

Urban Sprawl, Property, and Urban Culture

Two of the most fundamental questions who will ask yourself in life - and I want you to bear them in mind during this discussion – are these: And where am I going to live? And where am I going to work?

Keep in mind as well – now with respect to your conduct and duty as lawyers – that the answers to these questions involve property, the culture of a place, and individual choice.

I England and the United States

We are going on a journey of sorts. It is going to require some imagination on your part. We are going to begin in the industrial and port city of London in the 1890's; and, during the same time period, the industrial and port cities of the United States : New York, Cleveland, Chicago and, in important respects, Seattle and Portland. The concern was where and how people lived.



The tenement building. The apartment house. Privately constructed on private property. A wooden or brick structure, four to eight stories in height, without light , ventilation, , water, or indoor sanitary facilities. Multiple families, living in poverty.

In London, the people were Anglo Saxon. In the United States the people were largely eastern and southern European immigrants who came for work, and black migrants from the south who came for the same reason and because of the failure of Reconstruction.

The response to this urban poverty in England and the United States was dramatically different.

England

A Royal Commission was created by Queen Victoria. They tried to find ways to improve the housing conditions on privately owned property. They received testimony concerning, among other matters related to the urban condition, building codes, fire codes, and sewage treatment. These are the kinds of requirements that, during this time, government began to impose on private property owners.

But the fate of the Commission is not our story

Ebenezer Howard was an elderly, thoughtful man with a big idea. He was not a planner or a homebuilder. He was a writer. In 1898 he wrote what eventually was titled “The Garden Cities of Tomorrow.”



Ebenezer Howard

He established a city distant from London (the second image); 5000 acres in size, containing homes at considerable density (the same density as London) on just 1000 acres of land, interspersed with and surrounded by gardens and farms and small industry. A number of these towns would be built and connected by transit system. [The University of Washington is 643 acres in size].



The Garden City

Howard’s vision was social and moral and ideological: To take working class people out of London, train them in productive crafts and farming. Howard’s intellectual imperatives came from anarchist thinking: a minimal amount of governance and hierarchy. Decision-making would be communal.

Investors came together to buy the land and share in the dividends from the land being sold to individuals and the community. Howard wanted additional dividends to be put into pension funds and hospitals.

The Garden City also reflected the emergence of suburbia.

The United States

Some communities confronted with the same conditions, including in New York, sought to develop precisely what the Royal Commission identified earlier: building codes, sanitary codes and fire codes.

Within cities like Chicago and, in time many other cities, the response to poverty and horrendous unsanitary living conditions, was largely social. People like Jane Adams in Chicago - and the Catholic Church - provided education, childcare, free baths, language instruction, music and literature lessons and ways for immigrants to assimilate culturally.

The movement to the suburbs however was quite different. It was not intended to aid in the life of working class people. It was intended to create a choice for the middle and wealthier classes to move out of the city.



Jane Adams



Olmstead

Frederick Law Olmsted set the precedent in 1868 that was followed regularly at the turn of the century. [note: Olmsted's sons, John and Frederick Jr. designed the Seattle Park system at the turn of the century, and between 1902 and 1920, took responsibility for the UW campus, including the quad layout and the vista toward Mt. Rainer.]

Back to 1868.

Olmsted was retained by a group of investors and landowners to plan Riverside, Illinois – nine miles west of Chicago. Olmsted created a community exclusively of residential areas, mansions on large plots, servants' quarters, and horse stables, with curving streets, parks and grand vistas. The train would take you to Chicago daily. This is the planned community: curvilinear streets and no density. The emergence of an American suburbia.

Other planned communities, albeit in a different form and purpose followed: Forest Hills Gardens in New York in 1906; Mariemont in Ohio in the 1920's; Radburn in New Jersey in 1929. Others in California, Wisconsin, Kansas, and Maryland. Often these communities were of greater density; some had rectilinear streets, the conventional grid.

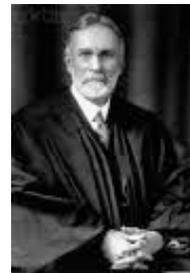
Many of these "Garden Cities" were on railroad lines, planned carefully by architects and landscape architects, most contained schools, meeting spaces and gardens. All were decidedly middle class and white.

II

Village of Euclid, Ohio v Amber Realty Company

We are going to 1926. Keep the images fully in mind.

In 1926 the United States Supreme Court decided *Village of Euclid, Ohio v. Ambler Realty*. The decision – 6-3- upheld a comprehensive zoning scheme; that is, a pervasive form of government regulation of private property. The decision was written by the Court's most conservative justice, George Sutherland, who had been a United States Senator from Utah.



George Sutherland, J.

Here was the heart of the controversy: The zoning ordinance in *Euclid* created a residential district that excluded apartment houses. No tenements.

Let's step back and look at *Euclid* not just as common law but as history and culture.

Zoning Movement. Herbert Hoover, when he was Secretary of Commerce under President's Harding and Coolidge, convened a conference to examine the growing interest in zoning. Olmsted was a member of the Conference. For some municipalities – New York among them – one major concern was



Herbert Hoover

how to regulate the safety and sanitary condition of tenement houses. For others, there was another motivation: how to protect against the perceived evils of the cities: crime, disease, foreigners and blacks.

The conference developed a model zoning code in 1924.

The Court Case

Cleveland, Ohio is on the southern shore of Lake Erie. Cold, rough, tempered by heavy industry, steel mills, and barge traffic through the Great Lakes. It was a period of labor unions and industrial opposition to them. The workers were largely eastern and southern European immigrants and blacks.



Southern European immigrants

Cleveland was traversed east to west by Euclid Avenue, which entered the City of Euclid. In Cleveland, part of the street had tenement houses. Near the end was the palatial home of John D. Rockefeller. When Euclid Avenue entered Euclid, the Avenue became a place of affluence; white and wealthy, and exclusively residential. The city's attorney, James Metzbaum lived on Euclid Avenue. Only a few thousand people lived in Euclid. It was a suburb.



Black migrants

The District Court found the Euclid Ordinance a violation of Ambler Realty's property rights under the 14th amendment's due process clause. The property could be acquired only by paying just compensation.

The District Court got right to the heart of the matter. This is what the District Court said about Euclid's motivation:

“The blighting of property values and the congestion of population, whenever the colored or certain foreign races invade a residential section, are so well known as to be within judicial cognizance... The plain truth is that the true object of the ordinance... is to classify the population and segregate them according to their income or situation in life.”

When the case reached the Supreme Court, the dispute – Ambler's private property rights verses municipal power to control land use – was reflected in the briefs and oral argument. Weeks after the oral argument – and this is quite exceptional – the National Conference on City Planning engaged an attorney, David Bettman, who was an old friend of Chief Justice William Howard Taft. He sought permission to file an *amicus curiae* brief. Permission of the court was granted. A new oral argument was set.



William
Howard Taft

The challenge to the *amicus*: how to correlate the fear and conduct of

immigrants and blacks, and the tenements, to the law of nuisance. Here is the way it was written:

“[T]he man who seeks to place the home for his children in an orderly neighborhood, with some open space and light and fresh air and quiet, is not motivated so much by considerations of taste or beauty as by the assumption that his children are likely to grow mentally, physically and morally more healthful in such a neighborhood than in a disorderly, noisy, slovenly, blighted and slum-like district. This assumption is indubitably correct...”

Justice Sutherland’s found comfort is this reasoning. He agreed with a Louisiana case that had found the apartment house was a “parasite.” Then he wrote this:

“Some of the grounds for this conclusion [that the Ordinance is constitutional] are promotion of the health and security from injury of children ... by separating dwelling houses from ... the ... danger of fire, contagion and disorder....”

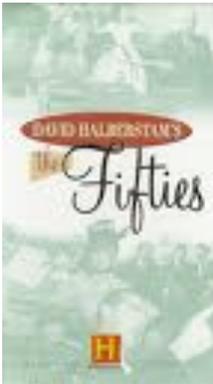
In the end, *Euclid* involved the use of property, the culture of place and individual choice (for those who could make it).

III The Baby Boom and Sprawl

We are now going to go to 1945. Keep the same images in mind. This is a period of special significance to me and Professor Rodgers: the end of World War Two and the beginning of the notorious “Baby Boom.”



David Halberstam



As you are watching this excerpt from the video based on David Halberstam’s *The Fifties* (about eleven minutes in duration) pay particular attention to individual choice and the use of property in cities and the suburbs; and the culture of place in the suburbs, particularly Euclidian Zoning, and the manner in which race, once again, emerges as central to this narrative.

Recall as well that the United States government is making mortgage insurance top purchase property more easily available to those who purchase in the suburbs, and the United States in about to dramatically expand the construction of the interstate highway system.

IV Two Responses

New Haven, Connecticut and Portland, Oregon

What sprawl did by the mid 1970’s and early 1980’s was to raise two broader questions: Had America effectively abandoned urban life and the value of cities? And for urban mayors,

governors and for those who choose to live in cities – or who had no choice – or for those who saw the harm of sprawl, what could they do in policy and in law to give life to what they valued?

We are going to look at two very different responses: New Haven, Connecticut and Portland, Oregon.

New Haven, Connecticut

Connecticut was founded in 1636; New Haven in 1638. Connecticut has 169 towns and cities. It had no culture or tradition of regional planning or thinking.

Some of New Haven's history is laid out in the testimony of Mayor DiLieto before the congressional subcommittee. Recall the image of the immigrant family in the tenement building. Mayor DiLieto was the son of those immigrants who had chosen to stay behind and live in New Haven.



New Haven Green

Mayor DiLieto sought to recapture the city's historic urban character and attract retail and people back to its urban core. He wanted to influence how you answer the fundamental questions I posed at the outset: where do I want to live? And where do I want to work?

To accomplish that goal he had to change the purpose and use of property and the culture of the place.

He was confronted with a proposed superregional mall, to be built with private funds on privately owned land, eight miles from his city, in an affluent suburban community, with a presumed right to do what it wanted. As the Mayor of North Haven had put it: "People had already voted with their feet." Sprawl justified. The market forces had worked.

The major regional newspaper and all the other suburban communities were vehemently opposed to New Haven's action. The Mayor had few tools available to him to stop the harm; certainly nothing in the state's tradition or custom that would be helpful.

When the Mayor asked me to serve as his special counsel, I knew the tools and understood the culture of the Corps of Engineers.

Here was the first move: We needed to disrupt and slow down the process. The developer's lawyers had mastered Section 404 of the Clean Water Act and Section 102 of the National Environmental Policy Act. They also understood the Corps' culture and the Reagan Administration's free market attitude concerning private property. If you owned it, you could do what you wanted with it.

I recommended we turn to Congress. Not the Congress of today or for most of your political years. Congressman Toby Moffett was young, aggressive, had strong views about protecting the environment and had worked for Ralph Nader; early Ralph Nader.

He also wanted to be the United States Senator and had courted Mayor DiLieto. Moffett agreed to hold the hearing. You have part of the transcript. The hearing had the effect we sought. It was visible, highlighted the Corps' failure to act independently (it had adopted, verbatim, every study the developer had done), and demonstrated what no one wanted to acknowledge publicly: the site had serious environmental problems and large regional shopping malls harm cities. Here, New Haven.

In the course of the next three years, we also sought to gain the mastery of the Clean Water Act and the National Environmental Policy Act (NEPA) and to move the Corps culture toward an attitude of independence.

New Haven also filed five lawsuits: against the Connecticut Departments of Transportation and Environmental Protection and the Federal Emergency Management Agency.

It worked. In 1985, the Corps denied the wetlands permit in part because of the social and economic harm the mall would have on New Haven. The developer sued the Corps in federal court. Eventually, the developer won. By then, the market forces had shifted. New Haven was now the place to be.

This was not a long term solution. It reflected a conflict in values. It did produce folklore. But it did not alter the culture and tradition of Connecticut.

Portland, Oregon



Portland (Mt. Hood)

Oregon became a Territory in 1848. Portland was founded in 1851. Oregon has a tradition of governance structure over large areas, and an awareness of its natural resources, some preserved, some terribly exploited.

In 1973, the Oregon legislature recognized that sprawl – what it called “uncoordinated use of land” – warranted special attention. The legislature’s motivation was deeply cultural in Oregon and related directly to property. When I looked at the legislative history and the declared purpose of the law, this is what moved them:

“To conserve farm land, forest land, coastal resources, rivers, wetlands, wildlife habitat, recreation area, and encourage- efficient development”

All of Oregon’s cities and counties were to adopt comprehensive plans and land use regulations. They were to create urban growth boundaries.

By 1979, the greater Portland area decided to create a new form of governance: a Metropolitan government of elected officials. It established an urban growth boundary. Two of these images are among the readings.

What was missing from the legislature's statement of purposes and its hierarchy of values: a formal commitment to urban life or the value of cities.

And what happened within the first decade following the establishment of the UGB?: sprawl. In other words, the Metro government – within the boundaries of the Urban Growth Boundary- had not materially changed the way it was operating.

It was not until the mid 1980's – when Mayor DiLieto already was fighting for his city – that 1000 Friends of Oregon forced Metro officials to focus on transportation and land use; and the importance of increased density in urban centers. It was during this time that the legislature created “the *Central City Zone* designation for the heart of Portland [and]... and six regional centers” in existing towns surrounding the metropolitan center. All these centers were to be mixed use and “walkable.” One of those centers was the City of Tigard.

Florence Dolan

She sought to do something commonplace and normally welcomed in any community: expand her business and add growth to the local economy. In refusing to accept the conditions imposed on her by the City of Tigard – pursuant to its authority to give meaning to the Urban Growth Boundary – she elevated to the Supreme Court of the United States something more than a takings case.

Before the Oregon Supreme Court, two amicus briefs were filed by national organization: the Pacific Legal Foundation and the Washington Legal Foundation. More organizations filed before the United States Supreme Court. Her victory added not a legal constraint – it is not that hard to get around what the Supreme Court did – but an argument in support of individual choice and the freedom of the market forces over the pervasive regulatory nature of what Portland Metro is trying to accomplish. That argument, in different forms – referenda, judicial challenges, and legislative battles – still tempers the fate of the Urban Growth Boundary as a means for impeding sprawl.

Portland now has a cultural tradition about how it will govern growth, including how to respond to global warming or how to lessen vehicle miles traveled as they related to land use.

One problem lingers and has for some time and it falls directly within the broader history I've discussed: whether the Urban Growth Boundary - which has affected property values – has made it more difficult for minorities and working people to remain within the city.

In the end, Portland Metro and New Haven, Connecticut share one common value. They want people looking at their respective regions to make the exact same choice: that you will want to live and work in a place with people who share the values you, and they, believe are important.