



Ecology v. Equality: The Sierra Club
Meets the NAACP

by Fred Bosselman, Esq.

Remarks made at the seminar on "The Emerging Conflict between Conserving the Environment and Making Room for the Poor." Mr. Bosselman is a partner in the law firm of Ross, Hardies, O'Keefe, Babcock and Parsons and is Associate Reporter for the American Law Institute's Model Land Development Code Project.

There is a disturbing portent in the new burgeoning of litigation challenging local land use practices. The litigation is disturbing not because it challenges the status quo, which clearly needs to be changed, but because the prospects for a sensible resolution of the litigation seem dim. I would like to describe two of these lawsuits — one brought by the poverty lawyers and one by the environmental lawyers — which I think will illustrate an emerging conflict between conserving the environment and making room for the poor.

The Town of Oyster Bay, New York, is located on the eastern edge of Nassau County in Long Island. The town contains a number of large aircraft plants and other factories employing thousands of workers — a very substantial fraction of whom are black. Only about 50 of these black workers, however, live in the Town of Oyster Bay where the prices of a home begin at \$35,000. Through a complex system of land use regulations the town has insured that future residential development will be restricted to homes of this type and that no apartment buildings will be permitted.

The NAACP has announced its intention to bring a suit challenging the constitutionality of this system of local land use regulation. A draft of the complaint asks that the court direct the town "to immediately formulate and implement a plan to effectively desegregate residential housing in the town and to provide black persons and economically deprived persons living in and coming to the town with residential and land use opportunities equal to those enjoyed by white and economically-advantaged persons." Translated into

real-world language that means the NAACP wants the town to permit apartments and particularly housing subsidized under federal programs for low- and moderate-income families.

About five miles east of Oyster Bay and across the line in Suffolk County is the Town of Huntington which offers few visible differences from Oyster Bay. This town is a defendant in a suit brought by the Suffolk County Defenders of the Environment represented by Victor Yannacone, one of the pioneers in the field of environmental law. Yannacone alleges that the zoning laws of the town "are demonstrably ecologically unsophisticated, environmentally irresponsible, socially irrelevant and politically naive," because they permit "the development of the natural resources of the County of Suffolk, in particular the land mass of Suffolk County, as merely a substrate for speculation, failing to determine the highest best use of each area of real property in the County of Suffolk in accordance with modern principles of real property utilization, in particular in that such laws fail to establish objective criteria for real property development based on the physiographic, hydrologic, meteorologic, and ecological characteristics of the Regional Ecological Systems of which such real property is an element." Mr. Yannacone is one of the few real artists in complaint drafting left.

One of the local ladies who's sponsoring this litigation translated its intent in the following statement quoted in the local newspaper, "The concern of the people here. . . is the high rate of contamination of the water supply when high density constructions are developed within the present sewage system." In other words, they want to exclude the same apartments that the NAACP wants to see built.

The NAACP has had little success in convincing the Town of Oyster Bay that its cause is just, but the Defenders of the Environment have been much more successful. The New York Times has recently reported that the town board of the Town of Huntington "unanimously backed" a plan to hire a team of environmental specialists to formulate an "environmentally oriented, ecologically protected, sociologically responsible, economically feasible, administratively sound and politically practical zoning law." While this plan is being formulated it appears that the town will withhold issuance of any further residential building permits.

In view of the fine reputations of the attorneys for the plaintiffs in both of these cases, and the substantial resources backing them, the courts will undoubtedly receive highly sophisticated evidence on behalf of the plaintiffs in each case. The NAACP will present an analysis of the socio-economic factors demonstrating clearly that the pattern of local land use regulation effectively discriminates against black people. The Defenders of the Environment will present highly sophisticated ecological evidence showing that the pattern of local land use regulation is destructive of the ecology of the region. Given the present trends in judicial decisions it is quite easy to imagine the courts deciding in favor of the plain-

tiffs in both cases. *Ergo*, a new form of regional planning in which the character of the suburban area is determined by whether the NAACP or the Environmental Defense Fund gets there first.

In the long run, however, a more unfortunate alternative is likely — the courts will wash their hands of the entire subject. It won't take more than a few conflicting decisions in cases like the two I have cited — and they won't have to be from towns five miles apart — before the embarrassed judges will realize that they are in way over their heads if they try to act as regional planners on the basis of a record slanted heavily toward one special concern. This would be highly unfortunate because it would mean the preservation of the status quo, and both the poverty lawyers and the environmental lawyers will correctly demonstrate that this is disastrous. And it is only action by the courts — or more correctly the threat of action by the courts — that has already begun to cause a gradual recognition on the part of suburban governments of the need for change. Within our present legal framework only the courts can, as my partner Dick Babcock recently put it, "dramatize the absurdities and inequities in a fractured system of governmental regulation."

But the most important moral of my story is that this present legal framework, this fractured system, need not prevail indefinitely. I submit that these disputes contain all of the classic elements which would suggest the creation of an administrative agency to replace the courts in resolving these disputes. They demonstrate the inadequacy of the courts and the adversary system to resolve complex land use issues. Only an administrative agency with adequate staff and expertise can be expected to intelligently resolve these problems.

The thrust of a drive for a national land use policy centers on the need to induce states to create this type of agency. The concept is central to the land use policy legislation pending in the Congress. It is also central to the Model Land Development Code being proposed to the American Law Institute. I suggest that it is in this direction that we must look if we are to solve this aspect of the emerging conflict between conserving the environment and making room for the poor.