The American Dream as Public Nightmare, or, Sam, You Made the Front Yard Too Long[1]

Donald G. Hagman *

In 1926 the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*[2] upheld a city zoning ordinance limiting uses of land in certain areas to single-family housing. Since *Euclid*, use of land for the free-standing house on its own lot (the larger the better) has stood at the pinnacle of desired land uses. The purpose of the following hypothetical opinion[3] is to consider whether single-family housing should continue as the most desired land use. In other words, is "single-familyness" in zoning next to godliness?

United States District Court
D. Nirvana
May 13, 1984

CONCERNED HOMEOWNERS OF SANTA ACINOM
Lars Moretom and Nold Reyschmidt, Plaintiffs

v.

CITY OF SANTA-ACINOM-BY-THE-SEA, Defendant

I.M. WISE, District Judge

Plaintiff, Concerned Homeowners of Santa Acinom, located in the City of Santa-Acinom-by-the-Sea, California, is a non-profit corporation composed primarily of the owners of single-family houses in Santa Acinom. Lars Moretom and Nold Reyschmidt

* Late Professor of Law, UCLA School of Law. This article is a first draft. The draft was completed shortly before Professor Hagman's untimely death in 1982. Because the editors do not want to guess how Professor Hagman would have modified the article, it is published here in substantially the form in which he left it.

1. An old adage—"Sam, you made the pants too long"—inspired this article.
2. 272 U.S. 365 (1926).
3. For another article in the form of a hypothetical opinion compare Bittker, *The Case of the Checker-Board Ordinance: An Experiment in Race Relations*, 71 YALE L.J. 1387 (1962).

are members of the corporation and single-family homeowners in the City of Santa-Acinom-by-the-Sea. Mr. Moretom's home is located within the Experimental-Housing zoning district, described later. Mr. Reyschmidt's home is located across the street from the Experimental-Housing zoning district. Plaintiffs are hereafter referred to as Homeowners.

The Homeowners oppose an amendment to the text of the zoning ordinance of Santa-Acinom-by-the-Sea, which provides for an Experimental-Housing (EH) zoning district. The district is a primarily residential zone having no height or setback, and no front, side, or rear yard requirements. The EH zone permits a maximum of twenty housing units per acre, a density equal to that now permitted in the most restrictive of the existing traditional multiple-family zones in the City.[4] The ordinance requires that one-third of the units in the EH zone be affordable for persons with low or moderate incomes.

The EH zoning ordinance does not require off-street parking in the EH zone, although the occupant of any unit who owns or leases an automobile on other than a temporary basis is required to secure a parking license if off-street parking is not made available within the EH zone. The City charges a substantial fee for the parking license. The parties have stipulated that the purpose of the license is either to encourage the provision of on-site parking, to encourage residents of the EH zone to use the municipal bus system, or to require a "market rate" payment for private parking use of the public streets.[5] Although neighborhood-oriented, convenience-type retail businesses are permitted uses in the EH zone, no customers of such businesses may use off-street parking.

To facilitate experimental-housing redevelopment, since the EH zone is exclusive and since nonconforming uses are to be eliminated through amortization over fifteen years, the ordinance further establishes a scheme of transferable development rights. The ordinance allows each lot owner a development right based in part on the ratio of the lot's square footage to the total square footage

4. The City of Santa-Acinom-by-the-Sea is a "full-range" community with industrial, commercial, and residential areas whose zoning ordinance includes several types of residential zones.

5. The City elaborates on its purpose to act in accordance with Proposition 13, CAL. CONST. art. XIIIA, a California tax limitation provision which was allegedly designed to force governments to cut "fat." The City asserts that charging a market price when public property is permitted to be used by private persons (in this case public streets used for private parking) is in accordance with the "spirit of 13."

of the EH zone (or subzone), and in part on the ratio of the market value of the house on the lot to the sum of the market values of all houses within the EH zone (or subzone). The ordinance then establishes a mechanism for trading the rights so that any redevelopment scheme which the lot owners agree to and which is approved by the City affects fewer than the total number of lots for development without financial hardship to any lot owner. If the lot owners cannot agree to an appropriate redevelopment scheme, either before or at the end of the amortization period (at which time all single-family houses must be removed), the owners of fifty-one percent of the land in each zone or subzone may impose a redevelopment scheme for the zone or subzone. Ownership rights to individual lots would thereby be converted to ownership or development rights in the redevelopment project.[6] The ordinance states that the EH zone is a "floating zone" that can be applied to any part of the city.[7]

While many of the EH zone provisions are controversial and nontraditional, the Homeowners express even greater concern with the mapping of the district. The new EH zone will be implemented in an area on the north side of Santa-Acinom-by-the-Sea which is now zoned for single-family uses and occupied by single-family homes. The parties have stipulated that the homes in the area have an average value of $400,000. The EH zone affects four city blocks, each block consisting of a subzone of twenty-four lots, and almost all of which are occupied by single-family homes. Instead of some ninety-six homes, the EH zone will permit approximately four hundred units.

As the City acknowledges, the EH zoning would permit a 100-story high-rise building of one unit per story on each block. Al-

6. The scheme, which could involve redevelopment, transfer of development rights, or money payments, is a combination of several techniques. For background, *see* Archer, *Land Pooling for Planned Urban Development in Perth, Western Australia*, 12 REGIONAL STUD. 397 (1978); Hagman, *Zoning by Special Assessment Financed Eminent Domain*, 28 U. FLA. L. REV. 655 (1976); Hagman, *Zoning by Special Assessment Financed Eminent Domain*, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 517 (D. Hagman & D. Misczynski eds. 1978); Marcus, *A Comparative Look at TDR, Subdivision Exactions, and Zoning as Environmental Preservation Panaceas: The Search for Dr. Jekyll Without Mr. Hyde*, 20 URB. L. ANN. 3 (1980); Nakamura, *The Politics of Urban Planning in Japan: The Case of the Land Readjustment Program*, 9 PLAN. & AD. 7 (1982); Schnidman, *Transferable Development Rights*, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 532 (D. Hagman & D. Misczynski eds. 1978).

7. On floating zones, *see* Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E. 2d 731 (1951) and Annot., 80 A.L.R. 3d 95 (1977).

though the market is unlikely to produce such a development, "European-type" development would be feasible. For example, the development might consist of row houses which sit flush with the sidewalk, opening toward the interior of the block on commonly or individually owned open space.

DUE PROCESS

Homeowners sue under 42 U.S.C. § 1983, which provides: "Every person who, under color of any . . . ordinance . . . subjects . . . any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."[8] It is well established that a city that passes an unconstitutional ordinance may be sued under section 1983.[9] Indeed, the ordinance in *Euclid* was "assailed on the grounds that . . . it deprives appellee of liberty and property without due process of law. . . ."[10]

Homeowners attack the EH ordinance on the basis that a substantial increase in population density will have significant adverse effects on the quality of life of Santa Acinom's residents. In other words, Homeowners argue that the EH zoning flunks the test established for zoning regulations in *Nectow v. City of Cambridge*,[11] which invalidated a zoning ordinance because it bore no substantial relation to the public health, safety, or general welfare.

State courts have had more experience than federal courts in applying the *Nectow* test. One of the most cogent statements of the test is found in *Fred R. French Investing Co. v. City of New York*,[12] where the court divides the test into three parts. First,

> A zoning ordinance is unreasonable . . . if it encroaches on the exercise of private property rights without substantial relation to a legitimate governmental purpose. A legitimate governmental purpose is, of course, one which furthers the public health, safety, morals or general welfare.

The second and third parts of the test are as follows:

> Moreover, a zoning ordinance . . . is unreasonable if it is arbitrary, that is, if there is no reasonable relation between the end sought to

8. 42 U.S.C. § 1983 (Supp. V 1981).

9. Monell v. Department of Social Servs., 436 U.S. 658 (1978); Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979); San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 656 n.23 (1981) (Brennan, J., dissenting).

10. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926).

11. 277 U.S. 183, 188 (1928).

12. 39 N.Y.2d 587, 596, 350 N.E.2d 381, 386-87, 385 N.Y.S.2d 5, 10 (1976).

> be achieved by the regulation and the means to achieve that end. . . .
>
> [Third] . . . a zoning ordinance is unreasonable if it frustrates the owner in the use of his property, that is, if it renders the property unsuitable for any reasonable income productive or other private use for which it is adapted and thus destroys its economic value, or all but a bare residue of its value. . . .[13]

The Homeowners do not believe that the EH zoning meets either the first or the second test. The Homeowners assert that the EH zoning does not foster public health, safety, or the general welfare. They argue that even if it did, the EH ordinance is not an appropriate means to achieve such goals. Rather, one can infer from the Homeowners' protestations that Homeowners consider existing single-family zoning as the appropriate means to foster these goals. Some of the Homeowners' submissions suggest that the ordinance fails the third test, namely, that the EH ordinance will cause property values to depreciate, if not in the EH zone, then in the rest of the community. In short, the Homeowners contend that removal of single-family homes in Santa Acinom in order to build the higher-density EH zone housing would not improve social conditions in Santa Acinom.

In *Euclid*, as here, the plaintiffs also alleged that the ordinance "offends against certain [due process and 'takings'] provisions"[14] of the state constitution.[15] And in *Euclid*, as here, the "prayer of the bill is for an injunction restraining the enforcement of the ordinance and all attempts to impose or maintain . . . any of the restrictions, limitations or conditions."[16] As my now deceased colleague District Judge Westenhaver observed in his trial court opinion in *Euclid*: "[t]his case is obviously destined to go higher."[17]

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13. *Id.*

14. 272 U.S. 365, 384.

15. The Ohio provisions are detailed in Ambler Realty Co. v. Village of Euclid, 297 F. 307, 310 (N.D. Ohio 1924). The California Constitution has provisions similar to those in Ohio and in the Federal Constitution on due process and "takings." For purposes of this case, nothing flows from the differences, if any, in the provisions, so they are not separately discussed.

16. 272 U.S. at 384.

17. 297 F. at 308. Of course, if this were a real rather than a hypothetical opinion, a discussion of pendent jurisdiction and abstention would here be proper. Since the opinion is only hypothetical, and the substance is the important part, the reader interested in the procedure is referred to Ryckman, *Land Use Litigation, Federal Jurisdiction, and the Abstention Doctrines*, 69 CALIF. L. REV. 377 (1981).

HEALTH

Plaintiff Nold Reyschmidt is a physician who specializes in preventive medicine, and thereby claims to qualify as an expert. He concludes that a substantial population increase will lead to a significant and negative impact on the health of the residents. His statement in support of the plaintiffs' motion for summary judgment lists public health concerns about noise, air pollution, solid waste, liquid waste, water shortages, and heath care delivery.

Since there is no showing that the City is substantially involved in health care delivery, as distinguished from the county, the state, the federal government, or private institutions, I find the doctor's statements on health care delivery irrelevant to the case before me.

NOISE

The doctor has persuaded me that high noise levels constitute a health hazard and that Santa Acinom already has a serious noise problem, caused largely by automobile traffic. Therefore, the doctor recommends that the City limit traffic. He also contends that any increase in population density will raise ambient noise levels due to increased traffic. Ideally, according to the doctor, the City should plan a ten to fifteen percent population reduction to avoid exceeding existing noise standards. Otherwise, "[t]here's no question noise levels would go beyond recommended state and federal levels. . . ."[18]

The City does not dispute that noise levels are high in Santa Acinom and it agrees that much of the noise is due to automobile traffic. But the City asserts that the EH zoning will actually lower noise levels by decreasing traffic. The City has become aware, for example, that the traditional zoning practice of requiring the provision of off-street parking in multiple-family zones merely begets more traffic. Persons occupying such housing either must have an automobile or "waste" the space provided for them. The traditional practice thus constitutes an indirect regulation encouraging the use of automobiles. Similarly, allowing free parking on public streets subsidizes driving by lowering the true cost of automobile ownership. These traditional incentives are removed by the EH zoning. Moreover, the City points out, the increased population densities permit the area of North Santa Acinom, now poorly

18. Bednar, *SM Housing Plan Called Threat to Public Health*, Santa Monica, Cal., Evening Outlook, Apr. 20, 1982, at B1, col. 1.

served by mass transit due to the high expense per rider of providing such a service, to be served better and less expensively by public transit. Indeed, the City asserts, it plans to earmark parking fees generated from its parking licenses to subsidize the mass transit system. The goal is for mass transit to approximate the convenience of the single-occupant automobile. The City notes that such a provision will especially aid the aged, student, and low-income person in the community who either cannot afford or cannot use an automobile and who is thus denied the driving subsidy.

The City admits that one bus creates more noise than one automobile. But, the City asserts, its evidence will show that implementing the EH ordinance will reduce total noise while increasing by four times the population density in the EH zone.

Of course, the court may find the City's EH zoning invalid only if it is unreasonable. In making that decision a judge must defer to the legislative determination unless the action is tantamount to irrationality.[19] Even if the court were able to exercise its independent judgment, however, the doctor has failed to show that higher density is necessarily unhealthful. Assuming that the City's assertion is supported by the evidence, namely, that adult occupants of single-family homes drive more automobiles for longer distances per capita than do adult occupants of multiple-family housing, it is clear that the occupant of the single-family home makes more noise than an occupant of multiple-family housing.

AIR POLLUTION

The doctor's assertions concerning air pollution also depend on an assumption that greater density will result in increased automobile traffic. The doctor's logic tells him that more people equals more cars equals more air pollution equals poorer health. He observes—and the City does not deny—that the City, located on the coast with only clean Pacific winds west of it, enjoys high air quality. But in the doctor's opinion, any significant increase in population density will add additional amounts of air pollutants to the atmosphere as a direct result of increased traffic.

The City does not agree. First, it alleges that a bus causes less pollution per occupant than an automobile. The City expects to

19. J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 404 (1978); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 450 (1978).

show that the total amount of air pollution generated by traffic from the EH zone residents will be less than from the occupants of the single-family dwellings which the EH zone would replace.

Moreover, the City asserts that from a regional air pollution perspective, the highest population densities should be concentrated along the coast. Sprawled development increases air pollution because residents must drive longer distances to get to work and to obtain goods and services. Dense development, on the other hand, would minimize this source of air pollution. In addition, concentrated development along the coast means fewer persons would live downwind, where the air pollution would be more severe. Low densities in Santa Acinom mean that more persons must live downwind. This would maximize the adverse impact of each unit of pollution unless enormous land areas and their accompanying airsheds were used to dilute the pollution. Of course, if large land areas are used for development so as to gain their related dilution effect, the amount of pollution produced per capita is enormously increased, dumping the problem still further downwind in the form of air pollution or acid rain. And just as with noise, single-family home residents generate more air pollution per capita than do occupants of multiple-family housing, assuming that the former both use more automobiles per capita and drive longer distances to their work places, stores, and schools. Again, if one were pointing the finger at harm-producing citizens, one would point to single-family occupants, who produce far more than their equal share of air pollution.

Plaintiffs are several leagues short of credibly demonstrating that higher population densities necessarily diminish air quality. Indeed, the City of Santa-Acinom-by-the-Sea deserves applause for its regional air quality citizenship in accepting higher density. Insisting on lower densities, on the other hand, might well constitute such regional irresponsibility as to violate due process.[20]

SOLID WASTE

The doctor's averments concerning solid waste are equally sim-

20. *Cf.* Arnel Dev. Co. v. City of Costa Mesa, 126 Cal. App. 3d 330, 337, 178 Cal. Rptr. 723, 727 (1981), where the court invalidated a downzoning ordinance on due process grounds because it was "not rationally related to the general regional public welfare but, at best, to conserving the interests of the adjoining property owners and residents of the immediate area." The ordinance rezoned property on which a developer sought to construct 127 single-family residences and 539 apartment units to single-family residential use.

plistic. The doctor notes that higher population densities increase solid waste disposal problems and that the filling or closure of nearby disposal sites means that trash trucks must make longer air-polluting trips. But, as the City points out, persons denied residence in Santa Acinom do not vanish; they merely produce garbage elsewhere. Plaintiffs make no showing that people would produce less garbage elsewhere, or that the ride the garbage enjoys from that elsewhere would be any shorter. Therefore, the health and welfare of the regional public are not necessarily improved by keeping population densities low in Santa Acinom.

Further, there is in fact no shortage of landfill sites in the canyons of the Santa Acinom Mountains, located within a mile of the City. The fact that the public entities involved have chosen to preserve the mountains for other uses does not prove that people rather than garbage dumps should inhabit the boondocks.

Moreover, the doctor has not analyzed the possible economic benefits from components of trash. Trash consists of recyclable materials (glass, cans, newspapers) and other materials, such as rubbish, grass clippings, and brush. The City avers that it has a very successful recycling program which costs less to administer in the multiple-family areas than in the single-family areas because of the higher concentrations of recyclable trash in the former. Moreover, neither the recyclable nor the other domestic rubbish together amount to as much volume as do the cuttings produced by the frenetic growth of the irrigation-agitated vegetation in the City of Santa Acinom. The City credibly claims that it can show that single-family housing areas produce many times more cuttings per capita than the multiple-family areas. Indeed, the City expects to show that the *total amount* of nonrecyclable solid waste produced by the 400 units in the EH zone will be less than that produced by the single-family area, constituting less than one-fourth of those units.

SANITARY SEWAGE

The doctor asserts that sanitary sewage is a public health problem in Santa Acinom despite the fact that sewage is being treated by a regional treatment plant. The doctor notes that the plant is under pressure from the Environmental Protection Agency to stop disposing of sludge in the ocean. The doctor's concern about the 100 gallons per capita per day of effluent leads him to conclude that the residential population in the City should be reduced by

ten to fifteen percent in the next two to three years.[21]

The City has a different perspective. The City is participating in the redevelopment plans of the regional treatment plant, which will soon be converting sludge into ash and energy. Furthermore, increases in the Santa Acinom population as a result of the EH rezoning, the City asserts, will produce only a drop in the bucket, sewage-wise. The sewer plant now services some 500 to 600 square miles of territory, so the EH rezoning of a few acres will not greatly harm the regional sewage treatment effort. Moreover, even if Santa Acinom's restrictions did force persons to settle outside of the 500- or 600-square-mile perimeter of the sewage plant's territory, which is unlikely, plaintiffs do not allege, let alone show, that they would produce less effluent or that sewage treatment plants would not have to be constructed or improved. It may well be less expensive to retrofit existing regional plants than to construct new ones. More water-quality-improvement bang for the buck is desirable. Effluent does not become a rose in another town.

The City has shown that the threat to public health from sanitary sewage in Santa Acinom remains unaffected by an increase in population density.

WATER POLLUTION

Moreover, as the City points out, the doctor overlooks the water pollution problem caused by point- (storm sewers) and non-point-source runoff. The City asserts that any sensible development of the EH zone would result in less *total* storm sewer and non-point-source surface runoff pollution than the existing use. Surface-area of single-family housing per capita far exceeds that of multiple-family housing, as does the amount of surface covered by automobile-oriented uses such as garages, driveways, and streets in single-family areas. Residents of single-family homes own more automobiles per capita, which contribute to water pollution by discharging toxic materials onto streets. Further, levels of vegetation are higher in single-family housing areas; but for street cleaning, which is much more expensively done per capita in single-

21. There is no showing that the doctor is willing to be among the ten or fifteen percent to move. Moreover, it is not within a city's power to pass land-use controls requiring persons to move out. *See generally* City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. Dist. Ct. App. 1979), *cert. denied*, 449 U.S. 824 (1980), in which the court found unconstitutional a city charter amendment establishing a maximum number of dwelling units allowable within the city.

family areas, such vegetation would end up as pollution in storm sewers.

WATER SHORTAGE

Finally, as the doctor points out, people need water. He asserts that any intentional increase in population density is not justified given the water shortage in the region.

The City asserts that the so-called shortage of water in Southern California is not primarily an urban problem. Very little of the water consumed in Southern California serves residential uses. Indeed, the City is so little concerned with the availability of water that its Council has resolved against a state initiative to bring water from Northern California to Southern California.

Moreover, the City avers, the single family occupants' insistence on making the semi-arid region of Santa Acinom look year-round like Wisconsin in May puts enormous and unnecessary demands on water supplies. Due to lawn watering, the City alleges, the per capita use of water in single-family areas leads its experts to conclude that quadrupling the density in the EH zone will lead to far less water consumption per capita and perhaps to less total water consumption. Thus, the existing use may be more, rather than less, harmful than the proposed use. Advocates of areas of low population density, such as the Homeowners, may be the cause of the health and welfare problem rather than its solution.

QUALITY OF LIFE

In addition to water shortage and pollution allegedly caused by higher population density, the Homeowners allege that quality of life will decrease with higher population densities. Quality of life is a difficult issue for this court to deal with since the plaintiffs have not specifically defined quality of life. There is at best an assumption by the Homeowners that quality of life and density of population are correlated and that moving toward a higher density lowers the quality of life.[22]

Neither the City nor this court understands the Homeowners to allege that the City currently has a low quality of life. Plaintiffs instead allege that increased densities would lower the quality of life. The City notes that it has the sixth highest population density

22. For a contrary view on the effects of increased density living, *see* J. JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 200-21 (1961).

of the eighty-one cities in Los Angeles County.[23] If quality of life and population density are correlated, there must be seventy-five other cities with a higher quality of life. Plaintiffs' ability to judge life quality thus seems highly suspect.

The City counters the Homeowners' assertions by denying that life quality and population density are necessarily correlated. In an attempt to help the Homeowners define quality of life, the City has indicated that the cities of lowest population density in Los Angeles County are Vernon, Industry, Irwindale, Palmdale, Bradbury, Lancaster, and Avalon. The Homeowners have stipulated that few, if any, of the named cities have what the Homeowners would consider high quality of life. Vernon and Industry are industrial towns; Irwindale is literally "the pits," since the town is extensively devoted to gravel mining. Palmdale and Lancaster are sprawling, high-desert towns. These cities' average per capita incomes are lower than those in Santa Acinom. Bradbury is a low-density community with only 850 residents and with a high per capita income, as is Avalon, on Santa Catalina Island.

The City suggests that per capita incomes could be used to indicate life quality, assuming that high-income persons can afford a higher quality life and will seek to reside in a high-life-quality community. Therefore, if high incomes and low population density are correlated, quality of life and low population density would likewise seem to be correlated. On that basis, Santa-Acinom-by-the-Sea has the sixteenth highest quality of life among the eighty-one cities, since its population ranks sixteenth in average income. The highest quality of life must then be found in the City of Rolling Hills, the highest average income city, which also ranks low (seventy-sixth) in population density. The second highest quality of life as derived from average incomes is found in the City of Beverly Hills, yet Beverly Hills is at the median of population density.

The City has also presented the court with a computer printout and a scatter diagram of the eighty-one cities in Los Angeles County, showing the densities of population and the average incomes of the residents of each city. The conclusion from a review of this data is that average incomes and densities of population are not correlated in any way. Therefore, under the assumptions made, it appears that quality of life and population density are not correlated.

23. CALIFORNIA STATISTICAL ABSTRACT 17 (1982).

NO REASONABLE ECONOMIC USE

As indicated previously, the third prong of a due process test asks whether restrictions render property unsuitable for any reasonable income production or other private use, thus destroying the property's economic value. Homeowners do not seriously press the assertion that a rezoning to EH leaves the rezoned property without any reasonable economic use. Moreover, while plaintiff Reyschmidt (the neighboring property owner) complains that the value of his property has decreased because of the multiple-family housing across the street, he does not and cannot allege that his property has no reasonable economic use as single-family property. Mere diminution in value does not a constitutional deprivation make.[24] Moreover, since the EH zone is a floating zone, there is nothing to prevent neighbors from seeking to rezone their property to EH. That alternative raises the market value of property, perhaps offsetting any value-depressing externalities of the present EH zoning.

HEALTH, SAFETY, AND WELFARE

The court is not persuaded that rezoning to EH will harm the public health, safety, or welfare. Indeed, the evidence is overwhelming that one unit of single-family housing harms the public more than one unit of multiple-family housing. It is even plausible that the total harm caused by 400 units of multiple-family housing is no greater than the harm caused by 100 units of single-family housing.

MOTION FOR SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides that a summary judgment "sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[25] Ordinarily, of course, challengers of a zoning ordinance must prove its invalidity. But because the City has also moved for summary judgment, the City as movant has the burden of demonstrating entitlement to the judg-

24. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 131 (1978).
25. FED. R. CIV. P. 56(c).

ment.[26] Consequently, this court will now consider whether to grant summary judgment for the City.

AMORTIZATION OF NONCONFORMING USES

The serious question in this case is almost the converse of what Justice Sutherland in *Euclid* fifty-six years ago called the "serious question" of that case, "namely, the creation and maintenance of residential districts, from which . . . apartment houses, are excluded."[27] The difficult issue here is whether existing single-family houses can be compulsorily removed to make room for multiple-family housing.

Courts are more reluctant to force existing uses to comply to a changed ordinance than to force new uses to comply with an existing ordinance. The benefit to the public from the ordinance or the harm to be avoided by the ordinance must be clearer for a court to require a nonconforming use to conform to the ordinance.

No extreme harm to the public health, safety, or welfare is required to justify termination of nonconforming uses. As the United States Supreme Court stated recently concerning its own classic nonconforming-use case:[28] "We observe that the [use] in issue in *Hadacheck* . . . [was not a noxious use of land and] was perfectly lawful. . . . [The case is] better understood as resting . . . on the ground that the restrictions were reasonably related to the implementation of a policy . . . expected to produce a widespread public benefit. . . ."

The referenced case, *Hadacheck v. Sebastian*,[29] involved a Los Angeles ordinance zoning property in a large area of Los Angeles to prohibit brickmaking. The owner of a brickyard alleged, and the court accepted, that the ordinance lowered the value of his property from $800,000 to $60,000. In upholding the ordinance, the United States Supreme Court used the same tests as this court uses today and noted that

> the imperative necessity for . . . [the] existence [of regulatory power] precludes any limitation upon it when not exerted arbitrarily. A vested interest cannot be asserted against it because of conditions once obtaining. . . . To so hold would preclude development and fix a city forever in its primitive conditions. There must be pro-

26. Adickes v. S.H. Kress & Co., 398 U.S. 144, 159 (1970). The movant initially has the burden to show the absence of a genuine issue concerning any material fact.
27. 272 U.S. 384, 390.
28. Penn Central Transp. Co. v. New York City, 438 U.S. 104, 133-34 n.30 (1978).
29. 239 U.S. 394 (1915).

> gress, and if in its march private interests are in the way they must yield to the good of the community.[30]

Thus, if justified by the exigencies of the time, existing development can be suppressed to achieve the public good.

The California Supreme Court so decided in *Metromedia, Inc. v. City of San Diego*.[31] The City of San Diego banned nearly all off-site[32] outdoor advertising signs, giving the owner of any existing sign, no matter how valuable, the right to keep it up for no more than four years. Despite assertions that purposes of the ordinance, traffic safety and aesthetics, were not strong, and that harm to the public from the signs was minimal, and despite further assertions that the ban infringed on freedom of speech, the court upheld the ban.

The court observed that the amortization period must be reasonable and commensurate with the investment in the nonconforming use. The court also stated that in determining the validity of the ordinance, it weighed the public gain against the private loss. But, the court stated, it is not necessary that the nonconforming property have no value at the termination date. *Metromedia* did not decide (as this court will not here decide) that the ordinance was valid as applied to each billboard individually. Here, as in *Metromedia*, the validity of the amortization as applied to each structure will depend on the cost of its depreciated value, its remaining useful life, and the harm to the public if the structure remains standing beyond the prescribed amortization period.

It is at this point that the City's assertions that the EH zoning will result in public gain and single-family housing will result in harm take on additional importance. After research, this court advised the City that it would need to do far more than merely defuse the arguments in the Homeowners' documents to support the City's summary judgment motion. Socio-judicial biases in favor of single-family housing are enormous. Lower court judges

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30. *Id.* at 410.

31. 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), reversed in part as to some noncommercial signs, on free speech grounds, 453 U.S. 490 (1981). In finding the ordinance valid, the California Supreme Court stated that it is reasonable that billboards relate to traffic safety because a driver's attention can be distracted by them and that a city may enact ordinances under the police power to eliminate traffic hazards. The court also stated that improving the appearance of the community is a purpose that falls within the city's authority under the police power. *Id.* at 858-60, 610 P.2d at 411-12, 164 Cal. Rptr. at 514-15.

32. I.e., a sign which does not advertise the business use of the premises on which the sign is located.

should keep in mind that *Euclid* was penned by Justice Sutherland, a reputed leader of the school of judicial activism which not infrequently invalidated regulations on the ground of substantive due process.[33] Yet in *Euclid*, jurist-*cum*-sociologist Sutherland used the following rhetoric to sustain a regulation excluding higher-density housing from single-family zones:

> With particular reference to apartment houses, it is pointed out that the development of detached house sections is greatly retarded by the coming of apartment houses, which has sometimes resulted in destroying the entire section for private house purposes; that in such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,— until, finally, the residential character of the neighborhood and its desirability as a place of detached residences are utterly destroyed. Under these circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near to being nuisances.[34]

Here the City seeks not only to permit "parasites" in the midst of a single-family zone; it also points a condemning finger at the existing single-family housing and seeks to force it out of existence by amortizing nonconforming uses. This is still a form of land-use heresy. Usually, the lower uses on the zoning hagiography of preferred uses are required to conform. If a zoning ordinance bans single-family homes, it usually (if not always) bans only prospective, not existing ones.

The City does not deny the lack of exact precedent. It does not deny that it is plunging into uncharted waters by requiring the fifteen-year amortization-out-of-existence of buildings worth an

33. J. PASCHAL, MR. JUSTICE SUTHERLAND (1951). For a revisionist view of the *Euclid* case, *see* Tarlock, *Euclid Revisited*, LAND USE L. & ZONING DIG., Jan. 1982, at 4.

34. 272 U.S. 365, 394-95. Justice Sutherland does not disclose his views about the public health, safety, and welfare needs of persons and their children who are forced by economic or other circumstances to live in multiple-family housing.

average of $200,000,[35] especially when their use as single-family dwellings has traditionally been regarded as the most desirable of land uses. To persuade the court that the ends and means are justified, the City has fired more arrows from its "reasonability" quiver.

SECURITY

The City first asserts that total costs of providing public goods will be reduced by the new EH zone. The single-family homes in the EH zone are currently inhabited by many persons concerned about their personal security. Many in the area have alarm systems, more often triggered by owners than intruders. Partly because of demands made on police personnel to answer false alarms, the City notes, police response has not been as prompt as it might be. This inadequacy in turn has led many homeowners in the area to subscribe to a private police patrol. But it should be noted that the nature of single-family homes, with unlighted yards on all sides, and with numerous doors and windows at ground level, makes such housing peculiarly accessible to intruders.

Providing residents with a sense of security is an aspect of the public health, safety, and welfare which a city may pursue, and achieving security through more secure types of housing is an appropriate means to reach that goal. This court does not disagree with the obvious: security can be provided at lower cost by housing developments with limited access onto an easily lighted central court viewed by many eyes. The City notes that its new EH zoning minimizing density, yard, and height requirements would encourage such a housing development.

CODES

The City also points to other public advantages from the multiple-family housing allowed by the new EH zone. Present housing is mostly vintage 1920-1930, and does not meet modern safety or energy-saving requirements for fire, electrical, plumbing, and insulation codes. Present housing is thus relatively unhealthy and unsafe. The City asserts that energy demands of existing housing are relatively high, both to access by automobile, and to heat and cool.[36] Solar heating is relatively infeasible for single-family

35. The parties have stipulated that the lots are worth about $200,000 on average and that the buildings on the lot, on average, are of similar value.

36. Because Santa Acinom's temperature is moderate, the public health, safety,

homes. Thus, the single-family house, the City argues, creates a variety of problems: energy demands that make the United States OPEC-dependent; air pollution caused by generating the energy to serve the homes; air pollution from the automobiles owned by single-family dwellers; and disutilization of economies of scale in shifting to alternative energy sources. However, the modern, carefully designed multiple-family housing permitted by the EH zoning would meet code requirements. Such housing reduces public and private (e.g., insurance) costs of fire protection, saves energy, and provides opportunities to use scale economies justifying other energy-saving means.

PROPERTY VALUES/FISCAL ADVANTAGES

The City indicates that protecting the government's fiscal situation and maintenance or enhancement of property values constitute traditional justifications for zoning.[37] The parties have stipulated that total property values in the City would increase if the property were rezoned. The parties agree that new market-rate housing units in the EH zone would have an average value of $300,000 and that the one-third low- and middle-income units included would have an average value of $100,000. Thus, the market value of property in the City would increase in value by approximately $55,000,000.[38]

The City is concerned with property values because they generate the tax base. The City avers and the Homeowners concede that property taxes generated from the area are approximately $192,000, assuming the average lot and house are now assessed so as to produce about $2,000. If the EH zone were built to the maximum allowed density of 400 units, property taxes would be ap-

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and welfare justifications relative to energy savings for heating and cooling in Santa Acinom are weaker than they are in areas where the ambient air temperature is far higher or lower than normal. Nevertheless, costs of heating are still significant because houses in Santa Acinom are not as well insulated as homes of equivalent vintage would be in colder climates.

37. *See* 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW: LAND USE AND THE POLICE POWER 293-325 (1974 & Supp. 1982).

38. *See supra* text between notes 7 and 8.

267 × $300,000 equals	$80,100,000
133 × $100,000 equals	+13,300,000
	93,400,000
96 × $400,000 equals	−38,400,000
	$55,000,000

proximately $934,300, a 487% increase.[39] The City would not receive the full $934,300, since other tax-levying bodies share in property taxes, but the City would enjoy the same proportionate increase from the area as would other tax-levying governments.

Sales tax revenues would also increase as a result of building the EH zone to the maximum allowed density. The City of Santa Acinom now levies a one percent sales tax. The family incomes of present residents in the EH zone average $30,000 per year.[40] The average incomes of the families in the new units is anticipated to be $40,000.[41] Assuming further that one-half of family income is spent on items subject to sales tax which are bought in the City of Santa Acinom, the ninety-six families now generate $14,400 annually in sales taxes for the City.[42] Four hundred families with a $40,000 average income will generate $80,000,[43] a 556% increase.

FISCAL BURDENS

The Homeowners remind this court that the fiscal merit of new housing cannot be deemed reasonable by considering revenue enhancement only. New housing creates public costs as well as revenues.

The City admits as much but submits documents denying a large increase in public costs. First, the City asserts, it is on the cutting edge of schemes to shift all of the public costs associated with new development onto the new development. The City is thus in general agreement with scholars who are urging such a course of action as being efficient, just, and legal.[44] Neighbor-

39. Under Proposition 13, CAL. CONST. art. XIIIA, property is assessed at the value that it would have had if assessed in 1975, except for an allowed two percent inflationary increase, and unless the property is newly constructed or changes ownership. New construction and ownership changes result in a reassessment to market value. *Id.* at § 2(a), (b). The parties stipulate to an assessed value of approximately $1,500 per unit in 1975, with an assumed increase to date of about $500 to cover allowed-for inflationary increases, new construction, and change of ownership which has occurred in the four-block area since 1975.

40. Many of the persons currently living in the area would not be able to afford to purchase their homes at current market rates, if they were purchasing their homes today. The homes were purchased prior to rapid price escalation.

41. The City estimates that only one-half (48) of the existing residents will choose to remain in the EH zone after it is rebuilt for multiple-family occupancy.

42. 96 × $30,000/2 × .01 = $14,400.

43. 400 × $40,000/2 × .01 = $80,000.

44. *See, e.g.*, Hagman, *Landowner-Developer Provision of Communal Goods Through Benefit-Based and Harm Avoidance "Payments" (BHAPS)*, 5 ZONING & PLAN. L. REP. 17 (1982). When confronted with a trial court decision by Superior Court Judge Laurence J. Rittenband which held some of the City's cutting edge im-

hoods and subareas of the state were free both before[45] and after[46] Proposition 13[47] to purchase goods and services from the public sector. And California local governments and courts have long led the nation in imposing or allowing the imposition of benefit-based taxes and exactions on new development.[48]

The City avers that it is prepared to extend the use of these fiscal devices to provide the public services as well as public works associated with new development. State statutes facilitate such action, authorizing even police and fire services to be financed by a benefit-based tax or charge.[49] Absent any showing of adverse fiscal consequences to the City as a result of the rezoning to EH, Homeowners might well be denied standing as taxpayers to challenge this rezoning. But assuming they have standing, plaintiffs have not disproved the City's claims that the rezoning to EH will further the public health, safety, and welfare purpose of achieving a more solvent public fisc.

SHIFT FROM PUBLIC TO COMMUNAL GOODS

The City notes that owners of the lots within the EH-zoned blocks are likely to redevelop the area in a way which maximizes both consumer acceptability and public health, safety, and welfare, even though they are not required to do so. Some current owners in the area have swimming pools, tennis courts, jacuzzis, and the like—customary facilities in modern planned-unit developments. Having these facilities available in an EH zone promotes public health, safety, and welfare in several ways, the City

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posts illegal (*see* Morgenthaler, *Judge Raps City for Charging Unreasonable Fees*, Santa Monica, Cal., Evening Outlook, May 1-2, 1982, at A1, col. 1.), Professor Hagman was moved to remark that "[t]he judge has overlooked or misinterpreted recent appellate court decisions on exactions." Judge Rittenband ruled that a city cannot extract fees from developers for affordable housing, child care centers, or the arts and social sciences unless the fees are rationally related to the proposed development. For example, the judge found that it would be rational to impose fees on developers to cover the added burden on schools and parks caused by a large residential complex.

45. Dawson v. City of the Town of Los Altos Hills, 16 Cal. 3d 676, 547 P.2d 1377, 129 Cal. Rptr. 97 (1982).

46. Los Angeles County Transp. Comm'n v. Richmond, 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).

47. CAL. CONST. art. XIIIA.

48. White v. City of San Diego, 26 Cal. 3d 897, 608 P.2d 728, 163 Cal. Rptr. 640 (1980); Dawson v. City of the Town of Los Altos Hills, 16 Cal. 3d 676, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976); Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

49. CAL. GOV'T CODE §§ 50078-50078.18, 53970-53978 (West Supp. 1983).

avers. First, such facilities are made available to more persons at a lower per capita cost. Second, such facilities strengthen neighborhood ties and social interaction. Third, they reduce the demand on public facilities, thus aiding the City's fisc.[50] Fourth, travelling to the public facilities is eliminated, thus reducing traffic congestion, pollution, and energy costs.

The City has deliberately eliminated from its zoning code restrictions on allowable construction, in keeping with state and federal policies of deregulation. Therefore, the City claims, the market itself will provide such facilities, unimpeded by the new regulations. The persons in the redeveloped area may retain private yards, or some private yards and some commonly owned open space. Great variety is possible—some of the EH blocks may wish to put in lawn bowling, shuffleboard courts, flower gardens, pet parks, children's play areas; whatever residents in the redeveloped area desire. Because deregulation, self-determination, and neighborhood control are public health, safety, and welfare goals shared by the Left,[51] the Right,[52] and the Establishment,[53] this court could hardly determine otherwise.

MIXED USE

The City asserts further that providing for neighborhood retail units where off-street parking[54] is not permitted will allow EH zone residents and neighbors to provide themselves with basic needs without driving an automobile. According to the City, the

50. The City has provided ordinances from several cities which allow a credit on property tax exactions for land dedicated and maintained as commonly owned open space.

51. COMMUNITY OWNERSHIP ORGANIZING PROJECT, THE CITIES' WEALTH, PROGRAMS FOR COMMUNITY ECONOMIC CONTROL IN BERKELEY, CALIFORNIA (1976).

52. R. NELSON, ZONING AND PROPERTY RIGHTS (1977); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28 (1981).

53. CALIFORNIA OFFICE OF APPROPRIATE TECHNOLOGY, WORKING TOGETHER: COMMUNITY SELF-RELIANCE IN CALIFORNIA (1981). Deregulation at the national level began seriously with the Carter Administration. For a contemporary account of the movement in the Reagan Administration, *see* DeMuth, *A Strong Beginning on Reform*, REGULATION, Jan.-Feb. 1982, at 15. The deregulation policies of the state of California include, for example, creation of a special office "to reduce the number of administrative regulations," CAL. GOV'T CODE § 11340.1 (West Supp. 1983), and an order to localities to coordinate land use controls. CAL. GOV'T CODE § 65913.3 (West 1983).

54. The City asserts that its ban on off-street parking combined with the licensed on-street parking scheme will virtually eliminate the adverse externalities from traffic which would otherwise be associated with retail businesses.

mini-retail concept promotes public health, safety, and welfare by eliminating the need for an expensive automotive purchase, by saving energy, by reducing traffic congestion, and by eliminating automotive air pollution. Such purposes and means appear appropriate to this court.

Though litigants' motives are rarely relevant to a court's determination of an issue, the City has presented this court with documents which may reach the heart of the Homeowners' objections. The City asserts that the Homeowners disapprove of the EH zoning primarily because of their dislike for low- and moderate-income housing, and not because of their stated concerns with health, safety, and welfare, low densities, and quality of life.

The City observes that many in Santa Acinom are, like persons everywhere, self-regarding or self-interested rather than group-regarding.[55] They tend to consider themselves and their pocketbooks when considering public policy issues. The mantle of citizenship means nothing more than what is good for them, not what is good for the community. These are the people who, when they exercise the right of initiative or referendum (widely available in California), base their votes on whether they as individuals would gain or lose. A legislator who voted on that basis would be regarded as corrupt. If an individual voted or participated in public debate on that basis, on the other hand, many would regard it as proper.

Others use government to promote the public interest rather than private interests. The City Council of Santa Acinom asserts that it is one of such persons. The Council has decided that housing should be economically integrated. Should a City be permitted, under the mantle of public health, safety, and welfare, to legislate in favor of "inclusionary zoning"?[56] The analysis of this question requires a short tale.

The use of zoning for purposes now sometimes called "social engineering" began in California in the last quarter of the 19th century, so far as one can tell from judicial precedent.[57] Compre-

55. Sagoff, *Economic Theory and Environmental Law*, 79 MICH. L. REV. 1393, 1403 (1981).

56. The court prefers the term inclusionary housing. *See* Hagman, *Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government*, 5 URB. L. & POL'Y 169 (1982); Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981); Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432 (1974).

57. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the court struck down a zoning

hensive zoning came to New York City first, motivated, according to some historians,[58] by a desire to separate immigrant workers from higher society.

Its social-engineering aspects well disguised in New York City, but probably widely understood, the social-engineering zoning movement swept the country, including Louisville, Kentucky, where it was used to keep blacks and whites separate. The United States Supreme Court held it invalid for that purpose.[59]

The social engineering motive in Louisville was also apparent in *Ambler Realty Co. v. Village of Euclid.*[60] Federal District Judge Westenhaver, who tried the case, recognized this motive:

> In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.[61]

The United States Supreme Court did not defer to Judge Westenhaver's observations in *Euclid*. After *Euclid*, the winds of social-engineering zoning to achieve a city beautiful by regulating into existence a wrong side of the tracks and thus preventing economic integration of housing, swept the country again. A depression and a war merely mothballed the idea. In the 1950's, aided by federal subsidy[62] and requirements for single-family restrictions as a condition for federal mortgage guarantees,[63] zoning swept the country a third time, the single-family zone carrying the flag. Judges who used substantive due process to invalidate zoning in the 1950's and 1960's were regarded as Neanderthals. Some courts simply would not acknowledge that substantive due process had died in the 1930's.

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ordinance in San Francisco directed against the housing of Chinese. The ordinance provided that permission of the board of supervisors was required in order to build or operate a laundry within the city or county limits.

58. S. TOLL, ZONED AMERICAN (1969), extracted in D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 974 (2d ed. 1980).

59. Buchanan v. Warley, 245 U.S. 60 (1917) (a city ordinance forbade blacks from living in houses on blocks where the majority of the houses were occupied by whites).

60. 297 F. 307 (N.D. Ohio 1924).

61. *Id.* at 316.

62. *See* Housing Act of 1954, ch. 649, § 701, 68 Stat. 590, 640.

63. J. KUSHNER, APARTHEID IN AMERICA 22 (1980); HOUSING FOR ALL UNDER LAW 19 (R. FISHMAN ed. 1978); D. FALK & H. FRANKLIN, EQUAL HOUSING OPPORTUNITY: THE UNFINISHED FEDERAL AGENDA 10 (1976).

Other courts were marked by "liberality." For a time, the California Supreme Court[64] and New Jersey Supreme Court[65] ran a neck-and-neck race to be liberal in sustaining any regulation attempted by a city in a zoning ordinance. The courts and the towns played legal leapfrog with one another, the towns acting and the courts approving. This was particularly apparent in New Jersey, where larger and larger minimum lot sizes were required for single-family homes while amounts of land zoned for mobile homes, for multiple-family use, or for other low- and moderate-income housing shrank. Justice Hall of the New Jersey Supreme Court finally struck a pro-housing note in his 1962 dissent in *Vickers v. Township Committee of Gloucester Township*.[66] But the California Supreme Court continued upholding restrictive ordinances in its "see no evil," aesthetic, preserve-the-environment way.[67]

In 1975, Justice Hall's 1962 dissenting position finally became the New Jersey Supreme Court's view. In *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*,[68] Justice Hall persuaded his colleagues that social engineering of the exclusionary-zoning variety had gotten out of hand. At the time Justice Hall wrote, only one percent of the net residential land supply for new development in New Jersey, excluding rural counties, was zoned for multi-family use.[69]

"[C]onditions have changed," said Justice Hall, "and . . . judicial attitudes must be altered from that espoused in . . . earlier [cases] to require . . . a broader view of the general welfare and the presumptive obligation on the part of developing municipalities at least to afford the opportunity by land use regulations for appropriate housing for all."[70]

The case immediately became the leading decision of the so-

64. DiMento, Dozier, Emmons, Hagman, Kim, Greenfield-Sanders, Waldau, Woollacott, *Land Development and Environmental Control in the California Supreme Court: The Deferential, The Preservationist, and The Preservationist-Erratic Eras*, 27 U.C.L.A. L. REV. 589 (1980) [hereinafter cited as DiMento].

65. Pazar, *Constitutional Barriers to the Enactment of Moderately Priced Dwelling Unit Ordinances in New Jersey*, 10 RUTGERS CAMDEN L.J. 253 (1979).

66. 37 N.J. 232, 181 A.2d 129 (1962). The court held that the township had the authority to adopt an ordinance prohibiting trailer camps and trailer parks in its industrial districts, as well as in all other districts.

67. DiMento, *supra* note 64.

68. 67 N.J. 151, 336 A.2d 713 (1975).

69. *Id.* at 181 n.12, 336 A.2d at 729 n.12.

70. *Id.* at 180, 336 A.2d at 728.

called "in-zoning"[71] or inclusionary zoning[72] movement.[73]

INCLUSIONARY HOUSING

Inclusionary zoning generally refers to the use of zoning to include rather than exclude the poor.[74] But in California inclusionary zoning has acquired a more specific connotation.[75] It refers to requirements put on developers to include low- and moderate-income units in their developments as a condition for allowing them to build market-rate housing.[76] To avoid confusion, this court will refer to the latter kind of inclusionary zoning as "inclusionary housing."

Does inclusionary housing serve the interests of the public health, safety, and welfare? The California Legislature, the Attorney General of California, and state planning and housing agencies seem to think so. A builder who elects to include low- and

71. H. FRANKLIN et al., IN-ZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS (1974).

72. Davidoff & Davidoff, *Opening the Suburbs: Towards Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971), may have been the first to use the term "inclusionary." Scholarly attack on "exclusionary zoning" began in earnest about 1969. Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969), is perhaps the earliest leading article. Sager was a professor at the UCLA School of Law at the time he wrote the article.

73. The Index to Legal Periodicals lists 18 casenotes on the Mount Laurel case. For a discussion of the case, *see* HOUSING FOR ALL UNDER LAW 104-22 (R. FISHMAN ed. 1978) and *see id.* at 105 n.175 for a citation to some of the literature on the case.

74. Davidoff & Davidoff, *supra* note 72, and H. FRANKLIN, *supra* note 71, use it in that sense.

75. Kleven, *supra* note 56. Perhaps the earliest article on the scheme was Fertig & Cassidy, *Moderately Priced Housing Without Subsidy: The MPDU Proposal*, PLAN., May 1973, at 26. Coincidentally, author Fertig later became a UCLA School of Law graduate.

76. With Sager, Fertig, and Kleven with their UCLA associations, also-rans from UCLA on exclusionary-inclusinary zoning include Hagman, *Urban Planning and Development—Race and Poverty—Past, Present and Future*, 1971 UTAH L. REV. 46; D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW ch. 18 (1971); and Keynote Address by Donald Hagman, Beyond Open Housing: Penumbra and Future, Lawyer's Seminar; Practice Under the Fair Housing Laws, UCLA School of Law (Nov. 18, 1972), which reportedly was influential in persuading the Los Angeles City Attorney to revoke his opinion, Authority of the City to Require "Low-Cost" Housing in Connection with a Zone Change (May 18, 1971), which had concluded that inclusionary zoning (in the species sense) was invalid. Armed with a favorable opinion, advocates persuaded the Los Angeles City Council to adopt an inclusionary (in the species sense) ordinance. 1 LOS ANGELES, CAL., MUN. CODE §§ 12.03, 12.39 & 13.04, as added or amended by Ordinance 145,927 (June 3, 1974). For a further elaboration, *see* Hagman, *Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government*, 5 URB. L. & POL'Y 169 (1982).

moderate-income housing in a market-rate development has a statutory right to increased densities in the development (regardless of the effects on the neighborhood), or to subsidies and other favorable consideration.[77] Special inclusionary housing provisions also apply in the California coastal zone.[78] Given the state's encouragement of inclusionary housing, this court would find it difficult at best to conclude that either economic integration or the means chosen to achieve that goal, inclusionary housing, is so irrational as to be unconstitutional.

Professor Freeman has written one of the most powerful indictments of single-family zoning.[79] He claims it is inefficient, inequitable, and unjustified on grounds of residential amenity (environmental and aesthetic considerations) and right of prior appropriation.[80] His egalitarian view is particularly persuasive:

> [T]he basic value of residential amenity is ill served by the segregation of residential land uses. The criteria for separation seem inherently demeaning to those excluded. It is a reasonable assumption that higher-density residential users have no particular desire to exclude lower-density ones. The very scheme of definition operates to tell succeeding categories of higher-density users that they are unwelcome in the lower-density setting. Given at least a rough correspondence between wealth and power and those who are doing most of the excluding, and since the principal victims will be those who by force of circumstance are unable to buy in at the more exclusive level, the message to the excluded is that they are unfit. . . . If the value of minimal residential amenity is thought to buttress feelings of self-respect or dignity, or to promote equality of opportunity, as suggested earlier, the message of exclusion does precisely the opposite. Alternatively, it may be said, relying on an apt analogy, that "separate but equal" cannot ever be equal so long as some persons

77. CAL. GOV'T CODE §§ 65915-65918 (West 1983 & Supp. 1984). Some of these sections have been construed in 64 Op. Att'y Gen. Cal. 370 (1981) and in 63 Op. Att'y Gen. Cal. 478 (1980). *See also* CALIFORNIA OFFICE OF PLANNING AND RESEARCH, BONUS INCENTIVES FOR AFFORDABLE HOUSING (1980); LEGAL OFFICE, CALIFORNIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT, INCLUSIONARY ZONING (Oct. 25, 1978).

78. CAL. GOV'T CODE §§ 65590-65590.1 (West 1983).

79. Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation*, 60 MINN. L. REV. 883 (1976). For another unsympathetic view of zoning, *see* Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980), *reprinted in* 13 LAND USE & ENV'T L. REV. 195 (1982). Professor Krasnowiecki's article was ranked by peer reviewers as the best article on land use and environmental law published in 1980-81. *See* Hagman, *Preface*, 13 LAND USE & ENV'T L. REV. iv (1982).

80. Under prior appropriation, first in time is first in right. *See* Freeman, *supra* note 79 at 899-903.

> are imposing the fact of separation on those who would prefer not to be separated. The problem is one of imposition by wealth and power on those without choice; the evil is the implicit insult. And, more specifically, the insult seems directed to the particular personal characteristics of those excluded that are the basis for the exclusion. [It involves] . . . telling the apartment dweller that the environmental conditions that he is compelled to accept as a way of life are sufficiently offensive to justify his isolation from others with power to acquire better conditions.[81]

ATTORNEY'S FEES

The defendant City also moves for its costs and attorney's fees under California Government Code section 65914.[82] That section provides that a city may recover its costs and attorney's fees in defending an action brought against the approval of housing development if that development includes more than twenty-five percent low- and moderate-income housing.[83] Three other findings must be made, including that the "action was frivolous and undertaken with the primary purpose of delaying or thwarting the low- or moderate-income nature of the housing development. . . ."[84] This court does not find that the action was frivolous or brought primarily because of the inclusionary housing feature of the EH zoning. Therefore, assuming without deciding that a federal court can apply section 65914, the City's motion for fees is denied.

SUMMARY JUDGMENT

I conclude, except in one respect to be discussed below, that the defendant City is entitled to summary judgment. There are no disputed facts which, when combined with the relevant principles of law, would lead me to conclude that the City's goals of public health, safety, and welfare or its means of achieving these goals are improper. Indeed, given the rampant irresponsibility of most of the country's 40,000[85] other local governments in failing to provide for a fair share of the housing needs of all economic segments

81. Freeman, *supra* note 79 at 906-07.

82. CAL. GOV'T CODE § 65914 (West 1983).

83. *Id.* at § 65914(1).

84. *Id.* at § 65914(2).

85. In 1977 there were 38,726 "laboratories of experiment" in the form of general purpose local governments such as counties, municipalities, townships, and towns. STATISTICAL ABSTRACT OF THE UNITED STATES 273 (1982-83). Santa Acinom is part of the spice of life produced by the potential for variety these numbers give.

of the community, Santa Acinom's scheme is imaginative, responsible, and laudable.

Summary judgment is not granted to the City as to the validity of the amortization features of the EH ordinance as applied to existing housing in the zone. The City argues that its formula for recognizing redevelopment participatory rights based on the value of each house makes the fifteen-year removal requirement valid. Validity might ultimately so be determined, but more proof is required. The parties admit that some of the older $200,000 houses in the area have recently been torn down and the sites used for new houses in the $600,000-$1.2 million price range. That the market is leading to the razing of existing houses worth an average of $200,000 does suggest that the amortization period for older existing houses is reasonable. As to the newer houses, should their owners protest the EH zoning as applied to them, this court will need to consider carefully the participatory scheme. The court must decide whether the participation provision is so drastic as to destroy all but a bare residue of the owners' property,[86] or whether it allows for a reasonable return, even if not the most profitable.[87]

The single-family house may be the American dream. But Americans have conflicting dreams. Among these dreams is the notion that government is not a machine which exists for the purpose of making the rich richer, as is the melancholy prospect in so many countries of the world. Rather, government's purpose is to maximize the public health, safety, and welfare. The City's action here comports with that American dream.

Therefore, summary judgment for the plaintiffs is denied. Summary judgment for the City is granted. The validity of the amortization features of the ordinance as applied to any particular lot within the EH zone is not here decided.

86. Fred R. French Investing Co. v. City of New York, 39 N.Y.2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976) (struck down ordinance rezoning two private parks in residential complex into parks open to public).

87. Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 366 N.E.2d 1271, 397 N.Y.S. 2d 914 (1977), *aff'd*, 438 U.S. 104 (1978) (upheld landmark preservation statute prohibiting construction on historic railroad terminal).