



ADVANCE SHEET – April 26, 2024

President's Letter

It has been my usual practice not to comment on current events except through the use of texts, written by myself or others, that are between a decade and two millenia old. I offer here an article on zoning reform that I published 35 years ago. It received some attention at the time, being included in the Zoning and Planning Law Yearbook for 1991 as one of ten outstanding zoning articles and also being reprinted in a publication called Municipal Attorney. Its ideas about accessory apartments and home occupations were not seriously taken up until recently, with new legislation on accessory apartments in California being credited with creating several tens of thousands of new moderately priced dwelling units and even the Maryland General Assembly creating a task force on the subject. COVID and the advent of telecommuting has also raised interest in home occupations, though it is still easier to open a one-room private restaurant in a residential area in Communist Havana than in most American suburbs. Many home occupations, however, are found nearby in the Amish country of Lancaster County, Pennsylvania; it may be that the cyber age is carrying us back to the future.

George W. Liebmann



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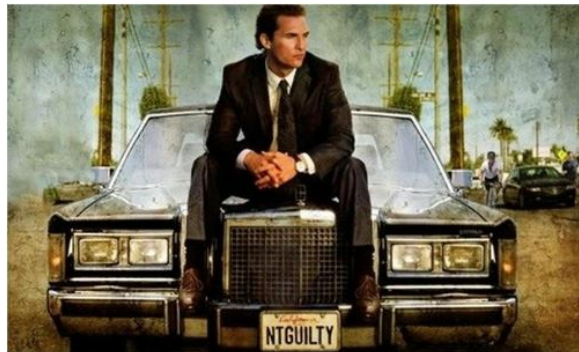
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The Bar Library Film Series Presents

The Lincoln Lawyer

Mickey Haller (Matthew McConaughey) runs his law practice out of a Lincoln Town Car rather than an office. Haller is hired to defend the son of a wealthy Los Angeles businesswoman in an assault case. Details of the crime bring up uncomfortable parallels with a former case, and Haller discovers the two cases are intertwined. The film also stars Ryan Phillippe, Marisa Tomei, Josh Lucas, William H. Macy and Bryan Cranston. *Rotten Tomatoes* describes the film as “briskly enjoyable entertainment.” Audiences polled by *CinemaScore* gave the film an average grade of “A-” on an A+ to F scale.

WHEN: Friday, May 17, 2024 - 5:30 P.M.

WHERE: The Clarence M. Mitchell, Jr. Courthouse (100 North Calvert Street)
Main Reading Room of the Baltimore Bar Library (Room 618)

COST: Free – Soft Drinks & Snacks will be served.

RESERVATIONS: May be made at the Library, by telephone or e-mail. In order

to keep track of attendance, **reservations are required.** For more information telephone 410-727-0280 or e-mail us at jwbennett1840@gmail.com.

The Season Is Now

Last weekend my wife and I were on the Jersey Shore. I would say it was fairly early in the season, but in actuality we are still about a month away from the start of the season. Still, we couldn't wait any longer for Sam's Pizza, Laura's Fudge and the sights and sounds of our favorite arcade, including that of my wife going down yet again to ignominious defeat in air hockey. Yes, even at my advanced age, I still have it. As a public service let me provide a warning to any of you thinking about venturing to the Jersey Shore for the first time and that is to be very, very careful around the sea gulls. The Ocean City gull and the Jersey Shore gull are two very different birds, the latter coming with a definitive Jersey attitude. Over the years my children had everything from a French fry to an ice cream cone snatched out of their hands by these flying disposals. My favorite story though is the time that my wife and I were walking along the beach one morning eating Danish and drinking coffee. A sad little gull stood to the side totally by himself, not another of his kind anywhere around. My wife, not the air hockey player I am, but certainly much brighter said "Don't do it," and when I did anyway we were soon engulfed in a scene from *The Birds*. Two questions persist in my to this day: where did they all come from and how did we make it out alive?

One of the great things about the Bar Library is that there is no season. We are, in effect, always in mid-season form. The Library has been in existence since 1840 and at its present location since 1900. Can you imagine that this very Library was around at the time of the Civil War? It was here through World Wars, a Great Depression and two terrible pandemics. Through it all, the Library has developed a definite way of doing things and treating the people that come through its doors. We are grateful to have made our way through all of it and that you continue to make use of the Library. In appreciation of that use we have striven to provide the collections and services that are worthy of that support. So, although we do not have funnel cake, we have expansive collections and access to more Westlaw databases than you are going to find just about anywhere else. We have far ranging services, lectures, movies and much more, and there is no reason to wait until Memorial Day to come by.

I look forward to seeing you soon.

Joe Bennett

**SUBURBAN ZONING--TWO MODEST
PROPOSALS**

Editors' Synopsis: *In protecting residential areas with single-family housing, Euclidean zoning has exacerbated problems of isolation of the elderly, housing discrimination, and child care. A modification of existing ordinances to allow accessory apartments and small commercial uses will mitigate these problems without threatening the basic goals of residential zoning.*

I. Introduction

Most Americans take for granted two features of community zoning: the protection of affluent suburbs from small apartments accessory to single-family homes and protection from commercial uses of those homes. Yet many pressing social problems, including homelessness, social isolation of the elderly, segregation of ethnic and economic minorities, and inadequate day care for children result directly from these zoning restrictions. The relief of these problems does not require drastic change. Permitting accessory apartments in owner-occupied homes and small service facilities and convenience shops in residential neighborhoods would not violate the purposes of zoning. Such uses would alleviate many social problems without sacrificing the traditional protection of residential neighborhoods from heavy traffic, noxious uses, and intrusion of strangers.

Zoning endures today because it seeks to achieve ends that society generally values. Though typically constituting a more drastic intrusion on property than the usual petty larceny of the police power,¹ zoning enjoys wide support from conservatives and liberals alike. Thus, any effort to alter zoning structures must appeal to the values that sustain the institution. What are these values? Ernst Freund, one of the first and wisest students of zoning, noted that Americans had no natural class distinctions. He felt creation of an artificial class structure explained the importance they attached to associating with particular sorts of neighborhoods.² The general acceptance of zoning reflects the American preoccupation with establishing and maintaining economic distinctions.

Freund expressed the hope, as yet unrealized, that the class distinctions recognized and fostered by zoning would in time be replaced by pride in community. However, in the suburbs, the fungibility of zoned communities has defeated this hope. The conservative Judge Westenhaver in *Euclid*³ described the social consequences of zoning in words that anticipate his liberal successors:

In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income and 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. It is a matter of income and wealth, plus the labor and difficulty of procuring adequate domestic service.⁴

The vested interests represented by home ownership epitomize the economic and class distinctions. For most families, and particularly those of modest means, the home represents their largest single investment, and one that is not easily disposed of.⁵ “One does not trade a house as easily as one might trade a car or switch breakfast cereals.”⁶ The home's location and surroundings also vitally affect the upbringing of the family's young. Zoning stands and is perceived to stand as a barrier protecting the home against the threat of change. Isolated decisions may disregard this premise; in practice society will not tolerate changes that threaten the fruit of labor and the symbol of success as embodied in the family home.

Yet Euclidean zoning in its traditional form creates problems that may in time defeat its own purpose.⁷ Broadening the scope of two exceptions already recognized by most zoning ordinances will not frustrate this underlying purpose, but, as West German experience indicates, will serve to reverse the social problems growing out of the unrelieved homogeneity fostered by zoning laws. Neighborhood values will not be threatened by allowing accessory uses and home occupations.⁸ But failure to make such changes may well vindicate the somber prophecy of Jane Jacobs, as to our postwar suburbs, that “thirty years from now, we shall have accumulated new problems of blight and decay over acreage so immense that in comparison the present problems of the greater cities' gray belts will look piddling.”⁹

II. Accessory Apartments

At the apex of the typical American zoning scheme is the single family residence. In this country, zoning ordinances generally limit accessory uses of such a house to structures such as porches and garages. The laws and the public both view garage or accessory apartments as out of place in better residential neighborhoods. Few good reasons support this view, however.

The “granny house” or “echo house” is a familiar European institution.¹⁰ The two-family home where rent from the duplex apartment pays the mortgage is likewise familiar abroad and also has found some recognition here in FHA loan legislation, if not in common practice.¹¹ Tax laws often encourage the growth of shared housing. In West Germany owner-occupants who build two dwelling units, one for owner-occupancy and one for rental, can deduct against taxes five percent of the cost for eight years and 2½% thereafter, while in Finland tax laws allow owners to disregard the first \$650 in rent from an accessory apartment.¹² Even in this country local subdivisions have on occasion been permitted to qualify for federal community block grants under 42 U.S.C. § 5305(a)(15) on the basis of “the development of shared housing opportunities in which elderly families . . . benefit as a result of living in a dwelling in which the facilities are shared with others.”¹³

The interest in accessory housing has increased in recent years. The American Planning Association published a monograph including model ordinances,¹⁴ and the Canadian Mortgage and Housing Corporation published a similar study on accessory housing. Patrick Hare, a Washington land planning consultant and Professor Martin Gellen of Berkeley published books in support of accessory housing.¹⁵ A number of subdivisions, among them the prosperous

and secure suburban areas of Montgomery County, Maryland, Marin County, California, Fairfax County, Virginia, and various towns in Fairfield County, Connecticut, passed legislation in support of accessory housing, as have California and Hawaii.¹⁶ That this legislation first appeared in jurisdictions known for high-cost housing is no accident. It is estimated that nearly 40% of American suburbs now recognize the concept of accessory housing in some form.¹⁷

The movement toward accessory housing has been in large measure spontaneous. The concept has generated little opposition, for it is non-threatening.¹⁸ The ordinances do not impair the rights of property owners. Municipalities tend not to oppose changes that ought to increase revenue by raising land value assessments and tax receipts. The move toward fiscal zoning to exclude families that will burden municipal services is absent because the apartments created are characteristically small and usually inhabited by single persons or the elderly. Racial fears are assuaged by the "Mrs. Murphy's boarding house" exemption to the Civil Rights Act of 1968. This exemption excludes from coverage buildings with four apartments or less in which the owner occupies and maintains one of the apartments as a residence.¹⁹ The appeal of this concept is enhanced by the opportunity to create an additional housing unit for a construction cost typically estimated to be \$16,500.²⁰

The major reason for this change, however, is thought to be the need for affordable housing arising from recent social changes. These social changes include demand for living units by growing number of elderly persons priced out of nursing homes,²¹ the increased entry of women with children into the work force and their consequent need for income obtained from renting extra space, and the decline in the marriage rate.²² The most dramatic change is the decrease in family size that renders much of the housing built in earlier periods needlessly large. The average number of persons per household declined from 3.14 in 1970 to 2.76 in 1980, 2.69 in 1985 and 2.67 in 1986, a decrease of almost 15% in 16 years. The number of persons over the age of 14 living alone increased from 7,064,000 in 1960 to 20,602,000 in 1985. The number of households containing six or more persons declined from 6.8 million in 1965 to 3.6 million in 1985.²³ "[A]t a generous maximum space standard threshold of three rooms per person, 7.5 million units or one-seventh of all owner-occupied dwellings in the United States can be classified as containing surplus space."²⁴

These changes have caused one observer to estimate that 2-1/3 to 3 million accessory apartments are already in use in the United States, a number equal to the average rental housing production²⁵ for six or seven years. It has been observed that "[t]he herculean job of the planner, aware of the clouded condition of his crystal ball, is . . . to try to figure out how the inevitable shifts in today's demands and the obsolescence of today's techniques can be absorbed at minimum social and economic cost."²⁶ Recent experiences with accessory apartments suggest that planners are unnecessary. The need is for planners to get out of people's way. Even the most widespread use of accessory apartments (particularly if the apartments are restricted to owner-occupied buildings) is unlikely to give rise to use intensities as high as those for which most large homes were built. Provided the usual restrictions concerning disfiguring exterior changes, fire prevention, health regulations and the use of residential streets by four-axle trucks are present, there will be no effect analogous to nuisance on the neighborhood.²⁷

The benefits of increased use of accessory apartments are numerous. First, persons of reduced means, for example, the elderly and female heads of single parent households, who would otherwise have to sell their homes, are enabled to retain them. A second benefit is that the rising number of elderly people, for whom inexpensive housing is in limited supply, can obtain housing in good neighborhoods, and can frequently receive necessary services such as transportation and home health care and, in turn, provide essential services such as child care. The burden of furnishing these services might otherwise fall on the state. Another benefit is the fostering of a possible revival of the extended family, since most people desire propinquity, but not too much, with their parents. "Granny houses" or apartments with separate entrances and cooking facilities meet this need. The babushka, though un-American and not a technological innovation, may reduce fashionable demands for expensive and publicly supported day care.

A more diverse suburban population in terms of both age and income may result. The more diverse population will help to insure that the entry of women into the workforce does not cause neighborhoods to be populated during the day predominantly by latchkey children, with the attendant problem of delinquency. The number of young adults in suburban communities available for the teaching force may increase.²⁸

Minorities and lower income persons may benefit directly by being introduced to suburban neighborhoods in small numbers, vouched for by landlord-neighbors and, indirectly, by the phenomenon of "filtering" that follows each creation of a new housing unit. Professor Bernard Siegan has summarized the literature as establishing that: "[T]he construction on the average of 1000 new units, both houses and apartments, makes it possible for a total succession of about 3,500 moves to occur to different and likely better housing conditions. . . . [B]eginning with the third succession of moves, poor families were represented in approximately the same proportion which they represent of the population."²⁹

Another beneficial result will be the availability of a large number of new housing units at very limited public or private cost. At a time when each new subsidized unit costs upwards of \$75,000, accessory apartments may be brought on line at a third or less of this cost. Moreover, the apartments created by accessory housing generally are in better quality buildings. Accessory apartments, unlike subsidized housing, also enjoy the benefit of owner-occupied management. Low and moderate income housing requires a great deal of maintenance and management expertise. A poorly managed project may fall apart completely after five years.³⁰ Accessory apartments promise gradually to provide low-rental housing in communities in which earlier efforts to build low income housing projects have proven fruitless.

The negative effects of allowing accessory apartments are negligible and can be dealt with by zoning and health and safety regulations. Jurisdictions opting to liberalize their zoning regulations to allow accessory apartments have found little difficulty in formulating restrictions designed to protect the character of the neighborhood, provide for the safety of apartment occupants and discourage speculation. These jurisdictions impose the typical apartment building code restrictions relating to plumbing, privacy arrangements and minimum requirements for parking areas, window space and ceiling levels. Additional specialized restrictions, however, are usually necessary. Such restrictions

commonly include requirements for additional entrances or exits to address the fire protection needs of an apartment as opposed to a single-family dwelling. Restrictions designed to alleviate concerns about neighborhood character typically require the building to have been in existence for at least five years prior to conversion. This requirement also discourages developers from constructing and marketing duplex rental units as accessory apartments; however, this purpose is of doubtful wisdom since this type of arrangement has proved both useful and popular in Europe. A more reasonable provision that achieves the same purpose is the requirement that the building be owner-occupied.

Some jurisdictions limit the number of accessory apartments by requiring the annual renewal of permits as special exceptions, by restricting to a small percentage the number of homes within a given radius that may have accessory apartments, or by imposing consent restrictions.³¹ Other jurisdictions, more wisely, do not impose such restrictions and allow accessory apartments without limitations in rural zones or wherever sufficient land is owned to support two or more houses. Restrictions on the creation of accessory apartments, to the extent they infringe on the owner's ability to set up living arrangements with blood relatives, may conflict with the Supreme Court's decision in *Moore v. City of East Cleveland*³²

Various policy concerns favor the accessory apartment concept, and support for the concept has come from diverse groups. Although no fortunes may be made from construction of accessory apartments, interest groups such as home improvement contractors, lenders and realtors have economic incentives to support the concept. Additional support should be forthcoming from organizations representing the interest of those with low or reduced earning capacity such as the elderly, divorced or single parents, recently discharged hospital patients, and school system employees. The fact that there is a recognized shortage of low cost housing in a nation that prior to 1970 spent eight times more of its capital on housing than countries in Western Europe and three times more than Japan³³ suggests that our housing shortage stems, not from a lack of construction, but from a failure to adapt. The accessory apartment concept could provide an immediate source of additional low cost housing. At the same time, the concept could soften the impact if the predicted collapse of housing values materializes. Deflation of home values coupled with high levels of second mortgage and equity loan borrowing may result in a major social and economic crisis if zoning regulations prevent owners from adapting their principal asset to meet debt coverage demands.

III. Home Occupations

The additional low cost housing made available by allowing accessory apartments results in the addition to suburban life of groups not previously represented in large numbers such as the elderly and single persons of modest means. This demographic change creates a corresponding need for greater access to retail and service establishments that traditionally have been excluded from residential neighborhoods.

While nearly all residential zoning laws authorize "home occupations," the term is frequently construed restrictively to exclude retail businesses. Permitted uses include those considered customary³⁴ resulting in limiting the class to mostly professional occupations.³⁵ It has been argued that the exceptions favoring professional offices rest not on functional but social class distinctions,

and the prohibition of retail establishments represents an unwillingness on the part of planning officials to make appropriate regulatory changes.³⁶ Yet, “[i]f the test were convenience to the neighbors, the beauty shop would be more acceptable than the lawyer's or broker's office, and the mom and dad grocery [store] with its liberal credit policy and its willingness to cater to special tastes and to odd hours would justify first consideration.”³⁷

The prohibition of small retail establishments is difficult to justify on any functional grounds. The health-and-safety rationale has been recognized as absurd since the dawn of zoning. Albert Bettman, a father of the zoning concept, once stated “[t]here have been mighty healthy kids raised over grocery stores.”³⁸ Traffic concerns as a ground for exclusion are difficult to justify if acceptance of deliveries from large trucks is prohibited. In any case, “[i]f our test were based on traffic annoyance, the church would be the first to be excluded from the residential district.”³⁹ The risk of traffic congestion resulting from allowing limited retail uses in residential areas is self-limiting because any business that depends on traffic from elsewhere will naturally choose a location accessible to large-scale traffic movement.⁴⁰ Siegan's study of Houston, a city without zoning regulations, suggests that commercial uses will limit themselves to no more than five percent of structures and will result in the establishment of small businesses that provide services for local residents and augment the viability of the neighborhood.⁴¹ As to more affluent subdivisions on large lots, “[t]he high cost of the homes coupled with the fact that they are on low-traffic streets would make it economically unfeasible for purchase by a commercial user.”⁴²

The interest of existing residents in avoiding depreciation of their homes by the advent of small commercial uses is limited, since changes will not occur rapidly and will be self-limiting, each neighborhood being able to support only a few establishments.⁴³ One possible approach to the legalization of new uses in established neighborhoods would be to allow home offices (which cannot be policed in an age of telecommuting), as well as small-group social services and only such retail establishments as are sponsored or contracted for by the local homeowners' or condominium association.

There are many benefits of small-scale retail uses in residential neighborhoods. The first benefit is simple convenience. In neighborhoods that prohibit retail uses, there is a characteristic “lack of neighborhood shops within walking distance; a loaf of bread entails an automobile trip, often of a sizable [sic] distance. This limits shoppers to drivers, a problem in some families, and restricts the shopping participation of children.”⁴⁴ It also burdens the scarce time of two-earner families.

The introduction of retail facilities within walking distance would also alleviate problems facing both the elderly⁴⁵ and the young. Many of the burdens attributable to the poverty of libraries, youth centers and recreational facilities in American suburbs are overshadowed by the hardships caused by the absence of retail establishments. “This deficit places a special burden on certain types of people . . . on those persons, in fact, who are most dependent on the resources of the local environment.”⁴⁶

Teenagers are disadvantaged, both as shoppers and as potential employees. Teenagers most often complain that there is nothing to do in the neighborhood.⁴⁷ “Few of the facilities are neighborhood-based; because of this they seem distant to the residents, even though the actual time spent getting to

them by car is not great. And the necessity for a car sets up a double dependence situation: Not only must the facility be available, but a car must also be available if the facility is to be utilized. This situation holds true especially for retail facilities, the most commonly used ones in any community."⁴⁸ "[T]he youths' transportation, frustrations, and boredom are compounded by the great dependence on parents for something as vital as transportation, which comes at a time when the teenager is striving for greater independence. The situation can lead to deep, underlying resentment on both sides and adds to the confusion and sometimes hostility that often seem to mark parent-teenage relationships in the U.S."⁴⁹ One of the best solutions to the problem of teenage idleness is the availability of part-time work, particularly in the summer.⁵⁰ Restrictive zoning plans severely limit the availability of this work for teens in residential neighborhoods.

Families in which both spouses want or need to work experience the negative impacts of restrictive zoning. The two-earner family usually requires two automobiles, since available jobs are beyond walking distance. "[W]hat happens if [one spouse] can't drive, can't afford a car, or the car breaks down?"⁵¹

Banishing commerce not only banishes employment opportunities but also creates an artificial social situation, or lack thereof, in which "one's quality of life depends heavily on the extent to which the microenvironment is embellished with private possession."⁵² "The opportunity (in modern life it has become a privilege) of playing and growing up in a daily world composed of both men and women is possible and usual for children who play on lively, diversified city side-walks. I cannot understand why this arrangement should be discouraged by planning and by zoning."⁵³ "[I]t is an uncommon family which can provide all of the things which a complete and well-rounded community could offer--facilities, a sense of participation in ongoing community activities, places where teenagers and adults can spontaneously meet, and a chance to observe life as it is lived outside of living room and yard."⁵⁴

Small scale retail uses assume particular importance in marginal low-income suburbs in danger of becoming the slums of the future--Jane Jacobs' "gray areas."⁵⁵ "For the family that does not own an automobile [or owns only one car], the existence of a nearby . . . store . . . may be a . . . necessity."⁵⁶ The incompatible use actually increases the livability of the area.⁵⁷

The relatively few who desire to use homes for small or beginning businesses also benefit.⁵⁸ It is important to remember that the business use of homes provides a safety net in hard times, as was true during the depression.⁵⁹

Home occupations also foster competition among businesses. Jane Jacobs believed that shopping centers could become monopolistic, causing "the subtraction of commerce, and of culture too, from the intimate and casual life of cities."⁶⁰ Professor Garrett Power noted that in Baltimore, businesses already in an area were protected from competition once the area was zoned residential.⁶¹ Zoning enthusiasts, however, regarded the protection from competition as an asset to the community, one which prevented the suburban retail store from being destroyed by the competition of an unnecessary number of shops.⁶²

The tendency of zoning to foster local monopolies is confirmed by the judicial view that zoning changes affect only a very small geographic area⁶³ and by findings that the convenience store is possibly an asset, and certainly not

harmful, if located a block away from a residence.⁶⁴ Professor Popenoe's study of Swedish housing found that excessive centralization of services, and their removal from residential areas, deprived many young people and working-class households of the use of those services.⁶⁵

As suburbs increasingly acquire offices and industry, the concentration of traffic around the few areas zoned for commerce becomes less necessary and less acceptable. Any specific attraction causes traffic congestion whenever people are thinly settled, or where diverse uses seldom occur.⁶⁶ Furthermore, the suburbs waste a great deal of land because of the need to duplicate parking. Both residences and attractions must have their own parking lots that frequently remain idle much of the time. Suburbs, at least while they remain suburbs, can stand this land waste and this high ratio of private automobile travel, because of their lack of concentration. ("Here, it would seem, is that elusive point of equilibrium; yet the moment work is introduced into the mixture, even in a suburb, the equilibrium is lost.")⁶⁷ This is so because commuting and industrial traffic is added to the concentrated retail traffic.⁶⁸

Finally, home occupations combat Jacobs' "wasted time and dull environments."⁶⁹ The age of the electronic office and liberalized tolerance of home occupations may free the suburbs from their historical lack of innate vitality, staying power, or inherent usefulness as settlements, and from their tendency to lose their attraction within a generation and decay in the pattern of city gray areas.⁷⁰

Of course, home occupations cannot be free of restrictions. While the prohibition against retail sales should be abandoned, residential areas should be protected from common law nuisance, loss of open space and light that exist when the single-family dwelling style is maintained, contagion and fire, and the use of residential streets for four-axle trucks.⁷¹

Size limitations and requirements that the building's primary use be as a home with a limited number of employees from outside the residence can be justified. Jacobs' point that "gray areas are unequipped to handle strangers"⁷² is a valid one, although the absence of heavily trafficked streets will itself operate to restrict the appeal of home based establishments. Indeed, it has been contended that the necessary traffic associated with large businesses causes substantial businesses to avoid residential locations even when, as in Houston, they are permitted to situate themselves there.

Additionally, there may be a case for severely prohibiting or restricting home occupations in a buffer area of a block or so where the residentially zoned area directly infringes on a commercial zone. Retail uses are less needed by residents with a commercial district in immediate proximity, and such restrictions protect the owners of homes backing up onto those on major thoroughfares. If the latter homes are replaced by or used for strip commercial purposes, values may be jeopardized for such adjoining homes.⁷³

Thus, with appropriate restrictions, zoning regulations should be amended to allow home occupations and small retail uses. Harwood suggests the following legislation: "[n]o regulation may infringe on the right of any resident to use a minor portion of a dwelling for gainful employment that does not change the character of the surrounding residential area."⁷⁴ This is undoubtedly an oversimplification. If a valid object of restrictions is to limit use to residents of the neighborhood, restrictions on size⁷⁵ and on the number of employees

(frequently no more than two persons other than a member of the immediate family may occupy a dwelling) are certainly relevant, as are limitations on signage (commonly to flat, nonilluminated signs not more than one square foot in area) and on deliveries by large trucks. With these qualifications, however, it is difficult to justify most restrictions on home occupations by reference to objective performance standards, because under a strict application of such restrictions “nearly all window air conditioners and power mowers in the residential neighborhoods would not conform and . . . the emission from a number of house chimneys would be illegal.”⁷⁶

As is the case with accessory apartments, weighty social considerations that were not present in like measure at the time of the *Euclid* decision now exist that weigh in favor of greater generosity toward home occupations. “In the early years of [the suburbs] the teenager, the elderly person, the widowed and divorced female head of household, the working-class woman living in tight financial straits and cut off from relatives, were unfamiliar figures.”⁷⁷ Working at home may be on the increase, and this may be a factor which will serve to strengthen family life.⁷⁸ Further, economic pressures and high energy costs may increase the likelihood that more people will moonlight at home when part-time work is feasible in order to avoid expensive commercial office space and reduce travel.⁷⁹ Regardless of whether such trends are actually occurring, existing prohibitions deserve another look.

The least frightening way of introducing change may be to provide homeowners' and condominium associations with zoning exceptions allowing them to either operate or authorize the operation of day care centers, convenience stores of limited size, and demand-response transportation facilities. Because most states recognize these associations as corporate bodies, these exceptions would not be open to the objections attached to zoning by plebiscite. Equipping these neighborhood governments with this real and important power may go far to restore community and self-government to otherwise anonymous suburban tracts that have become “neighborhoods of strangers and jurisdictions without traditions.”⁸⁰

While income from such retail operations is not “exempt function income” under section 528 of the Internal Revenue Code,⁸¹ the benefits of that section to certain homeowners' associations are not materially greater than those available to a regular corporation following “a regimen of thorough tax planning, yielding nominal annual tax payments.”⁸²

In an age of diminishing personal savings and reduced agricultural activity, the home is now the principal capital asset of most families. A society that promotes respect for private property, individual self-reliance, and suspicion of needless government regulation should be hesitant to deny individuals and families of limited means free recourse to what is for most of them the only available cushion against personal, social, and economic dislocations.

IV. Conclusion

Federal, state, and local governments, particularly those with a declared commitment to frugality and market-based approaches, should consider adopting several obvious measures to facilitate and encourage accessory apartments and small commercial uses.

These governments should adopt a German-based tax credit scheme that will

popularize the creation of accessory apartments,⁸³ give local legislators incentives to liberalize zoning so as to grant these newly-created credits to their citizens, and enlist the aid of the accounting, home-improvement, and retirement-planning professions in promoting accessory apartments. State governments should enact legislation modeled after California's Mello Act⁸⁴ which stimulates local legislation by liberalizing rules in the absence of express restrictions subsequently imposed by the local government.

States should also amend current laws regulating homeowners', condominium, and cooperative housing associations to grant these associations the same zoning exceptions enjoyed by public entities.⁸⁵ FHA lending limits for accessory apartments should correspond to the limits applicable to mobile homes, and zoning enabling laws should allow developers of self-contained subdivisions (those with forty units or more) to include duplex homes and convenience stores in residential projects.

Local governments should liberalize ordinances to allow accessory apartments as of right for owner-occupied homes and amend "home occupation" restrictions to allow "telecommuting." These ordinances should also permit small-scale social services and one-room retail establishments, but prohibit deliveries from large trucks and restrict signage. Finally, and most importantly, all persons and entities addressing the housing issue must emphasize that while barriers to fuller use of the existing housing stock continue to exist, any talk of housing shortages is premature.

Footnotes

a Attorney, George W. Liebmann, P.A., Baltimore, Maryland; A.B., Dartmouth College, 1960; J.D., University of Chicago, 1963.

1 Holmes-Laski Letters 475 (M. Howe ed. 1953) (explaining he had deleted the phrase from his opinion in *Jachman v. Rosenbaum Co.*, 260 U.S. 22 (1922)), quoted in *Loretto v. Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 423 N.E.2d 320, 440 N.Y.S.2d 843 (1981).

2 E. Freund, *Some Inadequately Discussed Problems of the Law of Zoning*, in *Planning Problems of Town, City and Region* 93 (1929). In contrast, Freund noted that in Europe, where a class system persists, much less social significance attaches to dwellings. "When you go to Vienna you find that the palace of one of the great aristocratic families has a big glass works display room on the lower floor." *Id.*

3 *Ambler Realty Co. v. Village of Euclid*, 297 F. 307 (N.D. Ohio 1924)

4 *Id.* at 316. Judge Westenhaver's opinion was of course reversed on appeal. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The district court opinion continues to be quoted in recent works on zoning, including B. Siegan, *Land Use Without Zoning* (1972), and S. Toll, *Zoned American* (1969).

5 "Middle income projects as they age tend to contain a significant (or at least articulate) proportion of people who are fearful of contact outside their class." J. Jacobs, *The Death and Life of Great American Cities* 40 (1969).

6 R. Babcock, *The Zoning Game* 50 (1966). Inducements to immobility include

moving costs, fixed rate mortgages, the nontaxation of imputed rent, property-tax relief through circuit-breaker credits, the income tax deductibility of mortgage interest and property taxes, and capital gains tax deferrals. See S. Newman & J. Reschovsky, *Federal Policy and the Mobility of Older Homeowners* (1985); Thomassen, *Circuit Breaking and Life-Cycle Lock-In*, 31 Nat'l Tax J. 59 (1978) (immobility leading to decay of older neighborhoods).

7 "We did not know what general welfare meant, or at least how it could help us in defining the zoning principles. We knew that dark rooms, dark streets, dust, noise, flies, vermin, vibration all those things have some effect on safety or health or morals and our code was built up with great trepidation on the basis. It was a little hard to see why retail business coming into a residence district really affected health and safety." A. Bettman, Proceedings of the National Zoning Conference 20-21 (1938).

8 *Euclid* on its facts may not support the exclusion of two-family homes from residential districts. See M. Gellen, *Accessory Apartments in Single Family Housing* 118-20 (1987). But contemporaneous decisions reflect the *Euclid* approach. See *Miller v. Board of Public Works*, 195 Cal. 477, 234 P. 381 (1925); *Brett v. Building Comm'r of Brookline*, 250 Mass. 73, 145 N.E. 269 (1924).

9 J. Jacobs, *supra* note 5, at 446.

10 See P. Hare, *Accessory Apartments and Echo Units* (1987); P. Hare & L. Hollis, *Echo Housing: A Review of Zoning Issues and Other Considerations* (1983).

11 It is said that FHA appraisal practices developed during the depression discouraged loans for two-family homes. M. Gellen, *supra* note 8, *citing* C. Harriss, *History and Policies of the Home Owners Loan Corporation* (1951). Recently, the Federal National Mortgage Corporation ("Fannie Mae") instituted a demonstration program in which it reserved \$100 million for various shared-housing initiatives that included rental income in determining loan eligibility of borrowers. See FNMC, *Seniors' Housing Opportunities* (April 1989).

12 See E. Howenstine, *Attacking Housing Costs: Foreign Policies and Strategies* 104 (1983); G. Hallett, *Housing and Land Policies in West Germany and Britain* (1977); M. Harloe, *Private Rented Housing in West Germany* (1979); R. Dumonchel, *European Housing Rehabilitation Experience* (1978). "Today the most exclusive zone defined in the [German] Federal building control statute allows duplexes as well as convenience shops." Logan, *The Americanization of German Zoning*, 42 J. Am. Inst. Planners 677 (1976).

13 Housing and Community Development Act of 1974, Pub. L. No. 98-181, § 105(d), 97 Stat. 1163, 1164 (1983).

14 American Planning Assn., *Planning Advisory Service Report No. 365, Accessory Apartments: Using Surplus Space in Single Family Homes* (1981).

15 See P. Hare & J. Ostler, *Creating an Accessory Apartment* (1987); M. Gellen, *Accessory Apartments in Single Family Housing* (1987) (by far the most comprehensive work to date). Hare also issues at semi-annual intervals an updated monograph: *Accessory Apartments: The State of the Art* (available from 1246 Monroe St., N.E., Washington, D.C. 20017). See also People for

Open Space, Second Units: An Emerging Housing Resource (1987). On the property tax effects, which are said to be modest, see Calvan, *Local Taxes and Accessory Dwellings* (1983). *See also* Frazis, *Second Unit Legalization: Issues and Policies* (1985); D. Mcgough, *Additions to Housing Supply by Means Other Than New Construction* (1982); G. Sternlieb & J. Hughes, *The Future of Rental Housing* (1981); Minnesota Housing Finance Authority, *Analysis of the Market and Economic Feasibility of Accessory Apartments in Minnesota* (1982). Popularization of the approach will require consideration of the effect on homestead exemptions. Liberalization is endorsed in the Report of the President's Commission on Housing 53 (1982).

16 Cal. Gov't. Code, § 65852.2, enacted by Senate Bill 1534 (West 1982) (the "Mello Act"); *see also* Cal. Acts, ch. 1630 (1984). The Act requires municipalities to grant permits for second residential units meeting prescribed standards unless the municipality has adopted an ordinance either specifically limiting such units to certain areas or containing findings that specified impacts on health, safety, and welfare would result from their allowance and acknowledging that their prohibition limits housing opportunities in the region. The Hawaiian statute lacks this local option feature; *see* Hawaii Legislative Reference Bureau, *Ohana Housing: A Five Year Review* (1988); *see also* Ontario Ministries of Housing and Municipal Affairs, *Housing Policy Statement: Implementation Guidelines* (1988).

17 Typical ordinances limit such apartments to one per lot, require that the house be five years old and owner occupied for one year, require that the apartment be internal to the house and have parking and a separate entrance away from the front street. *See generally* Simons, *Single Family Homes Adding Illegal Apartments to Meet Economic Realities*, *Washington Post*, Aug. 10, 1981, at B1, col. 1.; Santry, *Legalizing Single Family Conversions* (Tri-State Regional Plan. Comm'n, New York, 1981); Goldberg, *Accessory Apartment Ordinances in the D.C. Region*, *Realtor Magazine*, Nov. 1984, at 15; Brooks, *Wide Appeal for Accessory Apartments*, *N.Y. Times*, Jan. 3, 1982, at 6R, col. 1.

18 P. Hare & J. Ostler, *supra* note 15, at 14.

19 42 U.S.C. § 3603(b)(2)(1982); *see* *Fred v. Kokinokos*, 347 F. Supp. 942 (D.C.N.Y. 1982). *But see* *Morris v. Cizek*, 503 F.2d 1303 (7th Cir. 1974) (possible private action under 1866 Civil Rights Act).

20 P. Hare & J. Ostler, *supra* note 15. The usual costs are for a kitchen, some additional plumbing, thicker walls and separate entrances. Conversions are facilitated by postwar design features such as split-levels and basement rooms with installed plumbing.

21 During the period 1970-1978, a short period historically, the life expectancy of a woman of 75 is said to have increased by 57.5%. P. Hare & J. Ostler, *supra* note 15, at 60. The aging of the population and resulting pressure on social benefits for the elderly may result in a shift in the trend away from the extended family. "[A]s late as 1950, about 58% of women aged 65 and older who had no spouse present lived with families of their kin, especially children. This percentage had been gradually declining since 1910 and started dropping sharply during the 1940's. By 1970 it had fallen to around 29% and further to 18% by 1980. M. Gellen, *supra* note 15, citing Sharers, *Older People and Their*

22 The percentage of men never married increased from 17.3% to 25.2% from 1960 to 1985; the corresponding figure for women from 11.9% to 18.2%. The percentage of never-married women between the ages of 25 and 29 increased from 10.5% in 1960 to 26.4% in 1985. U.S. Bureau of the Census, summarized in 1988 World Almanac and Book of Facts 813. “[W]ith the exception of elderly widows, divorced and unattached persons prior to 1950 represented a relatively small part of the population. The YMCA and YWCA hotels developed by early twentieth century social reformers were an attempt to provide standard quality housing for this sector of the population which for various reasons was not being served by the market.” M. Gellen, *supra* note 15, at 66, citing Rose, *Interest in the Living Arrangements of the Urban Unattached*, 51 Am. J. Soc. 483 (1948).

23 U.S. Bureau of the Census, summarized in 1988 World Almanac and Book of Facts 813-15. Eighteen million units had 2.5 rooms per person or more in 1982. M. Gellen, *supra* note 15, at 91-93. “Whereas the number of one and two family households grew by 140% between 1960 and 1980, the number of efficiency one and two bedroom units [constructed] increased by only 54%.” Report of the Maryland Housing Policy Commission to the Governor and General Assembly 27 (1985) [[hereinafter Maryland Report]].

24 Maryland Report, *supra* note 23, at 27.

25 P. Hare & J. Ostler, *supra* note 1; M. Gellen, *supra* note 15, at 41. The number of conversions of owner occupied apartments are estimated to be approximately 50,000 to 65,000 per year, or about one-fourth of the number of unsubsidized rental units completed during the years under study. The proportion is said to have accelerated to about half of new completions since 1980. *See* A. Downs, Rental Housing in the 1980's 126, 147 (1983) (recommending various incentives including loans, grants, property tax deferrals and selective housing code enforcement to foster accessory housing).

26 R. Babcock, *supra* note 6, at 136. “The Bureau of the Census estimated in 1979 that there were 12.2 million households of two persons or less in which the head was over 55 and the household occupied 5 rooms or more, not counting basements or garages.” Council of State Housing Agencies, Accessory Apartments and Echo Units 1 (1987).

27 R. Babcock, *supra* note 6, at 141.

28 “Teachers have also been a worry. There is a high turnover of younger teachers in any community, but Park Forest is at an especial disadvantage in this matter. There aren't any bachelors around.” W. Whyte, *The Organization Man* 424 (Anchor ed. 1957). *See* D. Rothblatt, D. Garr & J. Sprague, *The Suburban Environment and Women* (1979); C. Stimpson, *Women and the American City* 93 (1982), *cited in* M. Gellen, *supra* note 15.

29 B. Siegan, *supra* note 4, at 93, citing Survey Research Center, University of Michigan, *New Homes and Poor People* (1969); Kristof, *Filtration and Housing Policy Objectives, A Study for the Committee on Economic Development* (1971). “The proportion that Negroes represent of families in the sequence of moves is about 70% (70 percent) of what would be predicted. . . . Thirty-three

percent of all moves by blacks leaves someone still occupying the former home, compared to seventeen percent of whites. The filtering effect may convert along the line into a thinning effect.” B. Siegan, *supra* note 4, at 94.

30 B. Siegan, *supra* note 4, at 187, quoting Biderman, *Shelter for Whom*, Barron's, Dec. 27, 1971, at 13. Rudel, *Household Change, Accessory Apartments and Low Income Housing in Suburbs*, 36 Professional Geographer 174 (1984) disclosed average rents in accessory apartments in the community studied of \$240 for relatives and \$375 for non-relatives, as against \$513 for conventional rental housing, \$179 for federally subsidized housing, and \$155 for federally owned housing.

31 *Cf.* Thomas Cusack Co. v. City of Chicago, 242 U.S. 526 (1917) (affirming the constitutionality of such restrictions as a valid exercise of police power).

32 431 U.S. 494 (1977) (regulations affecting family living arrangements must further legitimate goals); *see also* Town of Durham v. White Enter., Inc., 115 N.H. 645, 348 A.2d 706 (1975) (restrictions limiting only unrelated persons are constitutionally valid because state has legitimate interest in preserving the integrity of the family); Farr v. Board of Adjustment of Rocky Mount, 318 N.C. 493, 349 S.E.2d 576 (1986) (occupancy of accessory building by a family member is a permitted use); *see generally* Comment, *Single-Family Zoning: Ramifications of State Court Rejection of Belle Terre on Use and Density Control*, 32 Hastings L.J. 1687 (1981).

33 G. Gilder, *Wealth and Poverty* 211 (Bantam ed. 1982).

34 *Compare* Boreth v. Philadelphia Zoning Bd. of Adjustment, 396 Pa. 82, 151 A.2d 474 (1959) (beauty shop is not a use “customarily conducted” in a dwelling because it is not a use that is both incidental to living in a home and customarily conducted in a dwelling) *and* Perron v. City of Concord, 102 N.H. 32, 150 A.2d 403 (1959) (roofing contracting is not a recognized “profession” within the meaning of ordinance and is not “customarily incidental to” residential use) *with* City of Rockford v. Eisenstein, 63 Ill. App.2d 128, 211 N.E.2d 130 (1965) (dancing classes conducted in basement of home is a “home occupation” because primary use of the premises is residential) *and* Dellwood Dairy Co. v. City of New Rochelle, 7 N.Y.2d 374, 165 N.E.2d 566, 197 N.Y.S.2d 719 (1960) (coinoperated milk vending machine in basement of apartment is but a different method of rendering a traditional service and is a use “customarily incidental and subordinate”). *See generally* Note, *Zoning, Accessory Uses and the Meaning of the “Customary” Requirement*, 56 B.U.L. Rev. 542 (1976); J. Pratt, *Legal Barriers To Home Based Work* (1987).

35 R. Babcock, *supra* note 6, at 142.

36 *Id.* at 143. *See also* W. Toner, *Planning for Home Occupations* 1 (1976) (American Society of Planning Officials Report 316) (encouraging the adoption of standards that allow rapid decisions without the need for extensive investigations). In Germany, by contrast, performance standards for convenience stores are the rule. See the early German ordinances in F. Williams, *Law of City Planning and Zoning* 215 (1922); Leftoe, *The Right to Develop Land: The German and Dutch Experience*, 56 Or. L.R. 31 (1977).

37 R. Babcock, *supra* note 6, at 143.

38 *Id.*

39 *Id.*

40 *Id.*

41 B. Siegan, *supra* note 4, at 235.

42 *Id.* at 243-44.

43 *Id.* at 237.

44 D. Popenoe, *The Suburban Environment: Sweden and the United States* 185 (1977).

45 *Id.* at 229.

46 *Id.* at 139.

47 J. Jacobs, *supra* note 5, at 84.

48 D. Popenoe, *supra* note 44, at 139.

49 *Id.* at 195.

50 *Id.* at 199.

51 *Id.* at 177.

52 *Id.* at 179.

53 J. Jacobs, *supra* note 5, at 84.

54 D. Popenoe, *supra* note 44, at 164.

55 *Id.*

56 B. Siegan, *supra* note 4, at 43.

57 *Id.* at 26; *see also* R. Babcock, *supra* note 6, at 27.

58 B. Siegan, *supra* note 4, at 43.

59 S. Toll, *supra* note 4, at 281 (citing Proceedings of the National Zoning Conference 20-21 (1938)).

60 J. Jacobs, *supra* note 5, at 4.

61 Power, *The Unwisdom of Allowing City Growth to Work Out Its Own Destiny*, 47 Md. L. Rev. 626, 659 (1988).

62 *Id.* at 659, quoting Comey, *The Value of Zoning to Business*, Balto. Mun. J., March 9, 1923, at 6.

63 R. Babcock, *supra* note 6, at 140. It is hard to be moved by one ground for prohibition set out in the leading American Society of Planning Officials study of the subject: "By locating in commercial districts many businesses absorb costs they would not otherwise have if they were to operate out of their homes. Consequently the home occupation ordinance can ensure that like uses are treated in the same fashion, thereby eliminating the potential for cost discrimination." W. Toner, *supra* note 36, at 4; *see* Hamilton, *Zoning and the Exercise of Monopoly Power*, J. Urban Econ., Jan. 1978, at 116.

64 B. Siegan, *supra* note 4, at 44, citing Tideman, *Three Approaches to Improving Land Use*, 39-44 (1909) (Ph.D. Dissertation, University of Chicago).

65 D. Popenoe, *supra* note 44, at 70-71.

66 J. Jacobs, *supra* note 5, at 229.

67 *Id.* at 356. Another writer, noting the migration of business and industry to the suburbs, describes the new suburb, with its enhanced traffic problems, as a "technoburb" and proclaims the death of the suburbs. R. Fishman, *Bourgeois Utopias* ch. 7 (1987); *see also* Cervero, *Suburban Gridlock* (1986) (on the new suburban traffic problems).

68 J. Jacobs, *supra* note 5, at 357.

69 *See* Macrae, *The Next Ages of Man*, 309 *Economist* No. 7582, at 18.

70 J. Jacobs, *supra* note 5, at 445.

71 R. Babcock, *supra* note 6, at 141.

72 J. Jacobs, *supra* note 5, at 231.

73 B. Siegan, *supra* note 4, at 43.

74 Corbin Harwood, *Using Land to Save Energy* 82 (1977); *see also* the comparable language of Vt. Stat. Ann. tit. 24, § 4406(3) (1975).

75 F. Bair & E. Bartley, *The Test of a Model Zoning Ordinance* 71 (3d ed. 1966), proposes a limitation of 25% of the floor area.

76 R. Babcock, *supra* note 6, at 132.

77 D. Popenoe, *supra* note 44, at 164.

78 *See* Roberts, *The Regulation of Home Occupations Under Zoning Ordinances--Some Constitutional Considerations*, 56 *Temp. L.Q.* 49, 92 (1983).

79 *Id.* at 93. "[B]ecause zoning is the most universal of all the legal tools for shaping the character of the municipality, any unwise use of the process has a far greater impact upon our national character than does the abuse of a less widely employed device for control of land use." R. Babcock, *supra* note 6, at 124.

80 R. Hanson, *The Political Thicket: Reapportionment and Constitutional Democracy* 132 (1966); *see* M. Glendon, *The Transformation of Family Law*

308 (1989). ("Another way of thinking about strengthening families would be to take a more ecological approach--to ask whether governments might be able to assist families and their members indirectly by attending to the health of surrounding small-scale communities.") See also S. Rothman, *Woman's Proper Place* 271 (1978).

81 I.R.C. § 528 (1982).

82 Campbell-Bell, *Homeowners' Associations--Is Tax Exemption Worth the Effort?*, 20 Real Prop. Prob. & Tr. J. 647, 662 (Summer 1985) . This is true of those associations which cannot meet the requirements of section 528 and reject the limitations of section 501(c)(4), but to which tax-exempt status is available under section 501(c)(7). *Id.* at 661.

83 See *supra* note 12.

84 See *supra* note 16 and accompanying text.

85 In Maryland, as in most states, the statutes relating to organization of such associations each contain a section disclaiming any purpose to override zoning. See, e.g., Md. Real Prop. Code Ann. § 11B-104(a) (1988); Md. Corps. & Ass'ns Code Ann. § 5-6B-19(b) (1985). Such statutes might readily be amended by adding the words "except that no regulation relating to zoning shall prohibit an association under this Act from operating, directly or under contract, a retail store having not in excess of 600 square feet and meeting generally applicable health regulations, not accepting deliveries from vehicles in excess of two tons in weight, and not displaying signage other than a single unilluminated sign of not more than two square feet in area."

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