a suggestion which arises out of intuitive reaction to the developing trend indicated by *Valtierra* and *Eastlake*. These cases have caused me to fear the ghost of *Reitman v. Mulkey,*[27] a popular referendum case which the Warren court laid to rest in 1967.

Reitman's "Private" Right to Racial Discrimination

In *Reitman,* Justice White wrote the opinion for a 5-4 majority consisting of himself, Fortas, Brennan, and Warren, with Douglas concurring. The dissent was written by Harlan, with the concurrence of Black, Clark, and Stewart. This case concerned the question of whether or not Article I-26 of the California Constitution (commonly known as Proposition 14), an initiative amendment, was a denial of "equal protection before the laws" within the 14th Amendment of the U.S. Constitution. This peoples' referendum, if constitutional, would have effectively repealed acts of the California legislature designed to prohibit discrimination in housing. As the California Supreme Court stated when it ruled Proposition 14 unconstitutional:

". . . its immediate design and intent was to overturn state laws that bore on the right of private sellers and lessors to discriminate (the Unruh and Rumford Acts) and 'to forestall future state action that might circumscribe this right. . . . It would establish a purported constitutional right to privately discriminate on grounds which admittedly would be unavailable under the 14th Amendment should state action be involved.'"

The U.S. Supreme Court upheld the California high court on the following reasoning:

"Section 26 (Proposition 14) was said to have changed the situation from one in which discrimination was restricted 'to one wherein it is *encouraged* within the meaning of cited decisions. In effect the new constitutional amendment was legislative action (albeit by the people) which authorized private discrimination' and made the state 'at least a partner in the instant act of discrimination . . .'"

The main reason for resurrecting this case is the dissent in which Justice Stewart concurred. The dissenting opinion said,

"(We) are . . . at a loss to understand how this . . . change in California's Constitution can be a violation of the 14th Amendment; thus rendering void a (private person's) refusal to rent to the (black plaintiffs) because of their race. The Equal Protection Clause which forbids the State to use its authority to foster discrimination based on such factors as race (citations omitted) does not undertake to control purely personal prejudices and predilections, and individuals acting on their own are left free to discriminate on racial grounds if they are so minded.

". . . The denial of equal protection emerges only from the conclusion reached by the Court that the implementation of a new policy of *governmental neutrality* embodied in the new constitutional provision, and replacing a former policy of anti-discrimination, has the effect of lending *encouragement* to those who wish to discriminate . . .

". . . When legislation in this field (discrimination) is unsuccessful there should be wide opportunities for legislative amendment, *as well as for change through such processes as the popular initiative and referendum.* This decision, (we) fear, inhibits flexibility." (italics supplied)

Keeping in mind that the Burger court upheld the popular referendum in the *Valtierra* case, in part because the *law was seemingly neutral on its face,* we can see that, the composition of the court having changed, there is broader support today for the views which were expressed by Stewart and Harlan in dissent.

It appears quite possible that if a state such as California were to pass a constitutional amendment today by popular referendum, such as Proposition 14, repealing all the anti-discrimination statutes relating to housing, the Burger court would find the legislative action of the people simply a retreat to neutrality.

This position is given even more credibility when one is aware that in 1971 the case of *Palmer v. Thompson*[28] declared that the court of Nixon appointees found there was *no official encouragement* of discrimination through the legislative act of closing the public swimming pools in a Mississippi town; and that

inasmuch as both black and white citizens were deprived of use of the pools there was no unlawful discrimination. Justices White, Brennan, and Marshall dissented, arguing that this was state action which penalized Negroes for asserting their rights.

HUMAN RIGHTS—THE NEED FOR STATESMANSHIP

It is hoped the day never comes that we go full circle on *Reitman v. Mulkey*. This nation has learned much since the passage of the Civil Rights Act of 1968 and the death of Martin Luther King, Jr. Both *Jones v. Mayer* and the 1968 act have had elevating influence on the Codes of Ethics of the various Realtor organizations.

It is public knowledge that Realtors were one of the prime moving forces behind the passage of Proposition 14 in California. Certainly, the language of the amendment is seductive in its appeal to the ancient concept of the fee simple absolute and the right of a man to do as he wants with his property. But, in a day of rising Black Africa, at a time when a developing third world is in a position to do us great harm (OPEC, Jamaica bauxite, etc.), when serious racial strife is rending South Africa apart, and when the Helsinki Accord on Basic Human Rights is used by U.S.A. in diplomacy, I am confident that Realtors would see the great public service involved in lending opposition to a revival of the "right to private discrimination." Otherwise, we as a nation would not really stand for human rights in the world's eye.

NEW JERSEY POINTS THE RIGHT WAY

Though this writer has made it obvious that he feels we are ill-advised to leave land use regulations in the hands of the U.S. Supreme Court, I still have hope that we will straighten out the confusion caused by the court in recent years.

I believe New Jersey is leading the way with its opinions which are called, for convenience, the *Mt. Laurel Cases*. Unfortunately, to date they apply only to the state of New Jersey.[29]

In a lengthy opinion both expanding and modifying its Mt. Laurel rule the New Jersey Supreme Court in January 1977 ruled that another "developing municipality's" zoning ordinance was invalid because it was exclusionary. The court remanded the case to the trial court with directions that the court should demarcate specific boundaries of a pertinent region (the housing market), and fix a specific number of low and lower-moderate income housing units as the "fair share" of the regional housing needs to be made possible by ordering a change in the "developing municipality's" ordinance.

The court adopted a standard of "least cost" unsubsidized housing, zoning for which would be necessary in these "developing municipalities." These municipalities must encourage the production of multi-bedroom units on small lots. The court specified revisions of these various ordinances in the developing communities: 1) allocate substantial areas for single-family dwellings on very small lots; 2) substantially enlarge areas available for multi-family dwellings; 3) substantially enlarge medium-size lots; 4) reduce the area

occupied by large lots; 5) modify restrictions in PUDs which generate costs to discourage the production of apartments with two or more bedrooms; 6) modify PUD regulations to eliminate undue costs; 7) modify PUD regulations to eliminate excessive road and utility costs; 8) generally eliminate and reduce undue cost-generating restrictions in those zones allocated for "least cost" housing. The court also noted that these "developing municipalities" must provide a "cushion" in land reserved for "least cost" housing to assure results in terms of actual production. The wisdom of these regulations is more apparent to Realtors than to lawyers.

This extraordinary opinion by the New Jersey Supreme Court demonstrates a very sophisticated knowledge of housing economics, something that is not common knowledge, as many REITs and banks can now attest. The Mt. Laurel Case opinion itself as written by Justice Hall should go down in history as one of those rare occasions when the law found a man who understood economics.

> "The record thoroughly substantiates the findings of the court that over the years Mount Laurel has acted affirmatively to control development and to attract a selective type of growth . . . There cannot be the slightest doubt that the reason for this course of conduct has been to keep down local taxes on *property* (Mount Laurel is not a high tax municipality) and that the policy was carried out without regard for non-fiscal considerations with respect to people, either within or without its boundaries. . . . Large families who cannot afford to buy large houses and must live in cheaper rental accommodations are definitely not wanted so we find drastic bedroom restrictions for, or complete prohibition of, multi-family or other feasible housing for those of lesser income.
>
> "This pattern of land use regulation has been adopted for the same purpose in developing municipality after developing municipality. One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms (and, in Mount Laurel's case, even some of its own lower paid municipal employees) to live in the community where they work.
>
> "Core cities were originally the location of most commerce and industry. Many of those facilities furnished employment for the unskilled and semi-skilled. These employees lived relatively near their work, so sections of cities always have housed the majority of people of low and moderate income, generally in old and deteriorating housing.
>
> "The situation has become exactly the opposite since the end of World War II. Much industry and retail business, and even the professions, have left the city; Camden is a typical example. The testimonial and documentary evidence in this case as to what has happened to that city is depressing indeed. For various reasons, it lost thousands of jobs between 1950 and 1970, including more than half of its manufacturing jobs (a reduction from 43,267 to 20,671, while all jobs in the entire area labor market increased from 94,507 to 197,037). A large segment of retail business faded away with the erection of large suburban shopping centers. The economically better situated city residents helped fill up the miles of sprawling new housing developments, not fully served by public transit. In a society which came to depend more and more on expensive individual motor vehicles, transportation for all purposes, low-income employees very frequently could not afford to reach outlying places of suitable employment and they

> certainly could not afford the permissible housing near such locations. This category of city dwellers desperately needs much better housing and living conditions than is available to them now, both in a rehabilitated city and in outlying municipalities. They make up, along with the other classes of persons earlier mentioned who also cannot afford the only generally permitted housing in the developing municipalities, the acknowledged great demand for low and moderate-income housing.
>
> "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. Necessarily implicated are the broader questions of the right of such municipalities to limit the kinds of available housing and of any obligation to make possible a variety and choice of types of living accommodations.
>
> "We conclude that every such municipality must, by its land use regulations, presumptively make realistically possible an appropriate variety and choice of housing. More specifically, presumptively, it cannot foreclose the opportunity of the classes of people mentioned for low and moderate-income housing and in its regulations must affirmatively afford that opportunity at least to the extent of the municipality's fair share of the present and prospective regional need therefor. These obligations must be met unless the particular municipality can sustain the heavy burden of demonstrating peculiar circumstances which dictate that it should not be required so to do.
>
> "We reach this conclusion under state law and so do not find it necessary to consider federal constitutional grounds urged by plaintiffs."

His able statement of the growth of our urban problems after World War II and the salient reasons why the Mt. Laurels of America must be called to task is actually a call to action for the entire country.

Leaders of the real estate industry could do a great service for the country by seeking the national adoption of legislation which would carry the obligations of the developing municipality to every metropolitan area in our several states. This could be attempted at the federal level through congressional land use policy acts such as the Air and Water Quality Control Acts under the commerce power or by way of pressing for the adoption of a properly drafted uniform state law such as was done with the Uniform Commercial Code. As a real estate professor, trained in the law, my final word is "don't leave it to the lawyers;" few of them understand urban economics and the economics of land use and development as well as real estate professionals. The problems of how land "ought" to be used in an open society will never end; they shouldn't because the conflicts are a necessary product of our diverse personalities. But we must remember that zoning is for orderly land use, not for denying the future.

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