

The Unwisdom of Allowing City Growth to Work out Its Own Destiny

Garrett Power

Follow this and additional works at: <http://digitalcommons.law.umaryland.edu/mlr>



Part of the [State and Local Government Law Commons](#)

Recommended Citation

Garrett Power, *The Unwisdom of Allowing City Growth to Work out Its Own Destiny*, 47 Md. L. Rev. 626 (1988)
Available at: <http://digitalcommons.law.umaryland.edu/mlr/vol47/iss3/4>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized administrator of DigitalCommons@UM Carey Law. For more information, please contact smccarty@law.umaryland.edu.

Article

THE UNWISDOM OF ALLOWING CITY GROWTH TO WORK OUT ITS OWN DESTINY

GARRETT POWER*

I. INTRODUCTION

During the 1920s America's cities were changing. Annexations increased their geographic area. Populations grew and regrouped. The wealthy abandoned their downtown houses and moved to the urban fringes. A growing middle class demanded new suburban homes. Vacated houses in the urban core filtered down to the working class and the poor. Commercial establishments ventured out of the central business district into the suburbs. And smokestack industries came to town seeking sites near harbors and railroads.

While these changes were taking place, practically all the large cities in the United States adopted "building zone laws." Forty-eight of the sixty-eight largest cities, with New York, Chicago, Boston, Baltimore, Pittsburgh, Los Angeles, Buffalo, and San Francisco heading the list, put zoning into operation. Hundreds of smaller cities and towns followed suit. By 1926 the 426 zoned municipalities had a total of more than 27 million inhabitants, over half the total urban population of the United States.¹

These zoning laws divided cities into districts according to determined uses of the land for residence, business, or manufacturing, and according to advisable building height and ground area. From their inception, zoning laws were either loved or hated. In 1921 Baltimore lawyer and zoning publicist Jefferson C. Grinnalds touted zoning as "the greatest piece of constructive legislation ever passed,"² while in 1925 Isaac Lobe Straus, the former Attorney General of Maryland, damned zoning as "viciously illegal."³

Experience has failed to resolve these differences. A half cen-

* Professor of Law, University of Maryland School of Law. B.A., Duke University, 1960; L.L.B., DUKE LAW SCHOOL 1962; LL.M., University of Illinois, 1965.

1. Hoover, *Foreword to U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT* (rev. ed. 1926).

2. Grinnalds, *Summing Up the Nature and Value of Zoning*, BALT. MUN. J., Feb. 18, 1921, at 1, 2.

3. The Sun (Baltimore), Feb. 10, 1925, at 4, col. 2.

tury later, Richard Babcock, a Chicago lawyer and a veteran player of the zoning game, labeled zoning a "smashing success,"⁴ but another Chicago real estate attorney, Bernard Siegan, concluded that "zoning has been a failure and should be eliminated!"⁵

This paper examines Baltimore's earliest experience with zoning in an effort to sort out the wisdom or "unwisdom of allowing city growth to work out its own destiny, subject to the whims of individual property owners or real estate promoters."⁶ If the paper achieves its goal, it also will illuminate a broader issue. Because zoning was among the first efforts by government to regulate a private market intensively, the successes and failures of zoning should shed light and cast shadows on the capacity of government to improve on the working of free markets.

Rather than taking the zoners' description of the institution at face value, the historical record is used to reconstruct its reality. We will examine the relationship between Baltimore's first zoning ordinance and the real estate market, political process, and class structure to see in what ways zoning proved worthwhile (or worthless) to politicians, bureaucrats, brokers, builders, businessmen, and homeowners.

II. POLITICIANS

Baltimore pundit H.L. Mencken observed that "most . . . improvements . . . of a public sort are accomplished by what are commonly called politicians, and one of the most enterprising and resourceful of these is . . . James H. Preston."⁷ Preston had served as Mayor of Baltimore beginning with his election in 1911 and by 1916 was well into his second term. In his general address to the City Council in October of that year he called for enactment of legislation akin to New York City's "zone law":

It is manifestly injurious to a purely residential neighborhood to have a factory, store or other injurious establishment of business placed in a section which is set aside for and should be occupied solely by residences.

New York has recently obtained a zoning law which to some extent meets this situation. Factories are prohibited

4. R. BABCOCK, THE ZONING GAME 17 (1966).

5. B. SIEGAN, LAND USE WITHOUT ZONING 247 (1972).

6. A Comprehensive City Plan Essential to Success in Developing Greater Baltimore: Advisability of Designating Residential, Business and Industrial Areas, BALT. MUN. J., May 10, 1918, at 1.

7. Mencken, *Forty Years of Baltimore*, The Evening Sun (Baltimore), Oct. 11, 1926, at 19, col. 4.

in certain sections, and the character of improvements, the height of buildings, the establishment of stores and factories, private or public stables or garages and motion picture theatres should be under some definite, wise and conservative public authority, in order to prevent the destruction of real estate values and insure the quiet enjoyment of residences.

The well-being of the community in the section⁸ should be considered as of more importance than the rights of private individuals and property owners.

Some well-considered and constructive legislation should be enacted to meet these situations.⁹

Mayor Preston already possessed considerable power to control the use of land in Baltimore City. In 1908 the City Council had enacted a comprehensive "Mayor's Ordinance" which gave the Mayor the power to approve or disapprove the location of buildings for treatment of the feeble-minded, sanitariums, stables, blacksmith shops, junk shops, brick factories, stoneware factories, paint factories, soap factories, candle factories, woodworking factories, lumber yards, iron mills, foundries, breweries, distilleries, packing houses, gas works, and acid works.¹⁰ His regulatory powers, however, were limited. Although the Maryland Court of Appeals generally had upheld the legality of building permits,¹¹ it had placed serious limitations on the legitimate grounds for disapproving applications for such permits. Permits might lawfully be denied to fire hazards such as tall buildings¹² or motion picture theatres,¹³ but might not be denied because a proposed building would not conform with the general character of other buildings in the neighborhood.¹⁴

Events occurring within the next two years heightened Preston's interest in zoning. A statute extending Baltimore's city limits slowly was progressing through the Maryland General Assembly. As Figure A indicates, annexation would provide an additional sixty-five thousand inhabitants and another sixty-five square miles of ter-

8. *Some Legislation, Akin to New York's "Zone Law," Is Needed to Protect Valuable Property from Invasions that Are Ruinous to Property Values*, BALT. MUN. J., Oct. 27, 1916, at 4 [hereinafter *Some Legislation*].

9. BALTIMORE, MD., ORDINANCES § 155 (1908).

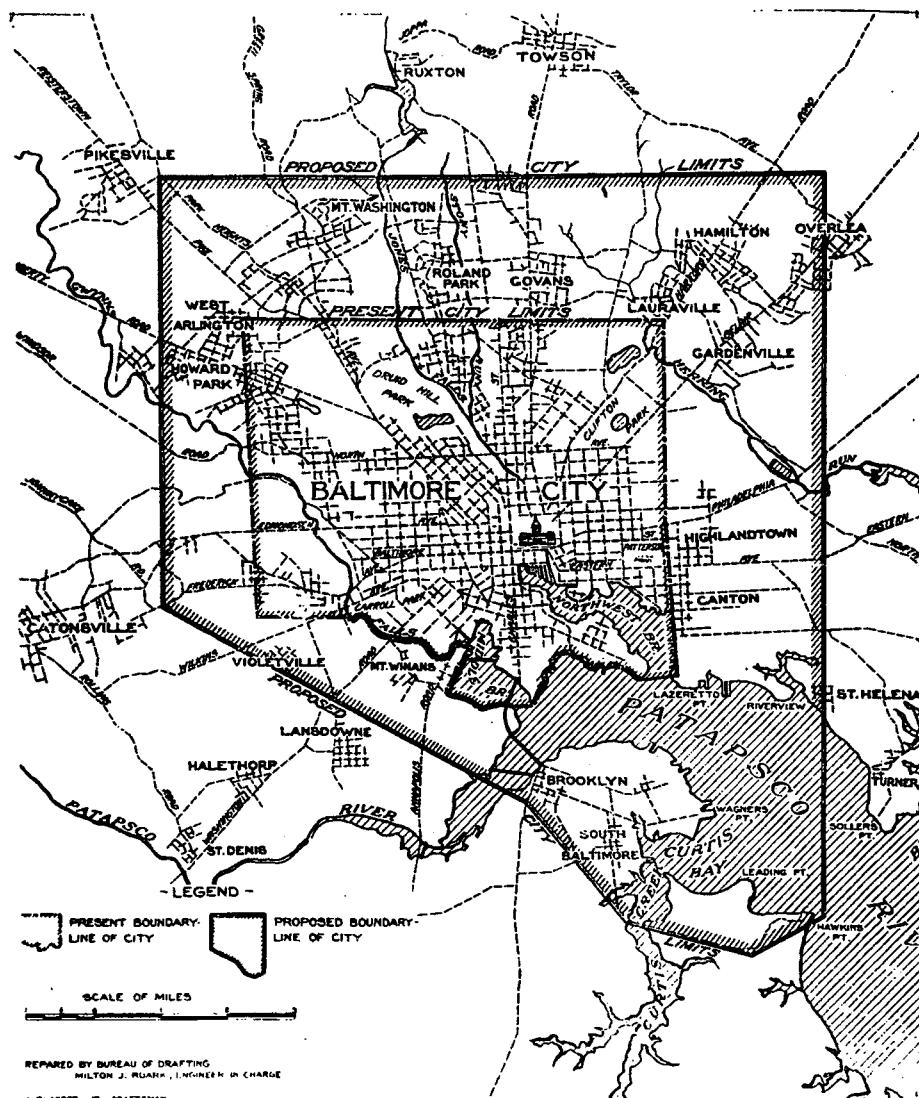
10. *Commissioner v. Covey*, 74 Md. 262, 22 A. 266 (1891).

11. *Cochran v. Preston*, 108 Md. 220, 70 A. 113 (1908).

12. *Brown v. Stubbs*, 128 Md. 129, 97 A. 227 (1916).

13. *Bostock v. Sams*, 95 Md. 400, 52 A. 665 (1902).

FIGURE A



ritory, much of it vacant.¹⁴ Meanwhile, the war effort¹⁵ had brought the home building industry to a virtual stop. Construction permits for dwellings dwindled from 2484 in 1916, to 885 in 1917, and a mere 378 in 1918.¹⁶ As soon as the war was over, pent-up demand was expected to produce a housing boom. Zoning would be the tool to direct development of the city—old and new. The Mayor hoped to implement a building zone law during his third term, but it was not to be. On April 1, 1919, Preston's bid for re-election ended in defeat in the Democratic primary.

While Preston was a staunch Democrat, support for zoning was by no means a partisan position. His successor, Republican William F. Broening, signed Ordinance No. 615 on June 14, 1921, authorizing the creation of a Zoning Commission consisting of seven members, three of them to be City officials and the other four, private citizens. The Commission was charged with the duty of preparing a comprehensive zoning plan for Baltimore and submitting it to the City Council in the form of an ordinance.¹⁷ When the City Council passed the enabling ordinance, only Councilman William Allen was heard to mutter that zoning was "segregation" that the "[p]eople do not understand."¹⁸ Everyone else seemed to favor the measure.

In August 1921 Mayor Broening appointed the following members to the Zoning Commission: Henry G. Perring, Chairman; Joseph W. Shirley; J. Frank Crowther; George W. Bahlke; Edward H. Bouton; John Holt Richardson; and James Carey Martien. Chairman Perring was the Baltimore Chief Engineer, Bahlke a life insurance agent, Shirley head of the Topographical Survey Commission, Crowther the Inspector of Buildings, Bouton the President of the Roland Park Company, Richardson a lawyer, and Martien an industrial real estate broker. Shortly after the Commission was impaneled, it appointed Jefferson C. Grinnalds, the city's Assistant Engineer, as its Secretary.¹⁹

The Baltimore Zoning Commission heeded the admonition of

14. Broening, *Baltimore's Progress During the War Period: Growth in Services, Training, Population and Wealth*, BALT. MUN. J., July 25, 1919, at 1.

15. The United States entered World War I on April 6, 1917.

16. REAL ESTATE BD. OF BALTIMORE, A SURVEY OF HOUSING CONDITIONS 10 (1921) [hereinafter SURVEY].

17. Baltimore, Md., Ordinance 615 (June 14, 1921).

18. The Sun (Baltimore), May 10, 1921, at 12, col. 1.

19. BALTIMORE BD. OF ZONING APPEALS, SECOND ANNUAL REPORT OF THE BOARD OF ZONING APPEALS TO HIS HONOR, HOWARD W. JACKSON, MAYOR, AND TO THE HONORABLE MEMBERS OF THE CITY COUNCIL FOR THE YEAR ENDING DECEMBER 31, 1925, at 3-4, 6 (1926) [hereinafter SECOND ANNUAL REPORT].

the National Advisory Committee on Zoning that "zoning regulations must be adapted intimately to each part of the municipality."²⁰ It prepared detailed maps which divided the city into districts by the use of land and by the use, height, and area of buildings. The Use District Map is depicted in Figure B.

The Use District Map divided the city into a hierarchy of Residence, First Commercial, Second Commercial, and Industrial zones. In Residence Districts only dwellings were permitted; in the First Commercial Districts dwellings along with retail and wholesale business and light manufacturing were allowed; in the Second Commercial Districts business and manufacturing, except certain obnoxious uses, also were permitted; and in the Industrial Districts all uses were allowed.

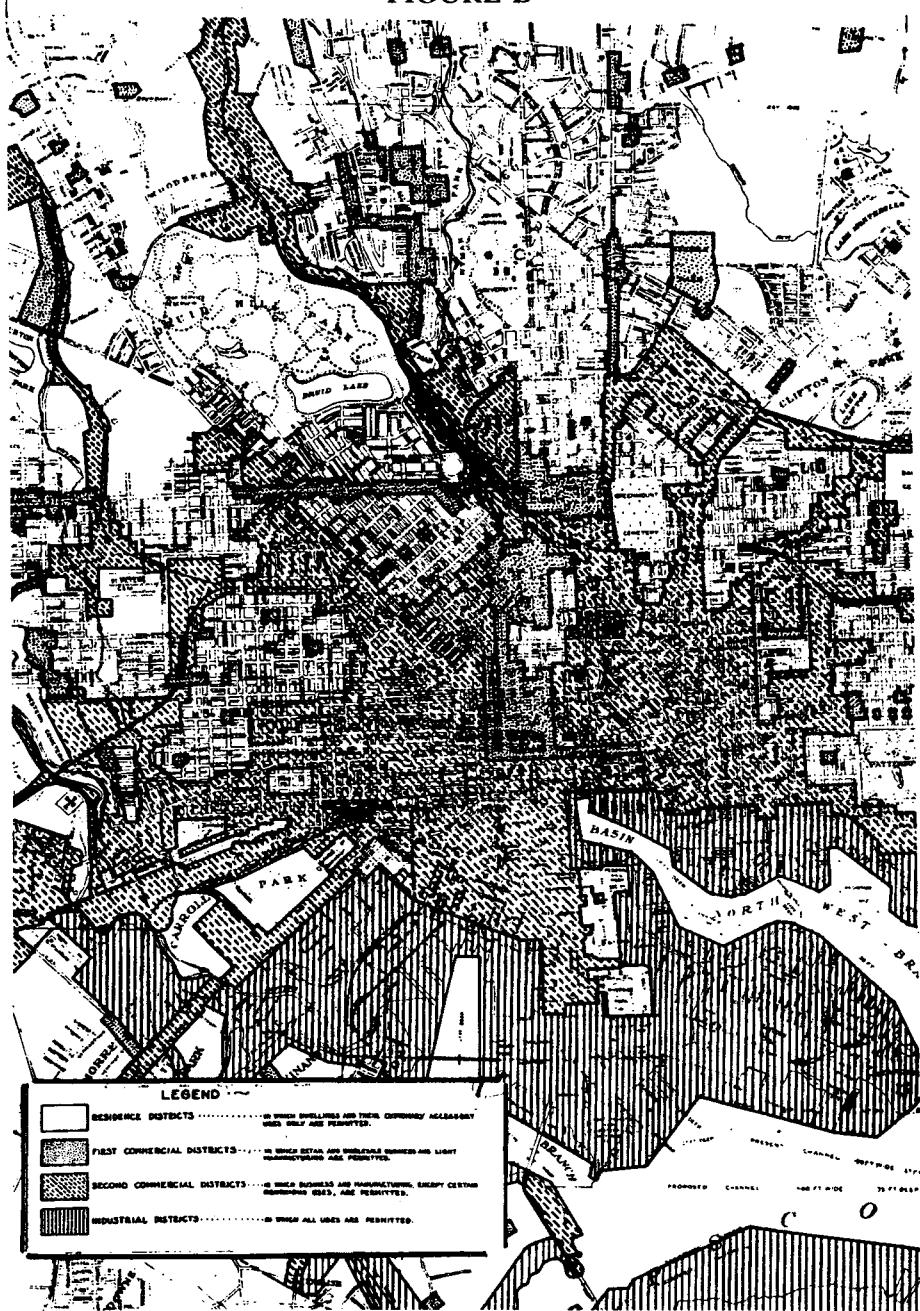
Most existing residential neighborhoods, along with much of the vacant land in the New Annex, was placed into Residence Districts, thereby protecting against commercial or industrial encroachment. The downtown central business district was placed in the First Commercial District, thereby guaranteeing its retail future, while outlying retail districts were scattered throughout the New Annex by creation of small First Commercial Districts at important street intersections. Immediately surrounding the central business district was a Second Commercial District wherein buildings might be used for manufacturing purposes. The Industrial Districts were to the southeast, the downwind side of town. Therein, seemingly any activity was permissible.²¹

The Area District Map divided the city into Area Districts A through F. Area District A was the least restrictive, establishing no minimum lot size, no sideyard requirement, and allowing buildings to cover most of their lots. Area Districts B, C, and D, while increasingly restrictive, required no sideyards. Districts E and F were the most restrictive, limiting building coverage to twenty-five percent to forty percent of the lot area, and requiring buildings to have at least one sideyard. The Map placed the old downtown area in the A District, thereby permitting intensive redevelopment. Most in-town residential neighborhoods were zoned B so as to accommodate tightly packed block rows of houses. The vacant land of the New Annex was zoned E and F so as to exclude rowhouses from the

20. U.S. DEP'T OF COMMERCE, THE PREPARATION OF ZONING ORDINANCES: A GUIDE FOR MUNICIPAL OFFICIALS AND OTHERS IN THE ARRANGEMENT OF PROVISIONS IN ZONING REGULATIONS 5 (1931).

21. See Use District Map for Baltimore, Md. (1923), *infra* Fig. B; SECOND ANNUAL REPORT, *supra* note 19, at 92-93.

FIGURE B



suburbs.²²

The Height District Map, reproduced at Figure C, divided the City into five districts: 2½ Times; 2 Times; 1½ Times; 1 Times; 40 foot. In the 2½ Times District buildings could be erected to a height not over 2½ times the width of the street upon which they abutted. The 2½ Times District more or less coincided with the downtown central business district and allowed construction of skyscrapers up to 175 feet. The 2 Times District was situated in areas to the north zoned for residential use adjacent to Druid Park Lake and Johns Hopkins University. These locations were thought most suitable for tall apartment houses. The 1½ Times District was approximately coincident with the Second Commercial and Industrial Use Districts, the locations where factory buildings were expected to be erected. The 1 Times District coincided with the Residential Districts and accommodated dwellings up to three stories high.²³

Having divided the city into commercial, residential, and industrial zones, on March 5, 1923, the Zoning Commission proposed an ordinance establishing these zones to the City Council. The Council enacted it on May 19, 1923, and Mayor Broening signed the zoning ordinance, along with the 105 zoning maps that were a part of it, into law.

Once zoning went into effect, it became an integral part of the political process. Rather than repealing the earlier "Mayor's Ordinance" which gave the Mayor veto power over various land uses, the City Council extended mayoral authority to include garages, laundries, stores, and warehouses.²⁴ The zoning ordinance itself vested in a new Board of Zoning Appeals power to approve or disapprove "Use District Exceptions," and to vary or modify any provisions of the ordinance where there were "practical difficulties or unnecessary hardship." The Board, consisting of seven mayoral appointees,²⁵ obviously was subject to the Mayor's influence. The City Council retained the power to "on its own motion or upon petition, amend, supplement or change the maps or the regulations."²⁶

The political machinations of Baltimore zoning are well illus-

22. Area District Map for Baltimore, Md. (1923).

23. SECOND ANNUAL REPORT, *supra* note 19, at 91-92. The 1 Times Height Districts were the portions of the old city built up with dwellings three stories high. It was possible, however, to erect a building not over five stories high if the height had not exceeded one times the width of the street.

24. Baltimore, Md., Ordinance 858 (Apr. 15, 1923).

25. See Baltimore, Md., Ordinance 922, §§ 7, 22 (May 19, 1923); BALTIMORE CITY CHARTER § 25 (1918).

26. Baltimore, Md., Ordinance 922, § 25 (May 19, 1923).

FIGURE C



trated by several episodes from 1924 which left the *Sunpapers* wringing their editorial hands. The zoning maps had placed the corner of Cathedral and Eager Streets (on the fringe of Mount Vernon Place) in the First Commercial District. Gasoline filling stations were a permitted use. Under the Mayor's Ordinance, however, the Mayor's approval also was required. In 1924 the new Mayor, Howard Jackson, approved a permit for a station, notwithstanding neighborhood protest. The *Sunpapers* lamented:

There are serious objections to the present situation in which the Mayor—without any definite scheme or purpose in mind for determining when permits should be granted and when they should be refused—must assume responsibility for doing one or the other. It practically comes down in each instance to a test of strength between powerful, competitive special interests who want these valuable privileges and a comparatively small number of citizens who wish to protect a neighborhood from such an invasion.²⁷

Meanwhile, from the New Annex where the zoning maps excluded construction of rows of block houses—and particularly from the Forest Park neighborhood where many preexisted—the Board of Zoning Appeals received applications for variances. Initially, the Board refused them and declared that a precedent had been set.²⁸ But the *Sunpapers* remained uneasy:

If blocks of houses are not to be allowed in various sections of the city, it may be advisable to pass ordinances to that effect, as the Zoning Board recommends in connection with an area of considerable extent in Forest Park. At any rate, there should be no uncertainty as to the permanence of restrictions of this sort. To be sure the Zoning Board can regularly turn down all applications for permission to build blocks of houses in districts where only detached or semi-detached dwellings are to be allowed, and its power which it holds under an ordinance would seem as valid as restrictions laid down in another ordinance applying to some particular district. But it is nevertheless desirable not only to forbid the erection of improper types of homes, but to set at rest all efforts to erect them. Repeated proposals to invade a restricted district have a disturbing effect. Property holders in the neighborhood in question become unduly excited and property values can hardly become as assured

27. The Sun (Baltimore), Dec. 26, 1924, at 10, col. 2.

28. *Id.*, Aug. 1, 1923, at 24, col. 3.

as when the character of the neighborhood is not open to suspicion of unwanted changes.²⁹

But the Mayor and City Council remained unconvinced and in May 1925 approved an ordinance which amended the zoning plan and allowed solid rows of houses in twelve blocks in the Forest Park section.³⁰

The City Council found itself besieged with requests for legislative map amendments. Beseechments to down-zone came from community groups seeking ordinances which would reclassify nearby vacant land from commercial to residential use. One such ordinance proposing to change the use classification on the corner of York Road and Rossiter Avenue was referred by the City Council to the Zoning Board for its recommendation.³¹ The Board responded with a letter of disapproval in which it said that although “[t]ransactions undoubtedly have been made which depend entirely on the zoning of particular neighborhoods[,] . . . [i]f the zoning ordinance is to maintain stable property values the commercial districts as they now exist should be altered very little.”³²

Importunities for up-zoning came from entrepreneurs who sought to make the highest and best economic use of their property. The City Council responded to one request with an ordinance that permitted erection of a garage on property which had been reserved for residential use. The *Sunpapers* chastised the Council members, warning that “[t]his measure can so clearly serve as a precedent for passing innumerable other ordinances of the same sort that it should never have been passed except after a statement of convincing reasons which justify it. These reasons have not been given.”³³

This short political history of origin, adoption, and implementation helps distinguish between the rhetoric and the reality of zoning’s attractiveness. Partisans argued that it would bring predictability and certainty to the real estate market. Demonstrably, this did not prove to be the case. Even if a parcel was designated for commercial use, the Mayor’s permission also might be required before it could be developed. Even if a use was prohibited, the Board of Zoning Appeals might grant an exception for a variance. And the City Council always could change the zoning maps.

The promise of publicists that zoning would enhance property

29. *Id.*, Jan. 5, 1924, at 6, col. 1.

30. Baltimore, Md., Ordinance 396 (May 13, 1925).

31. *The Sun* (Baltimore), Nov. 19, 1924, at 3, col. 6.

32. *Id.*, Nov. 25, 1924, at 3, col. 5.

33. *Id.*, Apr. 9, 1924, at 10, col. 1.

values has been repeated so many times that it is easy to forget its implausibility. The direct impact of zoning was to tell some property owners that they could not develop property to its full economic potential, nor sell it for its highest and best use. How then could zoning be said to promote the value of property? Perhaps the general advantage to landowners protected from perturbation would prove greater than the special cost to disappointed landowners, but this is an *a priori* assumption, not an empirical conclusion—the burden of proof never was met.

There is a more realistic explanation of zoning's political appeal. When the Baltimore City Council adopted the 1923 ordinance, only one person spoke in opposition. Edward V. Coonan, a former city surveyor, was against the whole thing. He charged that zoning would open up great opportunities for graft and corruption and said that Boss Tweed could have devised no better money-making scheme.³⁴

Perhaps Coonan was right. Politicians seek to survive—*i.e.*, re-election or re-appointment—by choosing regulatory policies which serve groups who offer support.³⁵ Zoning transferred decisions concerning the use of urban land from the real estate market to the political process. The Mayor, the City Council, and the Zoning Board were given broad power to make choices determining Baltimore's developmental future. Favors could be dispensed in return for support. Politicians might well view zoning a welcome source of "honest graft."

III. BUREAUCRATS

Social scientist Anthony Downs prepared a study entitled *Inside Bureaucracy*³⁶ in which he developed a theory of bureaucratic decisionmaking. His fundamental premise was that bureaucratic officials, like all agents in society, are significantly (although not solely)

34. *Id.*, Mar. 20, 1923, at 3, col. 5. William Marcy Tweed is the most remembered leader of The Tammany Society, the ill-famed political machine that governed New York City on-and-off between 1822 and 1950. From 1857 through 1871 the Tweed Ring took kickbacks from contractors who shamelessly padded bills for public works. By the 20th century, the plunder had become more sophisticated. Tammany lieutenant George Washington Plunkitt allowed that only a foolish politician took bribes, when the opportunities for honest graft were so great. Honest graft involved taking advantage of the "grand opportunities all around for the man with a political pull." Baida, *The Corrupting of New York City*, AM. HERITAGE, Dec. 1986, at 81, 89.

35. See B. MITNICK, THE POLITICAL ECONOMY OF REGULATION 121 (1980).

36. A. DOWNS, INSIDE BUREAUCRACY (1967).

motivated by their own self-interest.³⁷ While Downs made no attempt to test his hypotheses in the real world, the Baltimore zoning experience lends credence to his conclusion.

Downs theorized that in most cases a bureau begins as a result of the aggressive agitation by a small group of zealots who have a specific idea they want to put into practice on a larger scale.³⁸ He further conjectured that a charismatic leader often will attract a group of disciples who create a bureaucratic structure to perpetrate his ideas, but also to support themselves.³⁹

Edward Murray Bassett played the role of "charismatic leader" in the zoning story. The so-called "father of American Zoning," he was a lawyer and a former congressman who served as chairman of the 1913 New York Commission on Building Districts and Restrictions which created the first comprehensive building zone law. He spent the rest of his professional life promoting zoning. Bassett explained his motivation as follows:

After the zoning plan was adopted by New York City a citizen's committee . . . was established . . . to help extend zoning throughout the country . . . The future of zoning was at that time precarious and it was considered that its extension to other cities would be an aid securing the approval of courts.⁴⁰

At about the time Bassett began his missionary work on behalf of zoning, Jefferson C. Grinnalds was a civil servant working for the City of Baltimore. He had graduated from Baltimore City College in 1904 and earned an engineering degree from the University of Virginia in 1907. After working for a time in Key West, Florida, he returned to Baltimore to serve as an assistant city engineer.⁴¹ Grinnalds subsequently became Bassett's disciple.

Although Grinnalds' civil service job was secure, he had broader ambitions. As his career progressed, he personified Anthony Downs' theses. Downs had suggested a typology of officials in which some are motivated almost entirely by goals that benefit themselves rather than their bureaus or society—e.g., "climbers," "conservers"—while others have goals that combine self-interest

37. *Id.* at 1-4.

38. *Id.* at 5-9.

39. *Id.* at 5-7.

40. E. BASSETT, *ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS* 12 (1974).

41. *The Sun* (Baltimore), Nov. 7, 1966, at A15, col. 1.

and altruistic loyalty to larger values—e.g., “zealots,” “advocates.”⁴²

At first Grinnalds was a “climber”—a bureaucrat seeking to maximize his own power, income, and prestige.⁴³ Recognizing that his job as a city engineer had led to a dead end, he pursued a strategy of aggrandizement. Grinnalds studied law at night and took courses in psychology, political economy, and art history “for the purpose of preparing himself for this particular work [zoning].”⁴⁴ He re-educated himself as a bureaucratic “zealot,” sublimating his personal ambitions to the sacred policies of zoning. He then looked for a pulpit from which to preach his gospel.

While still an assistant engineer, Grinnalds became Baltimore’s official zoning publicist, writing a fourteen-part serial, borrowing heavily from the rhetoric of Bassett’s national zoning movement, that appeared between October 1920 and November 1921 in the *Baltimore Municipal Journal*. Together these articles are the definitive apology for Baltimore zoning.

Grinnalds ascribed any number of virtues to zoning. He explained that zoning contributed to public health in a variety of ways. First and foremost, it assured to the people the “light and pure air so necessary for their health.”⁴⁵ By limiting the construction of skyscrapers on business streets, dark canyons would be avoided and the natural sunlight filtering into the interiors of buildings would protect the employees from the diminished “mental and physical efficiency” which results from artificial lighting.⁴⁶ Also, the exclusion of tall factory buildings from residential neighborhoods would permit the sun’s rays to act as a disinfectant against germs which would breed otherwise in the nearby dark, damp yards and houses. Likewise, the exclusion of tall buildings would improve the circulation of air, and the prohibition against factories in a residential neighborhood would assure growing children “fresh, clean air to breathe.”⁴⁷

Grinnalds further opined that zoning would protect against

42. A. DOWNS, *supra* note 36, at 88.

43. *Id.* at 92.

44. *A Course of Lectures by Jefferson C. Grinnalds on City Planning at the Johns Hopkins University*, BALT. MUN. J., Nov. 10, 1922, at 2. Grinnalds graduated from Baltimore City College in 1904, studied engineering at the University of Virginia, and was admitted to the degree of Bachelor of Laws at the University of Maryland in 1915. His subsequent study at Johns Hopkins University seems to have been limited to special topics with no discernable course of study or degree objective.

45. Grinnalds, *Zoning Under the Police Power of the State*, BALT. MUN. J., Oct. 22, 1920, at 5.

46. *Id.*

47. *Id.* at 5, 6.

congestion and overcrowding. When people live close together, “[t]heir freedom of action is restricted, their forms of entertainment are limited in kind and in number, their opportunity for recreation out of doors is curtailed and their liability to contract communicable disease is increased.”⁴⁸ Zoning’s “remedy for the sake of health is a limit to the heights of tenements, a limit to the proportion of the lot which they may occupy, [and] provision for side yards or spaces between the buildings.”⁴⁹

Decentralization of population also was said to have public safety advantages:

[C]oncentration of population in the business district make[s] travel in the streets slower and dangerous. The sidewalks are crowded. Pedestrians often take to the roadway, endangering their lives amid the ever increasing traffic. Moving fire apparatus makes the danger greater. The fire department is hampered in answering an alarm and the occupants of the burning building are in a worse plight. It would be better if the business district could be spread over a greater area, if the tenement district were less dense, if rows of brick dwellings could be elongated to the detached house conditions. The greater the density of population, the greater is the fire hazard, the lower is the state of health and the higher is the death rate.⁵⁰

Height limitations likewise were said to limit fire hazards.

In the case of fire in a high building, the position of the occupants above the tenth floor is extremely hazardous. The fire department can fight effectively with outside means a fire not over 80 to 100 feet above the street. Higher than this there is a significant risk that lives may be lost.⁵¹

Moreover, Grinnalds argued that exercise of the police power for the general welfare had a wider scope than regulations for health and safety:

Property values can properly be stabilized under the power to legislate for the general welfare. Low buildings can be protected against tall ones. Blighted districts can be prevented or rehabilitated, perhaps not for their original high class residential use but for business use. High class resi-

48. *Id.* at 6.

49. *Id.*

50. *Id.*

51. *Id.*

dential districts can be preserved for their rightful use. Detached dwellings can be protected in a district. Areas can be assigned to unbroken rows of brick houses. Apartment houses can be segregated. All of these classes of uses can have their values stabilized and even increased since they would not be subjected to varying uses as they are without a zoning ordinance.⁵²

Hence, the segregation of land uses into districts was seen as a method of increasing property values overall while promoting the general welfare.

Finally, Grinnalds hoped that zoning, by promoting good housing, would encourage productivity and good citizenship. "It is a fact that a well-housed community of laborers will be more productive, will earn more for the employer, will get higher wages, will be able to pay higher rent, will give better return to the capital invested in houses and will make better citizens."⁵³

His credentials as a zoning zealot thus established, Grinnalds looked for a chance to advance himself by moving into a position affording greater power and prestige. Opportunity knocked when he acted as secretary of the Baltimore Zoning Commission in 1921.⁵⁴ That same year he was selected by Secretary of Commerce Herbert Hoover "from among all the zoning experts of the country as the only advisor" to the National Zoning Committee.⁵⁵

When Mayor Broening signed the zoning ordinance into law in 1923, he used two pens. One of these he gave to Grinnalds.⁵⁶ Grinnalds also received a more material reward. The ordinance created a new position of Secretary of the Zoning Board, who, according to Grinnalds, would be called upon "to meet and deal with the public, make investigations and be familiar with Supreme Court decisions on zoning in other States and cities."⁵⁷ To no one's surprise, Grinnalds was appointed to the job that he had tailor-made for himself.

Once ensconced, Grinnalds became less the *zealot* and more the *advocate*. He directed his energy toward enhancing the power and prestige attached to his position. He fought tenaciously when his position was threatened by a court ruling which held zoning uncon-

52. *Id.*

53. Grinnalds, *A Comprehensive Scheme for Single-Family Residence Zones is the Only Means to Protect the Homes and Investments of the Working Classes*, BALT. MUN. J., Aug. 19, 1921, at 2.

54. SECOND ANNUAL REPORT, *supra* note 19, at 3-4.

55. Grinnalds, *supra* note 44, at 2.

56. The Sun (Baltimore), May 20, 1923, at 8, col. 1.

57. *Id.*, Mar. 30, 1923, at 3, col. 5.

stitutional.⁵⁸ He called publicly for an amendment to the Constitution of Maryland, and behind the scenes he worked with Edward Murray Bassett to have the court decision reversed without being overruled.⁵⁹

Grinnalds served as Secretary of the Zoning Board from 1923 until his retirement at the age of seventy in 1954.⁶⁰ At some time during that long run, he likely became a "conserver"—one opposed to change and dedicated to maintain his present level of powers, income, and prestige.

Grinnalds created for himself a career of public service in the field of zoning. He joined Bassett in the nationwide legion of professional zoners. Among the other members were Robert Whitten of New York, Harland Bartholomew of St. Louis, and Gordon Whitnall and Hugh R. Pomeroy of Los Angeles.⁶¹ While these officials sought to serve the public interest as they perceived it, their motives also were rooted in their own self-interest. Together they zealously promoted the creation of zoning bureaus and staunchly advocated expansion of zoning powers throughout the nation's urban areas.

IV. BROKERS

On December 1, 1920, the lead in a *Sunpapers* editorial read as follows:

That the Real Estate Board [of Baltimore] should favor a zoning system for this city is not surprising. A good zoning system tends both to stabilize and to increase real estate values, and while it may prevent some individual speculator from making an occasional large profit, it will benefit the fraternity of real estate men as a whole.⁶²

But, of course, the position of the Real Estate Board does seem incongruous. Just two years before, it had opposed a new building code for Baltimore. The Board objected to the "very drastic rules

58. *Goldman v. Crowther*, 147 Md. 282, 128 A. 50 (1925).

59. See, e.g., *The Sun* (Baltimore), July 16, 1925, at 3, col. 4; *id.*, Oct. 15, 1930, at 3, col. 1.

60. "Grinnalds, Jefferson Cleveland," Biography File, Maryland Department, Enoch Pratt Free Library, Baltimore, Md.

61. A veritable "who's who" of contemporary city planners contributed to a group of articles published as *Zoning in the United States*, 155 ANNALS AMER. ACAD. POL. & SOC. SCI. (Part II) (May 1931) [hereinafter *Zoning in the United States*]. This compilation, including an article by Bassett, presents an important cross-section of philosophy as it had evolved by the early 1930s.

62. *The Sun* (Baltimore), Dec. 1, 1920, at 10, col. 1.

for the future erection and conversion of existing dwellings."⁶³ Zoning would include many of the same type of rules limiting the use, size, and design of buildings. Real estate boards in nearby cities opposed zoning. According to the Pittsburgh Real Estate Board zoning would "serve no good purpose, and . . . [would] retard the city's growth and prosperity."⁶⁴ Why then did Baltimore's Real Estate Board welcome the intervention of government regulation into its marketplace? Perhaps the answer to this question may be found in the historical record.

The Real Estate Board of Baltimore began life in 1858 as a trade association of eleven Baltimore real estate agents. Its declared objective was "facilitating the sale of property—real, personal and mixed—and for the purpose of protecting and regulating the business of real estate broker."⁶⁵ It also hoped to fix commissions at an appropriate level so as to discourage "unhealthy" competition and to mediate disputes as to how commissions were to be split.⁶⁶

In 1915 the trade association formally adopted the name the "Real Estate Board of Baltimore."⁶⁷ The change was in keeping with a movement sponsored by the National Association of Real Estate Boards to change real estate brokerage from a trade to a profession.⁶⁸ To this end, the Association coined a new name—"Realtor."⁶⁹ An insignia showing both a suburban home and a skyscraper in silhouette, with the words "Realtors, Are Active Members of Constituent Boards," became the Association's trademark.⁷⁰ Not all Baltimore real estate agents could call themselves Realtors, only the elite members of the Real Estate Board of Baltimore.

These were volatile times in Baltimore's real estate trade. The old city was thinning and changing. As the upper class and investment capital moved to the Annex, downtown property depreciated in value. Speculators converted some three-story houses into walk-

63. Real Estate Board of Baltimore, Minutes of the Meeting of the Zoning Committee, May 7, 1918, at 1 (minutes are generally available at the office of the Greater Baltimore Board of Realtors) [hereinafter Minutes].

64. R. LUBOVE, TWENTIETH CENTURY PITTSBURGH: GOVERNMENT, BUSINESS AND ENVIRONMENTAL CHANGE 95 (1969) (quoting PITTSBURGH REALTOR, June 26, 1923, at 3).

65. Pitt, *The Real Estate Board—From 1858*, BALT. REAL EST. & BLDG. NEWS, Sept. 1958, at 25.

66. *Id.*

67. Minutes, *supra* note 63, Apr. 7, 1915, at 1.

68. Pitt, *supra* note 65, at 25.

69. *Id.*

70. H.L. MENCKEN, THE AMERICAN LANGUAGE: SUPPLEMENT ONE: AN INQUIRY INTO THE DEVELOPMENT OF ENGLISH IN THE UNITED STATES 565 (1962).

ups; businesses replaced other residences.⁷¹ The market for new houses was characterized by boom or bust. In 1918, the last of the war years, only 378 permits for the construction of new dwellings were issued. Dwelling permits soared to 3700 in 1919 only to drop back to 2000 in 1920. During this period the average cost of a dwelling increased from \$1,666 in 1918 to \$4,490 in 1920. By August 1921 the Board reported that economic depression and inflated costs had "virtually destroyed the housing market." In 1921 fewer than 1000 new dwelling permits were issued.⁷²

The Real Estate Board responded to these vicissitudes with a variety of lobbying efforts. It successfully opposed a new building code which would have made it more difficult to convert houses into apartments.⁷³ It worked to facilitate construction in the New Annex: on the demand side, it supported Mayor Broening's "Own-Your-Own-Home" campaign; on the supply side, it lobbied for low gas and electric rates, and for the inexpensive extension of water and sewer service.⁷⁴ The Board also sought to expedite the conversion of blighted residential neighborhoods to commercial use so as to increase the city's tax base.⁷⁵

When it came to zoning, the Board was ambivalent. Mayor Preston had championed zoning as a means of stopping commercial encroachment in residential neighborhoods, as a method of preventing conversion of houses into tenements or apartments, and as a technique for promotion of cottage development to the exclusion of block rows. Some real estate brokers on the Board had an economic stake in the expansion of the Baltimore business district, in the conversion of old residences into multiple dwellings, and in the construction of low cost houses. But the housing market had collapsed. Something had to be done. National experts argued that zoning would enhance property values overall. In June 1920 the Real Estate Board of Baltimore appointed a committee to study the possible approaches.⁷⁶

The Committee sponsored a conference in August 1920. In attendance were many of its members as well as Mayor Broening and other city officials. The guest speaker was Harland Bartholomew, a city planning expert from St. Louis, Missouri. It was the unanimous

71. S. OLSON, BALTIMORE 303-04 (1980).

72. SURVEY, *supra* note 16.

73. Minutes, *supra* note 63, May 7, 1918, at 1.

74. *Id.*, May 13, June 17, July 10, Aug. 22, 1919.

75. *Id.*, Dec. 9, 1919, at 1.

76. *Id.*, June 22, 1920, at 1; July 7, 1920, at 1.

opinion of the conference members that Baltimore was "very much in need of a zoning system and that prompt steps should be taken for the preparation of necessary plans and the passage of the requisite law."⁷⁷ In October of that year outgoing president Charles H. Steffey in his final address urged the Board to remain behind the zoning movement and, if necessary, to have its lawyer prepare and submit a suitable zoning ordinance to the City Council.⁷⁸

Nevertheless, when City Solicitor Roland Marchant proposed just such an ordinance in November 1920, the Real Estate Board was recalcitrant. It contended that the proposed ordinance vested too much power in the Mayor by placing final say in zoning matters in the Board of Estimates, which was under the Mayor's political thumb. Further, the Mayor would continue to have veto power over the location of nuisances such as livery stables and soap factories. The proposed ordinance subsequently failed passage in the City Council.⁷⁹

When in June of 1921 an ordinance was passed, it created a commission rather than a zoning law. The Zoning Commission of seven members included three public officials and four private citizens, two of them, Edward H. Bouton and James Carey Martien, members of the Real Estate Board of Baltimore.⁸⁰

The experiences of James Carey Martien on the Zoning Commission illustrate how one Realtor harnessed zoning to serve his own ends. In 1921 Martien purchased on behalf of his client, clothing manufacturer L. Grief & Bros., the Albert tract which lay between Govans and Notre Dame College. Govans was a nineteenth century town which had become part of Baltimore as a result of the 1918 Annexation. Martien convinced the Commission to designate the tract as commercial without public hearings and without disclosure as to how it would be developed.⁸¹

When the Commission's decision was discovered, the neighbors reacted immediately and negatively. The Reverend Father Hartwell of St. Mary's Church-Govans accused Martien of a "public-

77. *Id.*, Aug. 19, 1920, at 1.

78. *Id.*, Oct. 19, 1920, at 2.

79. *Ordinance Creating a Zoning Commission for City*, BALT. MUN. J., Nov. 5, 1920, at 2; *The Sun* (Baltimore), Dec. 29, 1920, at 5, col. 4; Minutes, *supra* note 63, Nov. 26, 1920, at 1; *Id.*, Dec. 2, 1920, at 1-2.

80. Baltimore, Md., Ordinance 615 (June 14, 1921); *SECOND ANNUAL REPORT*, *supra* note 19, at 3; Minutes, *supra* note 63, Oct. 18, 1921, at 3.

81. *The Sun* (Baltimore), May 9, 1922, at 10, col. 3; *The Evening Sun* (Baltimore), May 10, 1922, at 3, col. 2; *The Sun* (Baltimore), Dec. 22, 1922, at 5, col. 1.

be-damned" spirit and "star-chamber" methods.⁸² A spokesman for Notre Dame College petitioned Mayor Broening "in behalf of the cultured community, whose children frequent our school, to do what you can to prevent the establishment of any industry in Govans."⁸³

The *Sunpapers* was conciliatory, editorializing:

It is not unnatural that property owners and residents in the vicinity of the Albert tract on the York Road should feel perturbed by the action of the Zoning Commission in setting apart a very considerable area in that important suburban neighborhood for commercial purposes. There is no good reason, however, for growing unduly alarmed or excited over it. The development may be an addition, not a disadvantage, to the vicinity . . .⁸⁴

When the furor died down, use of the tract for business purposes was approved. Mayor Broening voiced the opinion that the proposed structure would be an "ornament not a detriment to the neighborhood."⁸⁵ Assurances were given that although the site might be used as a factory, the character of the plant, if this happened, would complement the neighborhood and that 50 percent of the 500 employees would be members of the executive and office force.⁸⁶

Martien also worked hard to assure that the ordinance proposed by the Zoning Commission would accommodate business and industry. He feared that the Commission might "establish a residential district stone wall about Baltimore which would make it a beautiful place to live in but not a place in which to do business."⁸⁷ Martien proposed that after zones were established which allowed residential areas reasonable room for expansion, the balance of the city be classified to permit the expansion of commerce and industry.⁸⁸

The Zoning Commission struck a compromise somewhere between the "ideal scheme" proposed by those planning for the future and the "conservative position of the practical businessman basing

82. *The Sun* (Baltimore), May 9, 1922, at 10, col. 4.

83. *Id.*, May 16, 1922, at 7, col. 2.

84. *Id.*, May 9, 1922, at 10, col. 3.

85. *Id.*, Dec. 22, 1922, at 5, col. 1.

86. *Id.*, May 9, 1922, at 10, col. 3; Dec. 22, 1922, at 5, col. 1.

87. *Id.*, Dec. 22, 1922, at 5, col. 1.

88. *Id.*, May 24, 1922, at 6, col. 4.

his decisions upon . . . more immediate considerations."⁸⁹ The old downtown was placed in a commercial district wherein business and light manufactories were permitted to expand. Vacant land on the outskirts of the city to the west and north was placed in a district which precluded non-residential development. In the southeast an expansive industrial district was created where industry could flourish free from neighborhood complaints. History remembers Martien as the leading industrial real estate broker of his day.⁹⁰

Notwithstanding Martien's influence, the Real Estate Board was not altogether happy with the zoning ordinance proposed by the Zoning Commission in 1923, and lobbied to defer enactment until a number of self-serving amendments were considered. Some amendments related to minor zoning map modifications suggested by members of the Board who were looking out for particular clients. Another amendment provided assurance that the law would not apply retroactively to building permits issued prior to its passage.⁹¹ And finally the Board sought to change qualifications required of the Secretary to the Real Estate Board. The job specifications originally called for training as a civil engineer rather than experience as a real estate professional, but C. Philip Pitt, Secretary of the Real Estate Board, "felt that the Zoning Board of Appeals should be left free to appoint any man as its secretary"⁹²—including a Realtor.

When Mayor Broening finally signed the ordinance into law in May 1923, it required that one of the appointed members of the Board of Zoning Appeals be a real estate expert with ten years of practical experience. James Carey Martien filled the bill. He was appointed by newly elected Mayor Howard Jackson as the Board's first chairman.⁹³

Hence, the mystery of the Real Estate Board of Baltimore's support for zoning was mostly in our mindset. We have been schooled so long by traditional historians that the governmental regulations proposed by the reform movement were anti-business that we accepted the proposition uncritically and unequivocally. More recent scholarship suggests that this is not necessarily the case. An influen-

89. *Id.* City planning experts were divided into two schools. One school took the broad view of social problems, planning for the future on the basis of an ideal scheme. The other school sided with business, seeing economic development as a more immediate concern.

90. *James Carey Martien*, BALTIMORE, Nov. 1961, at 12.

91. The Sun (Baltimore), Mar. 30, 1923, at 3, col. 5.

92. *Id.*

93. *Id.*, June 9, 1923, at 3, col. 4.

tial book on the Left, James Weinstein's *The Corporate Ideal in the Liberal State*,⁹⁴ hypothesized that reforms were formulated and developed under the aegis and supervision of America's corporate leaders. Businessmen, the theory goes, were not always or even normally the first to advocate regulations, but few reforms were enacted without their tacit approval. Business leaders sponsored institutional adjustments such as zoning with a view toward creating schemes of business and governmental cooperation that would insure to their benefit.⁹⁵

The relationship between the Real Estate Board of Baltimore and zoning supports this revisionist view of regulation. The Board was not the first to advocate zoning, but it recognized early on that zoning was an idea whose time had come. It joined the zoning movement in large part to influence the shape of the new institution.

Not all real estate brokers benefited from the realization of Baltimore zoning. The ordinance made it more difficult to convert residences to commercial use, which worked against those brokers who had a stake in the expansion of the business district and in the conversion of old houses into multiple dwellings. The zoning maps placed drastic limits on where apartments and block rowhouses could be built. For example, George Morris, a real estate agent who had fostered many Baltimore suburban developments, quarreled with the exclusion of group houses from the Arlington section of the suburbs. He argued, "I don't see why houses of the duplex type are more objectionable. . . . They are the sort of houses that people are demanding these days especially in this vicinity."⁹⁶ Other agents serving the blue-collar market presumably shared his frustration. But most Realtors were benefited. As the elite in the real estate trade, they had shaped the new institution so that it would embrace their values. Those catering to the cottage trade looked to zoning to keep working-class housing away from the garden suburbs. Industrial agents saw in zoning a device to encourage new industry. Zoning created an apparatus with strings to pull on behalf of their clients.

V. BUILDERS

When zoning was first considered in the 1920s, Baltimore had a

94. J. WEINSTEIN, THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918 (1968).

95. *Id.* at ix-xv.

96. *The Sun* (Baltimore), Jan. 20, 1922, at 20, col. 5.

mixed housing stock. Within the old city limits most of the houses were in block rows. The Poppleton Plat, a street map for Baltimore devised in 1812, laid the groundwork. Prepared without a topographical survey, it imposed a gridiron of 350 long blocks with service alleys on the hilly inner city irrespective of contours. The most effective way of housing a large number of people in a small space proved to be the building of straight block rows.⁹⁷

The downtown houses were built of brick and fronted directly upon the sidewalks. They ranged in width from ten to eighteen feet and were from forty-five to fifty feet deep with one or two "blind" rooms in the center. Most were two-story, and a few were three-story houses. On narrow side streets and alleys were scaled down versions of the houses on broad front streets.⁹⁸

As the city radiated out from its center, rowhouses were built along trolley lines. To the east, old style houses continued to be in preferential demand. In Baltimore's Teen years, E.J. Gallagher and others had built thousands of rowhouses for blue-collar workers around Patterson Park and in Canton.⁹⁹ But to the west and north, a new style rowhouse was coming into fashion. "Daylight" houses had a front of twenty to twenty-two feet and a depth of approximately thirty-five feet. Each room had at least one outside window. Westward, James Keelty constructed blocks of new style rows along the Number 14 line.¹⁰⁰ To the north various builders had created the streetcar suburb of Peabody Heights.¹⁰¹ These overwhelmingly Roman Catholic and Protestant communities were inhabited by white-collar workers and skilled craftsmen.¹⁰²

Baltimore contained surprisingly few apartment houses. Writing in 1911, a commentator from *Harper's Monthly* observed, "[I]n all Baltimore there can scarcely be more than a dozen 'apartment buildings'!"¹⁰³ A study of *Housing Conditions in Baltimore* done in 1907 found the "old style death trap tenement with its six stories and its air shaft . . . practically nonexistent."¹⁰⁴ The few tall apart-

97. N. SHIVERS, THOSE OLD PLACID ROWS: THE AESTHETIC AND DEVELOPMENT OF THE BALTIMORE ROWHOUSE 15-16 (1981).

98. *Id.*

99. S. OLSON, *supra* note 72, at 262, 271.

100. Orser, *The Making of a Baltimore Row House Community: The Edmondson Avenue Area, 1915-1945*, 80 Md. HIST. MAG. 203, 206 (1981).

101. J. KELLY, PEABODY HEIGHTS TO CHARLES VILLAGE (1976).

102. *Id.* at 14; Orser, *supra* note 101, at 214.

103. Rhodes, *Baltimore*, 122 HARPER'S MONTHLY 407, 416 (1911).

104. BALTIMORE ASS'N FOR THE IMPROVEMENT OF THE CONDITION OF THE POOR & THE CHARITY ORG. SOC'Y, HOUSING CONDITIONS IN BALTIMORE (1907).

ment buildings which pre-existed zoning served the retiring families of the Social Register, not the working class.

Since the turn of the century the favored ground for suburban development was to the north and northwest. Beyond Peabody Heights, to the north, the Roland Park Company had embarked on the most ambitious suburban development in Baltimore. Beginning in 1891 with 550 acres of land beyond the city's limits, the company installed a streetcar line which made the area about a half-hour ride from the center of town. In 1911 the company expanded to include the Guilford territory, thereby increasing its holdings to "a thousand acres of restricted land."¹⁰⁵

The first Roland Park houses were mansions, built by the company on speculation. Later, various builders constructed custom houses for lot purchasers, subject to the company's approval of the architectural plans.¹⁰⁶ By 1922 Roland Park-Guilford was a mature and successful subdivision. It was the home of most of Baltimore's successful merchants and professionals—assuming they were gentiles, since in practice Jews were excluded from the area.¹⁰⁷

According to all reports, the man most responsible for the success of the Roland Park Company was Edward H. Bouton.¹⁰⁸ He came to Baltimore from Kansas City in 1908 as a young general manager for the company. From 1921 through 1922, Bouton served on the commission which prepared Baltimore's zoning ordinance. He retired in 1935 as company president.¹⁰⁹

Perhaps Edward H. Bouton's greatest contribution was the inclusion of restrictive covenants in each deed from the company. Pursuant to these restrictive covenants the owners agreed to abide by certain restrictions. The basic restrictions were as follows: first, premises were to be used for single family residences; second, the houses were required to be set back from the street by thirty feet; third, stables and private sewer systems were prohibited; fourth, an annual charge was assessed against landowners in order to pay for the cost of maintaining the streets, water supply, and lighting and sewer systems.¹¹⁰

105. NATIONAL ASSOCIATION OF BUILDERS' EXCHANGE OF THE UNITED STATES OF AMERICA, BALTIMORE OF TODAY: SOUVENIR OF THE FIFTH ANNUAL CONVENTION 17 (1916) [hereinafter BALTIMORE OF TODAY].

106. J. DORSEY & J. DILTS, A GUIDE TO BALTIMORE ARCHITECTURE at xlivi-xliv (2d ed. 1981).

107. S. OLSON, *supra* note 71, at 256.

108. J. DORSEY & J. DILTS, *supra* note 106, at xliii.

109. *Id.* at xlivi-xliv.

110. *Id.* at xliv.

Before zoning was implemented the Roland Park Company had mixed uses of land. As early as 1896 the company had sited the Roland Park Shopping Center, sometimes called the first suburban shopping center in the United States, at a location where it was surrounded by mansions. Nearby the company had built a seven-story apartment house, the Upland Apartments. A fire station at the rear of the shopping center provided protection for the apartment house. Elsewhere a few rowhouses had been scattered among the detached cottages.¹¹¹

Although the company had mixed building types, it was no social leveler. The shopping center was an architectural landmark in the Tudor half-timbered style; its shops catered to the carriage trade. The Upland Apartments were spacious and elegant, just the place for aging gentry who no longer wished to deal with the cares of homeownership. By and large, the company used rowhouses as a buffer. For example, Waverly, a blue-collar rowhouse community, pre-existed Guilford on the other side of Greenmount Avenue, its eastern boundary. The company responded by building a block of new houses facing along the west side of Greenmount. Behind this strip, detached houses were built. Such group houses as were constructed in the interior were of grand scale and proportion. Some sold following World War I for as much as \$27,500.¹¹²

A different situation prevailed in the northwest suburbs. There a number of developers had built large-frame cottages along the main thoroughfare in Walbrook, West Arlington, and Forest Park.¹¹³ Small-scale subdividers followed, intent upon filling in with block rows of houses. The Forest Park Improvement Association feared "cheap two story development of congested dwellings" nearby. In 1912 it convinced the Maryland General Assembly to enact a law requiring any dwelling subsequently constructed in the area to be "constructed as a separate and unattached building."¹¹⁴ But in 1916 the Maryland Court of Appeals held the law unconstitutional.¹¹⁵ The northwest was left architecturally up for grabs.

In reality, the conflict between cottages and rows was a skirmish in the battle between the classes. Ownership of a single-family de-

111. *Id.* at xlivi-xliv.

112. *Id.* at 239-40; *The Sun* (Baltimore), Apr. 16, 1950, at 1, col. 3.

113. *BALTIMORE OF TODAY*, *supra* note 105, at 101.

114. *Id.*

115. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 98 A. 547 (1916).

tached house was vital to the middle-class American dream.¹¹⁶ The working class, including first-time home buyers among the immigrant Jewish community, would settle for a rowhouse.¹¹⁷ The middle-class fought this attempted invasion of its domain by the lower classes.

Class warfare moved to the New Annex in 1918. Annexation incorporated a number of pre-existing towns and suburbs: West Arlington, Mount Washington, Roland Park, Govans, Hamilton, Lauraville, Gardenville, Highlandtown, Canton, and Brooklyn. The houses in these neighborhoods ranged from the modest bungalows of Lauraville and Hamilton, to the small country cottages of Govans, the fine frame residences of West Arlington and Mount Washington, and the mansions of Roland Park. Only to the east and south in the working class neighborhoods of Highlandtown, Canton, and Brooklyn was there rowhousing to be found in the annexed territory. Since most of the new ground was empty, however, several questions arose. Would the vacant areas be developed in block rows or on the cottage plan? Would the New Annex be inhabited by the lower class or the upper class, by foreigners or the native born?

Mayor Preston had a political preference. Lamenting that rowhouse construction already had resulted in 33d Street "being occupied by a character of residences entirely inadequate for the dignity, beauty, and cost of the street,"¹¹⁸ he observed: "The 'row of houses' is always unwelcome in the community developed on the cottage plan. Such an invasion is invariably followed by a conspicuous display of 'For Sale' signs and a consequent drop in real estate values."¹¹⁹ He expressed the hope that the New Annex should be improved free from rowhouses so that "growth of the city and wealth and population" would "best pay the taxpayers of the old city."¹²⁰ Baltimore would lift itself by its own bootstrap—by limiting itself solely to the construction of cottages, the New Annex would be more middle class and more prosperous.

The Zoning Commission shared the view of Mayor Preston that

116. C. PERIN, *EVERYTHING IN ITS PLACE: SOCIAL ORDER AND LAND USE IN AMERICA* 32-80 (1977).

117. See generally M. Vill, *Park Heights: A Study of a Jewish Neighborhood* (1979) (unpublished manuscript prepared for the Baltimore Heritage Project).

118. *Some Legislation*, *supra* note 8, at 4.

119. *Some Advantages of the Districting Idea in City Planning: Coupled with Revised Building Laws Would Promote Public Safety, Increase Efficiency and Protect Property Values*, BALT. MUN. J., May 24, 1918, at 1.

120. Preston, *Public Improvement Program for 1919: Paving a Most Important Detail—Intensive Development for the New Addition and Harbor*, BALT. MUN. J., Feb. 7, 1919, at 1.

cottages were the most desirable form of residences.¹²¹ But in 1916 the Maryland Court of Appeals held that the legislature lacked the power to require that each dwelling house within a section of Forest Park be "constructed as a separate and unattached building."¹²² The police power might not be used for aesthetic purposes or to promote segregation according to social class.¹²³ First and second class residence districts were thus of dubious legality.

Edward Murray Bassett, the New York expert advisor to the Zoning Commission, proposed an alternative strategy, arguing that "[i]t might be desirable to establish only one residence district instead of two, as contemplated, with provision for height and area, to take care of cottages, apartment houses and other buildings housing more than one family."¹²⁴

The zoning commission accepted Bassett's recommendation. In form, the zoning ordinance created a one-class Residence District. But in effect, by overlaying Area and Height Districts it segregated cottages from block rows and apartments. In Area Districts E and F all residences were required to have at least one sideway. The Area maps placed virtually all of the residential portions of the New Annex in E and F Districts, thereby assuring that only detached or semi-detached dwellings would be constructed there. The Height District maps limited construction of tall apartment houses to certain portions along Charles Street, University Parkway, Eutaw Place, and Lake Drive.¹²⁵ Class segregation was made to appear a side effect of civil engineering, not the desired product of social engineering.

When zoning came to Baltimore in 1923, the building industry was in the midst of an economic recovery. Housing starts, which dwindled to 1000 per year in 1921, reached an historic high of 6000 per year in the mid-1920s. New houses filled in the old city, and the city population overflowed into the new suburbs. In response, the builders¹²⁶ adapted zoning to their various ends.

The advantage of the new zone plan to the small-scale cottage developer was clear enough. Without it, a marketing problem arose when it came time to sell the cottages. Purchasers were concerned that shops or rowhouses might be built nearby, resulting in "depre-

121. *Some Legislation*, *supra* note 8, at 4; *The Sun* (Baltimore), Jan. 30, 1922, at 6, col. 1.

122. *Byrne v. Maryland Realty Co.*, 129 Md. 202, 210-11, 98 A. 547, 549 (1916).

123. *Id.*

124. *The Sun* (Baltimore), Mar. 25, 1922, at 22, col. 5.

125. *SECOND ANNUAL REPORT*, *supra* note 19, at 67.

126. *SURVEY*, *supra* note 16, at 12.

ciation of property values and lowering the character of the neighborhood."¹²⁷ Builders in neighborhoods such as Forest Park needed zoning so that they could assure their purchasers that the neighborhood would continue to be a first class community of "well-spaced homes with breathing spaces around them."¹²⁸

Larger developers such as the Roland Park Company were insulated by their extensive land holdings from the prospect of having glue factories, groceries, or blue-collar housing nearby. The company passed along this protection to its purchasers in the form of restrictive covenants running with the land. But even a 1000 acre tract has edges, and company president, Edward H. Bouton, as a member of the Zoning Commission, saw to it that the border was protected.

Across the alleys from Roland Park's boundaries, rows of garages were built in response to the widespread ownership of motor cars beginning in the decade of the Teens. Such garages, which often were rented to Roland Park householders who needed a place to store their newly acquired automobiles, were unsightly and unappreciated. In 1922 the *Sunpapers* editorialized:

One of the most difficult city problems to cope with has been the shrinkage of property values occasioned by the large communities of private garages often set down tier on tier in the rear of homes and apartment houses. . . . A vast amount of new housing is required yearly because citizens have declined to remain in sections of their cities which have steadily deteriorated in this way[.] . . . [I]t represents an economic waste which the cities now realize they must guard against . . .¹²⁹

The zoning ordinance placed Roland Park-Guilford and surrounding neighborhoods within a Residence District. A garage was permitted only as an "accessory use," to be located on the same lot with the house to which it was accessory.¹³⁰ This requirement guarded against economic waste.

The more intriguing question is why apartment builders and rowhouse developers agreed, with hardly a public complaint, to the strictures of zoning. The Height Districts dramatically limited the location of suburban high-rise apartment houses to Lake Drive fac-

127. *The Sun* (Baltimore), Nov. 26, 1921, at 20, col. 3.

128. *Id.*, Aug. 1, 1923, at 24, col. 3.

129. *Id.*, July 4, 1922, at 6, col. 3.

130. Baltimore, Md., Ordinance 922, art. II, § 3(b) (May 19, 1923); *see also* Use District Map for Baltimore, Md. (1923), *supra* Fig. B.

ing Druid Hill Park and to an area between the Johns Hopkins University campus and Guilford. Perhaps no objections were raised because, while apartment sites were limited, those provided were in prime locations, and already in the hands of a group of virtually monopolistic apartment builders. The aftermath of zoning saw the construction of the Warrington (1928), the Ambassador (1931) near the Johns Hopkins University, and the Temple Gardens (1926) near Druid Park Lake.¹³¹ These ten-story apartments were situated at the edges of Eutaw Place and Roland Park-Guilford, the best Jewish and gentile neighborhoods, perfect locations in which the elders could retire and expire.

The lack of objection by rowhouse builders to zoning strictures is more difficult to explain. Among them, Edward J. Gallagher and Frank Novak seem to have been particularly disadvantaged. In 1923 both were building rowhouses on a large scale in the still sparsely settled northeast part of the city. The zone plan, however, seemed to foreclose further development of rowhouses in the corridor north of 33d Street and east of Erdman Avenue, thereby interfering with the seemingly ordinary course of expansion.

Frank Novak was born in 1877, the son of Bohemian immigrants. In 1914 he established the Frank Novak Realty Company and by the early 1920s reigned as "the two-story king of Baltimore,"¹³² having built over 7000 two-story rowhouses in East Baltimore by that time. Frank Novak worked hand and glove with the city. He donated the Venable Park location upon which the city erected a stadium in 1922. The new stadium attracted a cross-town trolley line that ran along 33rd street and eventually extended eastward along Erdman Avenue to Belair Road. Novak subsequently gave a stream valley to the city which was used to create Herring Run Park. The city, in turn, sewerred his properties and on one occasion even bought the previously installed private sewer system.¹³³

When zoning came into effect, Novak was focusing his attention on the northeast. South of 33d Street he had a number of block rows under construction. Further to the east he owned a parcel of the Montebello estate, on which he planned to construct 2400 homes.¹³⁴ North of 33d Street, to the east of the stadium, he owned

131. Maryland Query File, Maryland Department, Enoch Pratt Free Library, Baltimore, Md.

132. Unpublished research of Mary Ellen Hayward, Curator, Maryland Historical Society.

133. *Id.*

134. *Id.*

a tract which he planned to develop as a cottage community modeled in a more modest way after Roland Park.¹³⁵

The 1923 zoning maps facilitated Novak's plans. The area south of 33d Street was districted for rowhouses, permitting him to continue his efforts unabated. The parcel north of 33d Street and adjacent to the stadium, upon which he planned to build cottages, was placed in an E Area District and was thereby protected against any intrusion of rowhouses. Novak's Montebello parcel at the junction of Erdman Avenue and Belair Road—where the existing number 15 streetcar line met the new crosstown trolley—was districted for rowhouse development. It was the only parcel in the Harford Road-Belair Road corridor so designated, giving Novak an oligopoly on the blue-collar housing market. The Frank Novak Realty Company eventually built about 1800 cottages and rowhouses in the area between the stadium and Belair Road.¹³⁶

Edward J. Gallagher, the son of Irish immigrants, had begun building porch-front daylight houses in the Teens. He was active in various neighborhoods within the old city limits to the north and northeast—Peabody Heights, Waverly, and along Harford Road. He is credited as having been among the first builders to introduce marble steps and indoor toilets to modest two-story houses. His Waverly development was to the west of the new Baltimore Stadium north of 33d Street and abutted the eastern boundary of Guilford.¹³⁷

In 1922 Gallagher purchased from Mary Garrett Jacobs a portion of the Garretts' "Chestnut Hill" estate. The parcel lay immediately to the north of the new stadium and seemed ripe for development.¹³⁸ The 1923 zoning maps, however, placed the parcel in an E Area District, thereby precluding block rows.¹³⁹

But not for long. On January 14, 1924, less than one year after the enactment of the original maps, they were amended by an ordinance which changed the Chestnut Hill parcel from classification E to D.¹⁴⁰ Later in the 1920s, Gallagher developed the parcel as a "restricted residential community" he called Ednor Gardens—after his sons Edward and Norman—consisting of 184 rowhouses in the

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Area District Map for Baltimore, Md. (1923).*

140. *Baltimore, Md., Ordinance 79 (Jan. 14, 1924).*

popular Tudor style.¹⁴¹

Zoning thus benefited various builders in varying ways: it enhanced the marketability of cottages sold with zoning's guarantee of a "first class" neighborhood; it buffered the boundary of Roland Park-Guilford; it insulated some builders from competition by limiting apartment and rowhouse development to tracts which they controlled. When zoning interfered with the plan of influential builders, they relied on the willingness of the Mayor and City Council to make changes.

VI. BUSINESSMEN

Baltimore's business firms came in all shapes and sizes. So did the advantages entrepreneurs found in the public regulation of land use.

Central business districts developed in American cities during the nineteenth century around inner city transport terminals. The earliest specialty shops catered to the carriage trade, but these were replaced by department stores that served a more general clientele. Concentration of merchant capital eventually led to the appearance of clusters of corporate and professional offices close to banks and insurance company offices.¹⁴²

Baltimore's downtown was completely rebuilt following the Great Fire of 1904. The first class retail trade occupied a square mile of territory south of Monument Street and west of Charles Street. To the east a few prestige skyscrapers and headquarters buildings had been added. The Baltimore Trust Company built a thirty-two-story tower bounded by Light, Baltimore, and Redwood Streets, and Standard Oil located a tower on St. Paul Street facing Preston Gardens.¹⁴³

The downtown business community apparently had little initial interest in zoning. The property located therein was the most expensive in the city, and the prime retailers, corporate leaders, and financiers were accustomed to pursuing their developmental goals within a laissez-faire land market. Downtown merchants were comfortable in their belief that unwelcome wholesalers and manufacturers could not afford the high cost of downtown property. The New York City experience in which horrified retail merchants found their

141. Hayward, *supra* note 132.

142. Walker, *A Theory of Suburbanization: Capitalism and Construction of Urban Space in the United States*, URBANIZATION AND URBAN PLANNING IN A CAPITALISTIC SOCIETY 386 (M. Dean & A. Scott eds. 1981).

143. S. OLSON, *supra* note 71, at 314.

businesses threatened by the encroachment of immigrant garment manufacturers was considered an aberration.

Once zoning was proposed, however, retailers looked for ways it might be used to further their interests. Baltimore's two leading department store executives, Albert Hutzler of Hutzler Bros. and Walter Sondheim of Hochschild, Kohn & Co., called for the creation of a district into which the first class retail trade might expand free from competition from manufacturing or processing firms. The Baltimore Street Merchant's Association and the Charles Street Association subsequently joined them, seeking assurances that the ambience of their districts would not be violated by the presence of laundries, bakeries, or the like.¹⁴⁴

Baltimore's zone plan accommodated these preferences by creating two commercial use classifications. In First Commercial Districts only retail, wholesale, and office uses were allowed; in Second Commercial Districts light manufactories were permitted. The plan designated as First Commercial a zone in the heart of the city significantly larger than the existing central business district. Herein retailers could freely expand and new office towers could be erected. The plan designated as Second Commercial the territory surrounding the First Commercial District. This area was targeted to become the city's manufacturing district.¹⁴⁵

The ordinance also encouraged construction of downtown skyscrapers. The Zoning Commission hired Robert H. Whitten, a planning expert from New York City, to advise it on the appropriate height of downtown buildings. Whitten recommended that buildings be limited in height to 150 feet with extra height allowance for set-backs. The Commission rejected these recommendations, taking the easier course of maintaining the existing height limitations, which were set at 175 feet following the Great Fire of 1904 (expressed by designating a district where buildings could be 2½ times the width of the street).¹⁴⁶ Zoning must not interfere with progress.

Retail and service establishments were scattered widely throughout the older portions of Baltimore City. Firms which provided frequently purchased commodities or services, such as grocery stores and laundries, were located conveniently near their

144. *The Sun* (Baltimore), Dec. 17, 1921, at 4, col. 2; Jan. 13, 1922, at 7, col. 1; May 27, 1922, at 22, col. 4.

145. Use District Map for Baltimore, Md. (1923), *supra* Fig. B; SECOND ANNUAL REPORT, *supra* note 19, at 92-93.

146. *The Sun* (Baltimore), Nov. 10, 1922, at 17, col. 7; SECOND ANNUAL REPORT, *supra* note 19, at 91-92.

customers.¹⁴⁷ The zoning ordinance permitted existing businesses in Residence Districts to continue as "non-conforming uses" until the owners changed the use or the building was destroyed.¹⁴⁸ Zoning's proponents gave assurances that "[u]ltimately all non-conforming uses will automatically change to prescribed uses. . . . The change will be slow but sure."¹⁴⁹ But this assurance failed to recognize that pre-existing groceries, filling stations, laundries, and confectioneries located in districts now zoned exclusively residential thrived on the absence of competition.

Likewise, merchants in the newly created outlying business districts were given an oligopolistic advantage. Zoning enthusiasts touted the advantages to the suburban retail store which was "protected from the destructive competition of an unnecessary number of similar stores."¹⁵⁰ Urban and suburban shopkeepers who enjoyed these protected locations became staunch defenders of zoning.

Large-scale factories, which were rare in the nineteenth century, became the norm by the twentieth.¹⁵¹ Baltimore's "boosters, boomers, gogetters and other such ballyho[o] men" were intent on getting their share of them.¹⁵² A major purpose of the 1918 Annexation had been to bring within Baltimore City's boundaries additional land for industrial expansion. Two areas were of particular importance. The Canton Company had a major holding of waterfront property which stretched to the east beyond the old city line. South across the harbor was a neck of land protruding into Curtis Bay that also was ripe for industrial development.¹⁵³ Not everyone, however, agreed as to the desirability of new industry. According to H.L. Mencken:

What Baltimore needs, of course, is not more factories, but fewer. All truly civilized cities, in fact, prohibit such factories altogether. They are shoved into ninth-rate towns where the smells they radiate seem natural, and the poor half wits they employ may be suitably entertained by evangelical religion and the Klan.¹⁵⁴

147. See R. MUTH, URBAN ECONOMIC PROBLEMS 58-59 (1975).

148. Baltimore, Md., Ordinance 922, § 8 (May 19, 1923).

149. Grinnalds, *What of the Buildings Which Do Not Conform to the Proposed Zoning Plan?*, BALT. MUN. J., Sept. 23, 1923, at 2.

150. Comey, *The Value of Zoning to Business*, BALT. MUN. J., Mar. 9, 1923, at 6.

151. Walker, *supra* note 142, at 386.

152. Mencken, *Notes of a Baltimorean*, The Evening Sun (Baltimore), Sept. 10, 1923, at 13, col. 4.

153. See S. OLSON, *supra* note 71, at 304-05.

154. Mencken, *supra* note 7, col. 5.

But most important people disagreed, and the 1920s witnessed an industrial renaissance. Lever Brothers built a soap factory in Canton, while Davison, Glidden, and United States Industrial Alcohol added new buildings to their Curtis Bay facilities. Bethlehem Steel, Western Electric, and General Motors all established branch plants in southeast Baltimore.¹⁵⁵

The Industrial Districts in the zone plan facilitated development. The plan placed virtually all of south and southeast Baltimore in a large and inclusive industrial zone. This industrial zone, however, embraced a number of existing residential neighborhoods. Some of these were mapped so as to remain residential enclaves—the Canton Town Center, Federal Hill, Carroll Park, Mount Wyman's, and Brooklyn. But many other pre-existing residential neighborhoods, among them Fells Point, Locust Point, the Otterbein, Pig Town, and Fairfield, were not so fortunate, and approximately 11,000 dwellings (many of them occupied by blacks and immigrants) were placed within the industrial zone.¹⁵⁶

This designation removed a major obstacle to the location of new industry. Incoming industry had been faced previously with the prospect of having nuisance suits enjoining operations or requiring payment of damages. In 1918, for example, the Maryland Court of Appeals had held that the noxious fumes from a recently constructed ferro silicon plant in East Baltimore could constitute a nuisance condition requiring payment of damages to homeowners for injury to their property.¹⁵⁷ Industrial zoning went a long way towards stifling such nuisance suits since it amounted to enunciating that a public choice had been made that the area in question might properly be used for industrial purposes. As a New York judge observed, "[i]t is not for the court to step in . . . and condemn as a nuisance a business which is being conducted . . . at the very spot where the [zoning ordinance] said that it might be located."¹⁵⁸ Hence, "industrial zoning [was] the means by which business [would] get the reciprocal protection that highly restricted residential neighborhoods have."¹⁵⁹

One group of businessmen pressed for and received an exemp-

155. S. OLSON, *supra* note 71, at 304-05.

156. See SURVEY, *supra* note 16, at 2; Use District Map for Baltimore, Md. (1923), *supra* Fig. B.

157. Jackson v. Shawinigan Electro Prod. Co., 132 Md. 128, 103 A. 453 (1918).

158. Bove v. Donner-Hanna Coke Corp., 236 A.D. 37, 43, 258 N.Y.S. 229, 236 (1932).

159. *Industrial Zoning Gives Business Districts the Reciprocal Protection which Highly Restricted Residential Neighborhoods Have*, BALT. MUN. J., Sept. 9, 1921, at 2.

tion from zoning. The operators of private investor-owned utilities—*i.e.*, the telephone company, gas and electric company, trolley companies, and railroads—argued that zoning might be applied to prevent them from extending necessary services to the New Annex.¹⁶⁰ A special provision was incorporated into the zoning ordinance to accommodate their concerns.¹⁶¹

While members of the business community found ways to adapt zoning to their specific needs, they also had a more general agenda. Marxist analysts posit that businessmen *qua* capitalists had on their collective minds the question of worker control.¹⁶² The rhetoric of zoning's proponents confirms this preoccupation. Jefferson C. Grinnalds, for example, heralded zoning as a device for keeping workers happy:

Industrial managers know that married men are the best workers as a class. They cannot afford to lose time like single men. They have the life and care of a family at stake; therefore, they are more industrious and more productive. They are not floaters to the extent that single men are. Married men demand fair housing. Single men can live in a lodging house, in a boarding house or even may sleep in a room. When time for lay-off comes at a plant, it is the single ones who generally go first. It is a fact that a well-housed community of laborers will be more productive and will earn more for the employer, will get higher, will be able to pay higher rent, will give better return to the capital invested in houses and will make better citizens.¹⁶³

New York expert Edward M. Bassett agreed. He suggested that the improved housing conditions resulting from zoning would "help to bring it about that city-raised families [would] have all the vitality which has formally been credited to country-raised families."¹⁶⁴ Such rhetoric no doubt appealed to the capitalists' wistful dream of a quiescent class of workers.

VII. HOMEOWNERS

At a 1916 convention of builders, Baltimore claimed the title "City of Homes."¹⁶⁵ Its homeowners came from all classes. Many of

160. *The Sun* (Baltimore), Jan. 13, 1923, at 3, col. 3.

161. See *Baltimore*, Md., Ordinance 922, § 27 (May 19, 1923).

162. See Walker, *supra* note 142, at 388.

163. Grinnalds, *A Comprehensive Scheme for Single-Family Residence Zones is the Only Means to Protect the Homes and Investments of the Working Class*, *BALT. MUN. J.*, Aug. 19, 1921, at 2.

164. Bassett, *Home Owners Make Good Citizens*, *BALT. MUN. J.*, Mar. 10, 1922, at 6.

165. *BALTIMORE OF TODAY*, *supra* note 105, at 97.

the wealthy had country estates where they escaped from the plagues and heat of summer, and they also maintained townhouses around Mount Vernon Place and Eutaw Place for the winter season. Many of the managerial-professional class of doctors, lawyers, and merchant chiefs lived nearby, while others were relocating in the garden suburbs of Forest Park and Roland Park-Guilford.¹⁶⁶ White-collar workers owned the ubiquitous two-story brick rowhouses which were Baltimore's building staple, but some were beginning to favor the new daylight houses under construction to the west and north of downtown along Edmondson Avenue and in Peabody Heights, while others were trading up to modest bungalows in Gardenville and Hamilton. Even thrifty workmen could afford to own their own homes. The economics of building in block rows (shared walls, common utilities, and mass construction) produced new houses for as little as \$1000, which, according to the easy payment plan associated with the ground rent system of financing and the liberal lending practices of neighborhood building and loan associations, could be bought for little more than paying rent.¹⁶⁷ According to police surveys in blue-collar East Baltimore, over seventy percent of the dwellings were owner-occupied.¹⁶⁸

Baltimore's homeowners were counted as the most numerous friends of zoning. In understanding why, students of Karl Marx remind us that the built environment has both an "exchange-value" and an "use-value."¹⁶⁹ Exchange-value inheres in the economic system, while use-value is a function of the class structure.

We already have discussed the effect of zoning on the exchange-value of dwellings. Brokers and builders attempted to use zoning to manipulate the housing market to their speculative advantage. Homeownership added two-thirds of the city's householders to the ranks of the speculator. Each owner was intent upon enhancing the value of this single most important asset.

Whether zoning would enhance the exchange-value of any particular dwelling remained an open question. Zoning's proponents argued that use restrictions would create a reciprocity of advantage by protecting neighborhoods from the stench, noise, and congestion which followed from commercial or industrial intrusions. Use restrictions, however, curtailed development. The reciprocal advantage might or might not be greater than the cost of lost opportunity.

166. *Id.* at 97-103.

167. *Id.* at 103-05.

168. SURVEY, *supra* note 16, at 4.

169. Walker, *supra* note 142, at 384.

Risk-averse owners, never bothering to make such calculations, welcomed zoning as insurance against the downside of neighborhood change.

Profit-maximizing owners, on the other hand, looked for ways to affirmatively adapt zoning to their advantage. Ideally, a speculator would want his or her property unrestricted, and everyone else's restricted. In that situation the owner could capitalize both on the advantages of a clean and quiet neighborhood and on the opportunity of making the highest and best economic use of the property. The speculator would have a monopoly site advantage—operating, for example, the only grocery store in an otherwise totally residential community.

In Baltimore it took no time at all for owners to figure out these market facts. In the spring of 1922 before zoning went into effect, there was a rush on building permit applications for stores, laundries, and garages. Building Inspector Crowther guessed that speculators purposely were selecting locations which would be closed to business once zoning went into effect in the hope that they would be able to sell their nonconforming businesses at a profit.¹⁷⁰ The *Sun* papers commented:

An instinct for speculation is undoubtedly the cause of the extraordinary number of applications for store permits which are now coming into the Building Inspector's office. No such flood has occurred during the summer months of previous years, and the perspective passage of the zoning ordinance which will prevent the construction of stores in the restricted residential areas is the only explanation of the present rush to get as many such stores as possible before the ordinance goes into effect. The rush is reasonable enough from the speculator's point of view, but the City's welfare demands that no such permits shall be granted now unless the need for them is clearly evident.¹⁷¹

The City Council responded by amending the Mayor's Ordinance so that the Mayor's approval was required before a store could be operated anywhere in the city.¹⁷²

We have seen that the residential zoning in Baltimore's New Annex required minimum lot sizes and prohibited construction of rowhouses and apartments. Common sense and empirical studies

170. *The Sun* (Baltimore), Aug. 15, 1922, at 5, col. 2.

171. *Id.*, Aug. 18, 1922, at 10, col. 1.

172. The Mayor's office usually exercised its approval prerogative with the advice of the Zoning Commission. See, e.g., *The Sun* (Baltimore), Dec. 9, 1922, at 5., col. 7.

indicate that regulations of this sort significantly increase the cost of new housing.¹⁷³ Economic theory teaches that prohibitions against least-cost housing will raise the value of the existing housing stock by restricting the supply of new housing.¹⁷⁴ We have seen that Baltimore brokers and builders capitalized on this strategy, but there is no evidence that Baltimore's householders similarly benefited. Homeowners were too diffuse and disorganized to effectuate profit-taking from "scarcity zoning."

Certainly, some householders did not benefit from increased values. Baltimore's disadvantaged "lumpenproletariat," which included poor blacks and immigrants, could by no means afford new houses, but might have taken advantage of a "filter-down" effect in a freer housing market. This effect occurs when, as a result of new construction, a number of houses previously occupied by the upper and middle class becomes available to the working class. As the working class moves to these dwellings, their former landlords, in order to keep their property rented, may find it necessary to lease to a poorer class at affordable rents.¹⁷⁵ Zoning, however, slowed the rate at which housing filtered down and made rental housing less affordable.

Recognition that homeowners are mini-speculators fails to fully explore their range of motivation. Owners *use* their dwellings as well as trade them. Although use-values are reflected to some degree in the market system, they are better understood as a product of the class structure of society.

Zoning was elitist in origin. Its first proponents were Progressive patricians. They looked to zoning to classify the population and to segregate the classes according to their stations in life. Everything and everybody would be put in their place. First-class neighborhoods would be protected from the perturbations of urban life.¹⁷⁶

Baltimore's plutocrats meant to use building zone laws to protect their grand old neighborhoods from change. It was part of a holding action to prevent conversion of the brownstones of Mount Vernon Place and Eutaw Place. Over the long term this fight was

173. S. SEIDEL, *HOUSING COSTS & GOVERNMENT REGULATIONS: CONFRONTING THE REGULATORY MAZE* 159-94 (1978).

174. See, e.g., Hamilton, *Zoning and the Exercise of Monopoly Power*, 5 J. URB. ECON. 116, 130 (1978).

175. See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Code, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971).

176. S. TOLL, *ZONED AMERICAN* 172-87 (1969).

doomed to failure because the wealthy were moving in record numbers to the New Annex. Once a critical mass had departed, demographic destiny earmarked these neighborhoods for flats, boarding houses, funeral parlors, and filling stations. Zoning only slowed the rate of change.

Once ensconced in the suburbs, the well-to-do had limited use for zoning. They had sufficient purchasing power to buy the quality of neighborhood that they wanted. The Roland Park Company, for example, capitalized upon this demand for an exclusive neighborhood in a garden setting.

It was rather the middle class that found a social use for suburban zoning. The bourgeois suburbanites placed a high priority on "residential differentiation"—everyone in the neighborhood should be of their social class or higher.¹⁷⁷ In Baltimore's New Annex this preference could be measured in terms of housing types. Cottages were dwellings suitable for the middle class while block rows were suitable for the working class. Cottage dwellers had a distinct aversion to having rowhouses nearby. The Baltimore experience is replete with examples of efforts by suburbanites to block construction of rows of brick houses in the area because of their fears that such construction would result in "depreciation of property values and lowering the character of the neighborhood."¹⁷⁸

Various reasons may be given for the preference for socio-economic segregation. Sociologist Constance Perin explained that:

[n]ewcomers to the suburbs who are lower income and who will live in other than a single family detached house contradict the cultural rule that there is a natural and correct order of life that suburban arrival preeminently symbolizes. Higher density in the suburbs confuses the public meaning. . . . Cluster development brings people of city ways who are rewarded *too soon* for their income and accomplishments by the suburban idyll. Out of order and out of place, they are dangerous to those already there.¹⁷⁹

Geographer Richard A. Walker elaborates that the demand for "residential differentiation" inheres in the class structure of capitalism. Separation of people according to class serves the capitalistic system by assuring an adequate supply of labor near the workplace; by providing a buffer of social control and defense when other social

177. Walker, *supra* note 142, at 389-91.

178. *The Sun* (Baltimore), Nov. 26, 1921, at 20, col. 3.

179. C. PERIN, *supra* note 116, at 206.

mechanisms are lacking (*i.e.*, keeping the lower classes literally in their place); by reproducing the class structure from generation to generation; and, by "imbuing neighborhood landscapes with class values and putting boundaries around the experience of children and adults." The upper and middle class—*i.e.*, the wealthy and the managerial-professional class—created a "cult of domesticity" to "optimize the life-chances of children, to avoid falling back into the working class, and to reproduce a mode of life."¹⁸⁰

A newspaper advertisement from 1925 translated such dialectics to the marketplace. Shortly before the 1923 maps were drawn, a new road had been created linking the commercial center at 33d Street and Greenmount Avenue to the Johns Hopkins University campus. Called University Parkway, it left a vacant wedge of land on the southern border of Guilford. The zone plan designated this parcel for rowhouse development since it served to buffer Guilford from the commercial, institutional, and residential development to the south. The area was developed in 1923-1924 as Oakenshawe, a community of two-and-one-half story rowhouses in the Georgian style. The marketing campaign emphasized the social uniqueness of their location:

Surrounded by the beautiful homes of Guilford . . . these homes, equally as beautiful and distinctive, offer the man of moderate means the only opportunity in Baltimore to live in such a fashionable district. Don't let this one great opportunity slip away. Living in one of these . . . [h]omes, you will enjoy all the refinement of the highly cultured community that it is. Your children will have the highest type of environment to mold their young characters in. And the most exacting will find this lovely community directly adjoining Guilford one of homelike charm. [The] desirable location has been properly improved by unique and beautifully designed brick homes as substantial within as they are artistic without . . .¹⁸¹

Growing up near Guilford, the advertisement suggested, would enhance the opportunity of the next generation to climb a rung on the social ladder.

While restrictions on the use of property were prompted by the middle class as a device for ensuring socio-economic segregation of residences, zoning proved valuable to the proletariat as well. When zoning went into effect, most of Baltimore's working class lived

180. Walker, *supra* note 142, at 390-92.

181. *The Sun (Baltimore)*, Apr. 18, 1925, at 2, col. 5.

within the old city limits. Blue-collar workers by and large lived in old style rowhouses built out to the sidewalks in East Baltimore. Many white-collar workers lived in the new style daylight rowhouses which were built with front yards within the old city limits to the west and to the north. These workers shared with their social superiors a desire to protect their neighborhoods from the forces of change.

The anxieties of the white working class were real enough. Commercialization threatened to bring noisy and dirty gasoline filling stations, groceries, and corner drug stores into what previously had been all residential areas.¹⁸² They feared that an increase in "rooming and apartment houses" would result in deterioration of residential streets¹⁸³ and that just around the corner was the "negro invasion."¹⁸⁴

Neighborhood groups responded with attention and organization. The Mount Holly Improvement Association created a Vigilance Committee in 1922.¹⁸⁵ And in 1925 seventeen neighborhood improvement associations held a meeting to discuss concerted action. One of the proposals discussed was the consensual imposition of restrictive covenants on 5000 pieces of city property.¹⁸⁶

Voluntary efforts, however, were doomed to failure. Prohibitively large transaction costs made it impossible to create a cartel of like-minded landowners. Zoning was a better solution. It employed the political process to fight the forces of the free market. For example, Peabody Heights was a white-collar community of daylight

182. See *The Sun* (Baltimore), Nov. 19, 1924, at 3, col. 5; Dec. 10, 1924, at 12, col. 3. The dominant class attempted to fuel working-class concerns. For example, C. Morgan Marshall, then chairman of the Board of Zoning Appeals, recounted the following cautionary tale:

Take for instance the young foreigner [sic] and his wife, both born in the shadow of Lombard Street near Central Avenue who determine their children should not be compelled to grow up under the same handicaps they had to overcome. Taking their scant savings they "bought" a house in a block with porch fronts, grass plots, yards with no board fences and what, to them, was most important, not a single store. The menace of that first entering wedge of business was very real to them . . . [N]oise, dirt, often vermin and rodents, increased traffic with its hazards, bright lights making porches and steps uncomfortable on a summer night, are not trite or empty reasons . . .

Year Just Closed Marks Important Period in Zoning of City, BALT. MUN. J., Feb. 27, 1928, at 5. Like a Pied Piper in reverse, the first merchants would lead a parade of horribles into the neighborhood.

183. *The Sun* (Baltimore), Jan. 4, 1924, at 3, col. 4.

184. *Id.*, Apr. 22, 1925, at 6, col. 5.

185. *Id.*, July 12, 1922, at 3, col. 6.

186. *Id.*, Apr. 22, 1925, at 28, col. 1.

rowhouses to the north of the city, south of 33d Street. William S. Norris, President of the Peabody Heights Improvement Association, expressly looked to "city zoning to protect residential neighborhoods."¹⁸⁷ The Association won some and lost some. It succeeded in preventing the commercialization of St. Paul Street south of 25th Street, and resisted the establishment of a moving-picture theatre.¹⁸⁸ It failed in its effort to prevent the location of a garage at the intersection of Oak and 26th Streets, which already had a pre-existing can manufacturing plant on one corner and an open cut of the Baltimore & Ohio Railroad on another.¹⁸⁹ Absent zoning, the Association would have been powerless even to attempt these fights, but zoning afforded homeowners of all classes a greater opportunity for "neighborhood self-determination."

VIII. CONCLUSION

When Jefferson C. Grinnalds and other spokesmen for the zoning movement first presented their case for zoning, there were few voices of dissent. So well placed politically and socially were the proponents that it was unfashionable to stand in opposition. Baltimore lawyer Issac Lobe Straus' attack on zoning as "based upon the communist theory of government" was beyond the pale of respectable discourse.¹⁹⁰

For its first forty years zoning was criticized only in muted tones. Naysayers pointed out that zoning, as implemented, sometimes fell short of achieving its laudable objectives.¹⁹¹ Commentators were particularly concerned that corrupt deals between developers and local officials sometimes resulted in permissive "spot zoning."¹⁹² Courts in Maryland and elsewhere developed special doctrines to curb rampant flexibility and to protect zoning's integrity.¹⁹³

Over the past twenty-five years the pendulum has completed a half-swing. Critics across the political spectrum now contend that

187. *Id.*

188. *Id.*, Oct. 9, 1924, at 12, col. 1.

189. *Id.*, Apr. 25, 1924, at 7, col. 5.

190. *The Sun* (Baltimore), Feb. 10, 1925, at 4, col. 2.

191. See, e.g., *Zoning in the United States*, *supra* note 61.

192. See, e.g., J. GARDINER & T. LYMAN, *DECISIONS FOR SALE: CORRUPTION AND REFORM IN LAND USE AND BUILDING REGULATIONS* (1978); Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509 (1959); Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

193. See, e.g., *Wakefield v. Kraft*, 202 Md. 136, 96 A.2d 27 (1952); *Fasano v. Board of Comm'r's*, 264 Or. 574, 507 P.2d 23 (1973).

zoning does the devil's work. The attack from the Left springs from a belated realization that zoning has been used to discriminate on the basis of wealth, race, and national origin.¹⁹⁴ The centrist critique questions the efficacy of zoning as a tool of city planning.¹⁹⁵ Rightists charge that zoning confiscates private property while promoting the inefficient use of land.¹⁹⁶

The liberal attack accepts the validity of the institution while attempting to remedy abuses. Most attention has focused on zoning's negative impact on the affordability of housing.¹⁹⁷ Empirical studies indicate that "excess" zoning bids up the cost of new housing by fifteen percent,¹⁹⁸ thereby excluding people of low or moderate income from entering developing suburbs and slowing the rate at which older housing becomes available to them in the cities. The assumption is that zoning would work if these "exclusionary" side effects could be curbed.¹⁹⁹ The proposed solution is more regulations—density bonuses and mandatory set-asides.

The Baltimore experience suggests that such efforts are doomed to failure. In Baltimore discrimination on the basis of race, national origin, and class was at the heart of zoning's political ap-

194. See, e.g., NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY: REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES (1968) (Douglas Commission); CITIZEN'S COMM'N ON CIVIL RIGHTS, A DECENT HOME: A REPORT ON THE CONTINUING FAILURE OF THE FEDERAL GOVERNMENT TO PROVIDE EQUAL HOUSING OPPORTUNITY (1983); Alois, Goldberg & White, *Racial and Economic Segregation by Zoning: Death Knell for Home Rule?*, 1 U. TOL. L. REV. 65 (1969); PRESIDENT'S COMM'N ON HOUSING, REPORT OF THE PRESIDENT'S COMMISSION ON HOUSING (1982).

195. See, e.g., J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES (1961); Reps, *Requiem for Zoning*, 1964 AMER. SOC'Y OF PLANNING OFFICIALS NATIONAL PLANNING CONFERENCE 56; Krasnowiecki, *Abolishing Zoning*, 31 SYRACUSE L. REV. 719 (1980); Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447 (1981); R. BABCOCK & C. SIEMON, THE ZONING GAME REVISITED (1985).

196. See, e.g., B. SIEGAN, LAND USE, *supra* note 5; R. NELSON, ZONING AND PROPERTY RIGHTS: AN ANALYSIS OF THE AMERICAN SYSTEM OF LAND-USE REGULATION (1977); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981); Delogu, *The Dilemma of Local Land Use Control: Power Without Responsibility*, 33 ME. L. REV. 15 (1981); Pulliam, *Brandeis Brief for Decontrol of Land Use: A Plea for Constitutional Reform*, 13 SW. U.L. REV. (1983); Delogu, *Local Land Use Controls: An Idea Whose Time has Passed*, 36 ME. L. REV. 261 (1984); W. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS (1985).

197. See, e.g., A. DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA (1973).

198. Burchell & Listokin, *The Impact of Local Government Regulations on Housing Costs and Potential Avenues for State Meliorative Measures*, in G. STERNLIEB, J. HUGHES, R. BURCHELL, S. CASEY, K. LAKE & D. LISTOKIN, AMERICA'S HOUSING: PROSPECTS AND PROBLEMS 313, 329 (1980).

199. See Krasnowiecki, *supra* note 195, at 719, 720.

peal; it was not an unintended consequence. Nothing has changed. Localities continue to prefer the majority's prejudice to the minority's need. In New Jersey, the one state which has taken significant steps towards "inclusionary" zoning, the change was ordered by its Supreme Court²⁰⁰ and not by the body politic. This move has been met with massive resistance from towns and cities,²⁰¹ further underscoring the conclusion that zoning regulations of local governments are an unlikely source of affordable housing.

The centrist critique is a product of planners. When zoning first was enacted, planning was a fledgling profession. City planners felt that zoning, the product of lawyers, was usurping their rightful place.²⁰² They had three basic objections: first, zoning laws were enacted before development of a comprehensive plan for the cities; second, there was little planning justification for the separation of land uses; and third, zoning districts devoted too much land to some uses and failed to provide enough land to meet the demand for others.

Planning's basic notion was that government ought to dictate the future and that city planners could use the scientific method to ordain the course of physical development. Imposition of legal controls before public choices had been made concerning the location and size of streets, rapid transit lines, sewers, public utility plants, parks, playgrounds, and public buildings, put the cart before the horse. Zoning was the antithesis of planning.²⁰³

The districts created by zoning laws mandated a rigid separation of uses. Rowhouses and apartments were excluded from single-family residential zones, grocery stores and tailor shops were kept out of residential neighborhoods, and factories were set apart by themselves. Such segregation is hard to justify in terms of planning the optimal physical environment for cities—assuming adequate streets and open-space rowhouses and cottages can comfortably co-exist. Shops operating in close proximity to residences serve as convenience stores. Dispersed factories, if clean and quiet, can bring the workplace close to the home without bad side effects. Jane Jacobs, in her iconoclastic classic *The Death and Life*

200. See *Southern Burlington County NAACP v. Mount Laurel Township*, 92 N.J. 158, 456 A.2d 390 (1983).

201. See Hanley, *Housing the Poor in Suburbia: A Vision Lags in Jersey*, N.Y. Times, June 1, 1987, § B, at 1, col. 2.

202. M. SCOTT, *AMERICAN CITY PLANNING SINCE 1890*, at 152-53 (1969).

203. See *DEPARTMENT OF COMMERCE ADVISORY COMM. ON ZONING, A CITY PLANNING PRIMER* 3 (1928).

of *Great American Cities*, convincingly argues that it is the intricate mingling of different uses which creates liveable, flourishing cities with eye-catching architecture, active street life, and stable land values.²⁰⁴

Zoning laws also were criticized for allocating too much land for some purposes and not enough for others.²⁰⁵ For example, the original Baltimore zoning ordinance excluded rowhouses from the suburbs, thereby creating a shortage of sites for blue-collar houses, while creating an excessively large industrial zone in neighborhoods already residential.

Conventional analysis argues that such mistakes could have been avoided if comprehensive plans had been developed prior to zoning's enactment. But the Baltimore experience urges a different conclusion. Although Baltimore zoners attempted to disguise the fact, the separation of land uses found in its ordinance was designed to accomplish the segregation of social classes, not physical planning goals. Zoning was consciously employed to put everyone in their proper place. Planners reluctantly went along. Robert Whitten apologized, "A reasonable segregation is normal, inevitable and desirable and cannot be greatly affected, one way or the other by zoning."²⁰⁶

Perhaps Baltimore's zoners underestimated the demand for working-class housing when they excluded rowhouses from the vacant expanses of the New Annex. More likely, they intentionally used a strategy of "short zoning." Jan Krasnowiecki coined the term to describe the procedure whereby local governments retain control over the timing and design of new development, as well as the identity of the developer.²⁰⁷ For example, because Frank Novak wanted to build rowhouses on land zoned for cottages, he was forced to negotiate with Mayor Broening and the City Council for a zoning change. "Short zoning" created the bargaining chips which the city used to exact a donation of park land.²⁰⁸

"Long-zoning" is the flip-side of the coin. Baltimore determined that its fiscal advantage in an "industrial renaissance" was substantial. It used pre-approved industrial zoning to attract new corporations. Lever Brothers, Davison, Glidden and U.S. Industrial Alcohol took the bait. Thus, the planners' criticism of zoning is be-

204. J. JACOBS, *supra* note 195, at 222-38.

205. See M. SCOTT, *supra* note 202, at 195.

206. *Id.* at 198.

207. See Krasnowiecki, *supra* note 195, at 734.

208. See *supra* notes 192 & 193 and accompanying text.

side the point. Although not "in accordance with a comprehensive plan," zoning was well designed to accomplish the political and social goals of its proponents.

Finally, conservative criticism views zoning as confiscatory and inefficient. It argues that our system of limited government and private property ought not be elastic enough to accommodate the institution of zoning. Private property is seen as a barrier to government regulation which zoning transgresses, thereby violating the constitutional prohibition against "takings."²⁰⁹

While this argument has a logical imperative, it denies twentieth century precedent. The Supreme Court has held that in most instances private rights must yield to public regulations designed to promote "health, safety, morals or general welfare."²¹⁰ As even Richard A. Epstein reluctantly concludes: "[U]nder the present law the institution of private property places scant limitations upon the size and direction of the government activities that are characteristics of the modern welfare state."²¹¹ Hence, zoning can be seen as an across-the-board confiscatory action only by those willing to join Epstein in the rejection of the central assumptions of modern constitutional law.²¹²

On the other hand, the conservatives' argument that zoning produces inefficient land use is very much in the mainstream of zoning criticism. Economists agree that zoning fails to assure the highest and best use of land. The Baltimore story proves them correct. Zoning increased the value of some parcels of land while decreasing the value of others. Some businessmen were insulated from the ravages of competition, while others were denied favorable locations. The market price for some houses was increased, but other residents were prevented from selling for top dollar. It made housing less affordable. It remains unproven that the advantages that zoning bestows on the winners exceed the costs in lost opportunities suffered by the losers.

We must resist the inference, however, that the absence of zoning assures efficient land use. The real estate market is imperfect—

209. R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

210. See, e.g., *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 107 S.Ct. 1232 (1987); *First Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Nollan v. California Coastal Comm.*, 107 S.Ct. 3141 (1987); *Pennsylvania Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). G

211. R. EPSTEIN, *supra* note 209.

212. See, e.g., Balkin, *Learning Nothing and Forgetting Nothing: Richard Epstein and the Takings Clause*, 18 URBAN LAWYER 707 (1986).

rife with uncertainties, monopoly advantages, and side effects. It likewise remains unproven that deregulation more efficiently serves the community than the admixture of planning, social engineering, and politics known as zoning.

Bernard Siegan spent his academic career attempting to meet the burden of proof in favor of deregulation.²¹³ He sees a simple problem: "Unfortunately we have allowed one group in the population, local politicians, to gain dominance over land use, despite their lack of competency, and even more important, socially desirable motivation."²¹⁴ And he proposes a simple solution: "elimination of most governmental powers over land use."²¹⁵

Our local history shows Siegan to be mistaken in his diagnosis and casts doubt on his remedy. In Baltimore zoning opened a political marketplace. Brokers and builders used zoning to manipulate real estate transactions. Small businessmen obtained advantageous locations. Large retailers created the "right atmosphere" in the central business district. Heavy industry stifled neighborhood objection to smoke and stench. The rich slowed the rate at which their emptying downtown houses were being converted to flats and boarding houses, and buffered their new neighborhoods from the hurly-burly of the city. The middle class kept their cottage suburbs exclusive of blue-collar rowhouses. The working class fought commercial incursion and the "negro invasion." Local politicians managed the market, but not the use of land.

Zoning is the essence of self-governance, not the result of a power grab. Abolition of zoning would deny citizen participation and reduce neighborhood empowerment. It would work at cross-purposes to what has been called the neighborhood movement—the "demand for self-government in the daily lives of people."²¹⁶

Admittedly, there lurks in the fine sounding notion of "self-government" a darker side. In *The Federalist Papers*, James Madison described the propensity of popular government to the "mischiefs of faction." By "faction" he meant "a number of citizens, whether

213. See Siegan, *The Houston Solution: The Case for Removing Public Land Use Controls*, 4 LAND USE CONTROLS Q. 1 (1970); B. SIEGAN, *LAND USE WITHOUT ZONING* (1972); B. SIEGAN, *OTHER PEOPLE'S PROPERTY* (1976); B. SIEGAN, *PLANNING WITHOUT PRICES: THE TAKING CLAUSE AS IT RELATED TO LAND USE REGULATION WITHOUT COMPENSATION* (1977); Siegan, *The President's Commission on Housing: Zoning Recommendations*, URB. LAND, Nov. 1982, at 24.

214. B. SIEGAN, *supra* note 5, at xviii.

215. *Id.*

216. NAT'L COMM'N ON NEIGHBORHOODS, *PEOPLE BUILDING NEIGHBORHOODS: FINAL REPORT TO THE PRESIDENT AND THE CONGRESS OF THE UNITED STATES* (1979).

amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community."²¹⁷ The Baltimore experience confirms that a zoning faction has on occasion wrought corruption, inefficiency, and confiscation in the land market.

This criticism, however, is less of zoning and more of majority rule. If land regulations never existed, local governments would invent them. If zoning were abolished, cities, villages, and towns would recreate it. Absent outside intervention, a pro-zoning constituency of brokers, builders, businesspeople, and homeowners will make its influence felt, and politicians will welcome the opportunity to patronize them. And the extent to which collective political action should be permitted to curtail freedom of individual choice, in the real estate market or elsewhere, will remain the most vexing problem of constitutional law and public policy.

217. *THE FEDERALIST* No. 10, at 122 (J. Madison) (I. Kramnick ed. 1987).