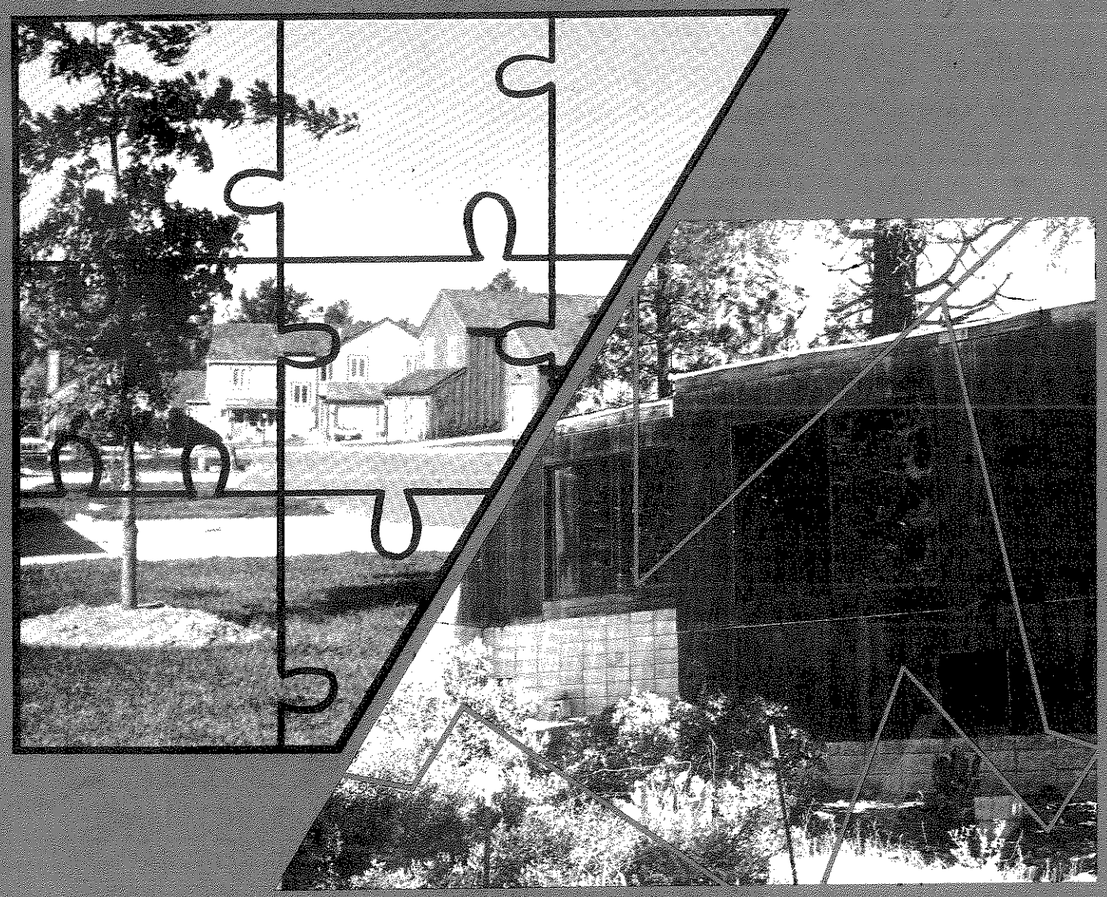
November 1978
Urban Land
news and trends in land development

Developing in a

Cooperative Environment



Hostile Environment

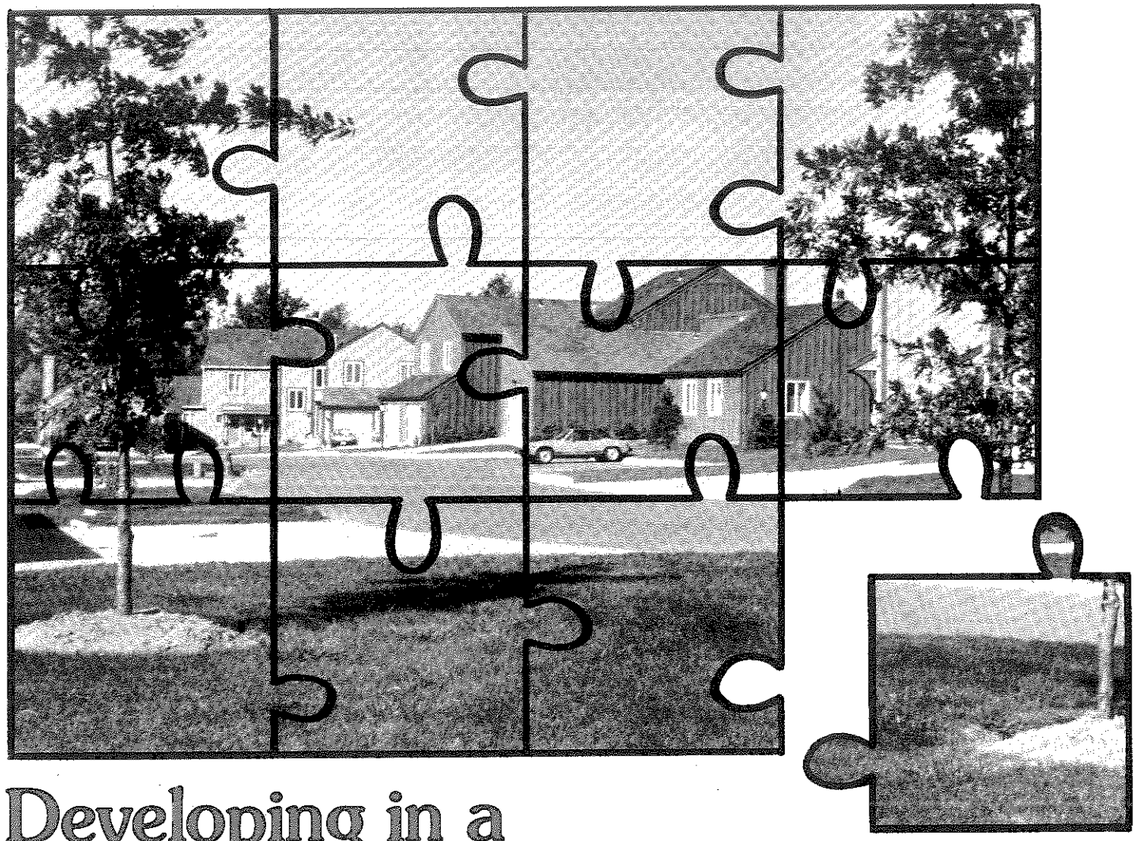
Urban Land

Issue At A Glance

Vol. 37 No. 10 November 1978

Urban Land is published monthly, July and August issues combined, by ULI-the Urban Land Institute, 1200 18th Street, N.W., Washington, D.C. 20036. Subscription to *Urban Land* is included in annual membership dues. Yearly subscription rates for nonmembers are as follows: $30 (U.S.A.); $35 (Canada and Mexico); $40 (all other countries). Second class postage paid at Washington, D.C.

Frank H. Spink, Jr., Director of Publications
W. Paul O'Mara, Editor
Linda M. Sittler, Editorial Associate
Libby Howland, Abstracts Editor
Carolyn E. Noe, Art Director
Robert L. Helms, Production Manager
Patricia E. Thach, Production Assistant



Developing in a Cooperative Environment

Joseph E. Vitt

During the past several years, Kansas City, Missouri, officials have made numerous attempts to improve the city's attractiveness to homebuilders. While many of these efforts have resulted in some success, they have never achieved the results hoped for by either the city or the local Homebuilders Association.

Under the leadership of the Policy and Rules Committee of the city council, the city and the representatives of the Homebuilders Association have been working together during the past year, more successfully than ever before under a unique working committee arrangement. This arrangement has resulted in important changes in the city's standards and procedures, changes that builders have viewed as being most important to their ability to work successfully in Kansas City.

These changes have included the following:

- Establishing a procedure for early identification and handling of problem zoning cases, involving the city manager's office and the director of city development.
- Streamlining water service so a tap can be made, a meter installed, and service activated in a single visit.
- Modifying the bonding requirements, including an allowance for the establishment of escrow accounts, so that developers are more able to meet them.
- Providing developers with construction water, for a nominal fee, until the certificate of occupancy is issued. This permit includes sod water.
- Allowing reductions in water main sizes, from 8 inches to 6 inches, in many development areas, based upon the results of hydraulic analyses.
- Preparing guidelines which delineate those situations where deviations from the city's policy requiring sidewalks on both sides of the street will be allowed.

In addition to these changes, the working committee has also made changes in street design and construction, storm and sanitary sewer design and construction, water system design and construction, and sidewalks and street lights.

Kansas City

The success of the working committee's efforts can be traced back to three essential ingredients, all of which were present when the committee was formed almost a year ago. The first of these is a positive attitude by the city and the homebuilders toward instituting changes that will make Kansas City a better place for builders to do business. The second ingredient is representation on the committee by those organizations whose participation is essential to effect the necessary changes. The third ingredient is the dedication to achieve specific results by taking issues one at a time, deciding on specific changes, and following through to make certain that these changes are made.

This unique arrangement between the city and the homebuilders grew out of an April, 1977 meeting of the Policy and Rules Committee. I reported to the committee on the status of homebuilding in the city. The policy and rules committee wanted to know whether there was a conscious decision by builders to build outside of Kansas City, even when land was available within the city limits. I indicated that residential builders and developers were indeed making conscious decisions to build outside the city. I pointed out that builders were unhappy with the time delays, with the imposition of city standards, and with requirements that they considered to be unreasonable. In general, they continued to view the process of developing land within the city limits as "too much of a hassle."

Several specific factors were identified by would-be builders as being significant:

- The time delays that were incurred throughout the process.
- The costs involved in meeting the provisions of the subdivision regulations and completing the work necessary to secure building permits.
- The inability to offer a competitive package, given the added cost that builders must incur in processing applications and meeting the city's requirements.
- In addition, builders also mentioned the existence of neighborhood resistence to some proposals for new residential development within already established residential areas and the existence of weak markets for residential housing within many of the outlying areas of Kansas City.

Further discussions and an exchange of letters and information between the city and homebuilders resulted in a meeting between representatives of the city councils' Policy and Rules Committee, the homebuilders, and the various city departments involved in the residential development process. It was at this meeting, held in September of 1977, that the homebuilders suggested the creation of a small working committee to address, one at a time, the most critical problems facing them. As a result of these discussions, the Policy and Rules Committee and the local Homebuilders Association jointly decided to set up the City/Homebuilders Working Committee.

The working committee consists of four elements, each of which is essential to its proper functioning.

1. Three members of the committee represent the city council. These members also happen to be members of the Policy and Rules Committee.
2. Three members represent three of the city's operating departments—Public Works, Water and Pollution Control, and Transportation. The operations and activities of these three departments have significant impact on the activities of the builders.
3. Three members of the committee represent the Homebuilders Association. The builders association members change from time to time and often total more than three members depending on the issues involved.
4. Bob Herchert, an assistant city manager and director of administration, and I acted as staff to this working committee. We were responsible for helping to set the agendas, providing information, and taking an integrated perspective toward the work of the committee. Since the development business is one that requires the integration of many separate parts in order to produce a successful project, this orientation toward integration by both the manager's office and the city development department was essential to the workings of the committee.

The committee work began by following an agenda set out by the Homebuilders Association. The committee took the issues which were most important to the homebuilders and perceived as causing the most difficulty for them.

Each meeting of the committee was chaired by a council member, and the staff of the various departments prepared information appropriate to the item being discussed at each committee meeting. After matters had been discussed and a proper course of action agreed upon, the method of implementation was also decided at the same time. This method may be by an ordinance introduced to the council for approval, by a change in the administrative procedure of a particular department or some other appropriate means. The committee met as often as necessary to address the issues raised by the builders.

Through the activities of the working committee, it was found that not all of the builders' requests could be met. In the course of the discussions, it became clear that some rules, standards, or procedures had been established for good reason, and the city council members were not disposed to modifying them at this time. Four issues fell within this category.

- Maintaining the city's standards for pavement width and thickness. (These generally conform with the standards of other jurisdictions within the metropolitan area.)
- Maintaining the city's policy not to grant water main extension refunds.

Changes in the City's Standards & Procedures Jointly Agreed to as a Result of the Efforts of the HBA/City Working Committee

Street Design and Construction

- A more realistic acceptance condition of street right-of-way will be available. At the option of the developer, a two-phase acceptance procedure will be developed (rough grade and final grade). Final grade to include valve and manhole cover adjustment prior to issuance of occupancy certificate.

  Eliminates added expense to the developer.
- An escrow procedure has been added to the bonding provisions for public improvements.

  These changes save the developer interest on funds placed in the escrow account. They also save the expenses involved in contractors' being required to qualify for bonding.
- In order to reduce delay, developers may secure sidewalk and driveway permits at the same time they secure their building permits.
- Changes in the right-of-way section may be submitted for approval with the street and storm drainage plans.

Storm and Sanitary Sewer Design/ Construction

- Lift stations will be allowed where their installation is justified, provided that a termination or elimination date is established (lift stations cannot be permitted where trunk sewers are provided within the watershed). HBA has agreed to use sewers where available.

  Permits builder/developer to develop land according to schedule. Prevents costly delays.
- Requirement for embedment (currently gravel to 6 inches over the pipe) will be expanded to include the option of providing gravel bedding to the springline of the pipe and carefully placed tamped backfill to 12 inches over the pipe for all pipe materials except flexible pipe.

  Makes available alternate methods of construction. Provides flexibility.

Water System Design and Construction

- Developers will be provided with construction water for a fee (currently $11.30) until the Certificate of Occupancy is issued. This includes sod water.

  Reduces the inconvenience and paperwork resulting from present practice.
- Water main contractors will be allowed to make chlorination taps.

  Saves the developer construction delays, waiting for city tapping crews.
- The city will, in a single visit, make the tap, set the meter, inspect and activate the service at the developer's request.

  Reduces delays caused by separate visits. Improves developer's ability to schedule work. Provides flexibility for the builder.
- C-900 plastic pipe in certain sizes and in certain locations will be permitted as an extension of current policy regarding the use of plastic pipe.

  Lower first cost.
- Two-inch class 250 plastic pipe will now be allowed in cul-de-sacs.

  Lower first cost.
- A heavier ductile iron pipe will be allowed as an option in lieu of polywrap, provided that the appropriate soil analyses are performed.

  Speeds up the job. Do not need to keep the trench open.
- Detailed hydraulic analyses of new systems by the Water Department will allow a reduction in the size of some mains, primarily from 8 inches to 6 inches.

  Lower first costs of about $2.00 per front foot.
- The city will place responsibility for adjustment of water valve covers with the developer of the subdivision, as a part of the acceptance of final grade prior to issuance of the Certificate of Occupancy. The water line contractor will not be notified by the city. The developer will be responsible for identifying the party at fault and obtaining corrections.

Sidewalks and Street Lights

- The inspection requirements for sidewalk edging and brooming will be made as uniform as possible.

  Eliminates inconsistencies in the requirements and reduces added costs incurred because of changes.
- Guidelines will be developed which delineate the situations where deviations from the city's policy requiring sidewalks on both sides of the street will be allowed.

  Reduces development costs by about $6.00 per ft.
- The city encourages the installation of street lights in new subdivisions. When the developer installs such lighting according to city standards, the city will accept responsibility for the maintenance and energy costs of the system.

General

- A registered professional engineer will be assigned within the Public Works Department to work with developers throughout the platting process. This person will have the authority to modify city standards and criteria, if warranted, when considered under Value Engineering Method. Examples include:
  - —reduce ROW requirements in specific cases
  - —allow grades less than .6 percent for 8 inch sanitary sewers (with a .4 percent minimum) where such revision is necessary to serve the watershed
  - —eliminate manholes in particular cases

- A procedure has been established, involving the city manager's office and the City Development Department, for identifying and reviewing "problem" zoning cases.

- A schedule of regular conferences will be established with the Homebuilders Association to review the city's current requirements, to discuss changes in these requirements, and to provide for improved distribution of these requirements to the members of HBA. These meetings will also provide the city with new ideas from the HBA on distribution of materials.

Keeps HBA members informed of requirements. Allows HBA to be aware of pending changes in requirements. Allows HBA a chance to review these before they are put into effect. City efforts will be continued to improve internal communications at city hall, especially between field and office personnel.

Park Land Dedication Requirements

- Ten suggested changes in the city's requirements for dedication of park land in subdivisions have been reviewed by the city. The city's responses to these changes have been submitted to the HBA and are now being considered by them.

Clarification in the City's Standards and Procedures Brought About by the Efforts of the HBA/City Working Committee

Street Design and Construction

- The city has established a 600 foot minimum block length within subdivisions. There is no maximum block length.

- The minimum tangent length of 100 feet applies only to major and collector streets. There is provision within the subdivision regulations for varying this length.

- The requirements for improvement of perimeter streets are currently considered on a case-by-case basis. There are no specified requirements within the city codes. Paving only one side of a street may be permissible under certain conditions.

Storm and Sanitary Sewer Design and Construction

- The city prefers manhole steps to portable ladders, principally for stability and safety. The only time that maintenance crews use portable ladders is when there are no manhole steps.

- The minimum sewer-pipe size must remain at 8 inches, since this is a state of Missouri minimum.

Water System Design and Construction

- The present requirements for location of water meters in relation to floor drains was agreed to be reasonable. The department will hold to 20 feet without any mention of an intervening wall.

Sidewalks and Street Signs

- The city is reconstructing all existing deficient sidewalk corners to include wheelchair ramps and desires this provision in new subdivisions as well. The city only requires one ramp per radius, and one ramp opposite a "T" intersecting street. Wheelchair ramps will be constructed at the time that adjoining sidewalks are constructed.

- The city encourages the use of temporary street signs during construction. The permanent signs need to be in place when the city accepts them as part of final street acceptance.

- Continuing to require copper pipe for house service lines.
- Continuing to require looping of the water system.

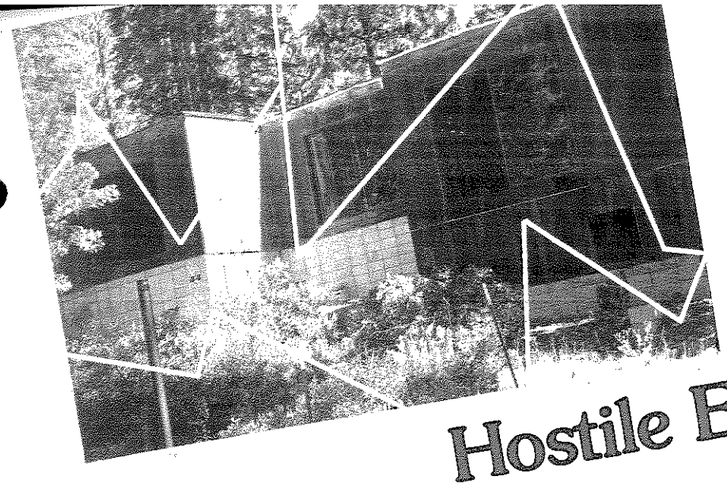
Through the efforts of this committee, over 15 changes have been have been made in the city's standards and procedures. These changes have been met with enthusiasm by the builders and the city council. "These changes should make a new home a little easier and cheaper to buy than before in Kansas City," said Don Ong, chairman of the HBA Public Affairs Committee that helped negotiate the changes. "Home quality should be maintained," he added. "The expediting of the zoning and platting process shows the sincerity of the city," said Councilman Victor Swyden, chairman of the city's Policy and Rules Committee.

This first phase of the committee's work has been completed successfully. The second phase will include addressing other important aspects of the city's development standards and regulations. Primary among these are the city requirements for parkland dedications and reducing further the processing time required for zoning and subdivision approval.

Kansas City has as one of its principal objectives the promotion and accomplishment of continued residential development. Through the process now established between the city and homebuilders, this objective is being met. The city intends to continue to make changes that will:

- reduce costs of development while maintaining appropriate standards;
- eliminate costs which do not add marketable value to the developer's housing package;
- improve the efficiency of needed procedures and eliminate those that are not needed; and
- add elements that add marketable value to the developer's housing package.

Joseph E. Vitt is Director of the Kansas City, Missouri, Development Department.



Developing in a Hostile Environment

Ronald C. Nahas and Neil Eskind

In the past decade the arsenal of new governmental planning proposals has become formidable. For even the most casual reader of ULI publications, the variety of land use control techniques being displayed is unsettling. Of greater concern to those in the development industry, however, is that for every overt proposal for land use controls, there are multiple covert techniques for land use restraint. In some areas of the country the term planning no longer applies to the subject of designating appropriate uses of land for the benefit of the community nor does it apply to simple regulation of those uses. Rather, it applies to the determination of the most legally enforceable technique for preventing all use of land regardless of the long-term public interest.

The public cost of such regulation is now beginning to attract political attention. However, the growing assembly of studies on the cost of existing regulations has produced little relief for those seeking more responsible land use policies. Many have been hopeful that leadership in this area would be provided by the courts. Unfortunately, the trend of judicial decisions is not encouraging. Our experience in California indicates that the courts provide a kind of living death, as publicly paid lawyers grind the life out of all but the best-financed builders. What is needed is a clear set of rules which will define the point at which a developer is *entitled* to use his property without the threat of governmental regulations changing the ground rules.

Lake Tahoe, California, is perhaps one of the most highly regulated areas in the nation. In addition to city and county government, there are both state and federal regional agencies. The condition of regional government at Lake Tahoe is not typical of the country as a whole, but neither is it unique. Areas such as Lake Tahoe are the testing grounds for future policies which will later affect less sensitive areas.

At Lake Tahoe, developers confronted with a hostile environment and changing rules have had to look to their own devices for protection. The results have not been encouraging, but the odds for success can be improved. Self-preservation requires some knowledge of the overall conflict and an understanding of how far your rights as a land owner have been eroded. It also requires an intimate knowledge of the regulators themselves, their objectives, and the administrative process.

Regional Government in California

Entitlement problems may be created by an level of government. Every experienced developer has encountered changing politics at the local level; new plans, new zoning, sewer and water moratoriums, no growth or slow growth. Despite these problems there still remains a partnership between the local government and the development industry. While growth creates new problems, it also creates jobs, taxes, and opportunities for expanded public services. For local politicians, growth creates activity, and at least some activity is politically healthy. Moreover, local politicians have a stake in the community and a personal concern for the welfare of the population.

Local prerogatives in land use matters are becoming less popular among planning professionals. As urban areas begin to have an impact on one another, or begin to infringe upon rural areas the local interests which were once considered responsible decisionmakers in land use matters are now considered too narrow or uninformed. Accused of being lackeys for developers, local politicians may be cast aside in favor of regional government.

The purpose of regional government is to override local prerogative. Such is not the case with regional planning. For years regional planning has been the work of highway departments, water and drainage districts, and other special agencies. The purpose of such planning has been to accommodate local decisions regarding land use without exacerbating regional problems. Regional government usurps the power of local government to make decisions regarding land use, thereby relegating local government to the role of a provider of services. As local control yields to regional control, immediate questions are raised regarding the rights of those who had in good faith relied upon local decisions.

Since regional government tends to usurp local prerogative, it is incumbent upon new agencies to develop a

plan of their own. Generally, the plan seeks to address questions of importance other than property rights and the economic health of the local community. Such concerns include open space, water and air pollution, recreation and scenic values. Establishing specific goals is very difficult because acceptable levels of open space, water and air pollution, recreation, and scenic values are difficult to quantify. One goal of the California Tahoe Regional Planning Agency (CTRPA) is stated in their regional plan as follows: "The Lake Tahoe region should have a pleasing natural odor such as a pine scent." The difficulty in quantifying such goals does not reduce their importance, but it does create an opportunity for arbitrary rules and regulations; rules and regulations which are derived from a completely different set of standards from those established by local government. When this occurs, a reversal in planning direction is inevitable. The new direction will encompass greater open space, lower overall development densities, transfer of development locations, greater public access; perhaps economic windfalls for the few, but certainly wipeouts for the many.

Regional government in California includes the Bay Area Conservation and Development Commission (BCDC), the Coastal Commission, and the California Tahoe Regional Planning Agency. Each of these agencies is governed by a board composed of local officials and state appointees. In the case of the CTRPA, the state appoints 3 of the 7 members. Local government appoints 3, and the last member is selected by the 6. In the event of a deadlock, the appointment is made by the governor, giving the state a 4-3 majority. The effectiveness of the state vote is greater than it would seem because the state appointees generally vote as a group. While the adopted plan of these agencies addresses a variety of goals including equal opportunity housing and a balanced economy, the priority of the goals and the clear bias of the governing members has resulted in very little variety in the results. The CTRPA has refused to review any new subdivisions of more than four lots since September of 1975. Their ordinance provides that no such applications will be accepted until 85 percent of the existing lots have been utilized for houses or commercial structures. Originally estimated to last 10 to 25 years, this moratorium is rapidly becoming a permanent ban through a consistent policy of refusing to allow significant expansion or improvement of roads, sewers, water facilities, and other public works necessary to accommodate the build out of the existing lots.

The California Coastal Commission plan divides the coast into subregions. The North Central Coast region includes well over 100 miles of shoreline. In the North Central Coast region, the commission has not approved a subdivision since its inception. In fact, it has aggressively pursued a policy of attempting to remove entitlement from existing major subdivisions, of which there were only two. The vast majority of the North Central Coast is undeveloped. This policy has resulted in limiting public access to the few state parks in the region and the few second home communities which were developed prior to the advent of the agency.

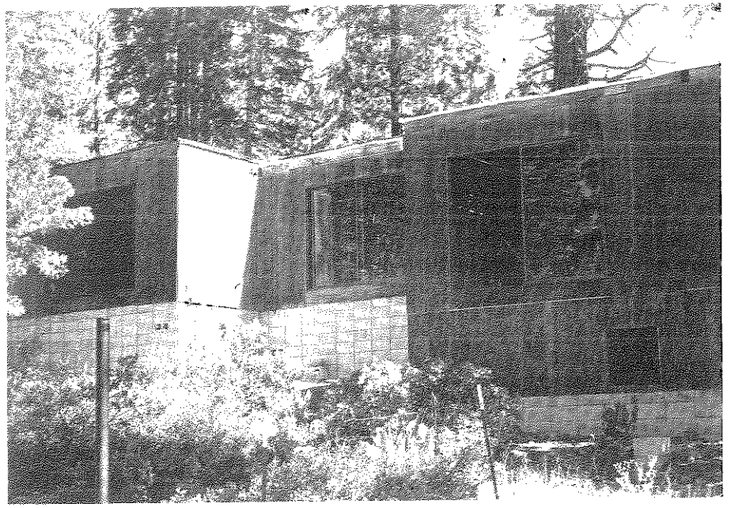
There is a proper and legitimate need for planning of these beautiful and fragile areas. Unfortunately, *planning* and *resource management* have become dominated by those who do not believe in the private use of land and those who are overly biased toward nonuse. Legitimate planning goals have deteriorated to the point where the Coastal Commission passes judgment on everything, down to the size and architectural appropriateness of individual homes. Even this decision is not entrusted to local government.

Entitlement Problems at Lake Tahoe

Prior to 1967, the Lake Tahoe area was governed by the rules and regulations of the two states (California and Nevada) and their five counties. The area was remote, and development proceeded in a normal but sporadic pattern for recreational, second-home uses. In 1967, the Tahoe Regional Planning Agency (TRPA) was created by a compact between California and Nevada and introduced regional government to the area. Initial actions of the TRPA included an effective down zoning of much land within the area. The TRPA Land Use Ordinance adopted in 1972 treated existing subdivisions by *vesting* uses to subdivisions whose final maps had been approved by the appropriate local government within 5 years prior to 1972 or whose final maps were approved by local government more than 5 years prior to 1972 if construction of roads, sewers, or other facilities had commenced or if performance bonds had been posted prior to 1972. Although the regional plan was damaging to those with unsubdivided land (in many cases allowing only one house on many hundreds of acres), the regulations provided consistent treatment for those land owners with recorded maps or partially developed subdivisions.

Concurrently with the creation of the TRPA, the California Tahoe Regional Planning Agency (CTRPA) was created. Basically an agency with powers only over the California portion of the Tahoe basin, the CTRPA had no significant effect until 1974 when, in response to California environmental pressure to control growth and remove or reduce gambling interests on the Nevada side of the basin, the CTRPA began to enact regulations more restrictive than the TRPA. The CTRPA Land Use Ordinance, adopted in September 1975, initially was similar in effect to the TRPA ordinance with respect to entitlement or vesting rights for existing subdivisions, the notable exception to the similarity being that nonvested subdivisions could not be resubmitted due to the 85 percent build out rule.

In June of 1977, the CTRPA amended its *vesting* ordinance to provide that in addition to existing restraints, there must have been "substantial construction pursuant to valid building permits on or before June 3, 1977."



At Kingswood Village, Unit No. 3, Lake Tahoe, California, 48 townhouses on recorded lots are not entitled to proceed beyond this stage of construction.

Thus, the effect of the amendment was an attempt to divest previously approved subdivisions for nonconstruction and to create a new standard without a clear definition. In September, 1977, the CTRPA governing body declined to adopt clarifying language. Accordingly, the vesting rules are based solely on the seven major entitlement ruling decisions made pursuant to the amended ordinance.

In a period of less than 1 year, the definition of *substantial construction* has changed dramatically. Tahoe Tyrol, a development which was partially built out with a recorded map was allowed to proceed with the commencement and the completion of new houses. Kingswood Village, a development which was virtually complete, was disallowed the right to finish townhouses already well under construction on existing lots. The developers exposed themselves to this entitlement disaster by having to renew their building permits. Adjacent to the half-completed buildings at Kingswood, single-family detached houses have been under continuous development by individual speculative builders and lot owners.

Coping With A Hostile Environment

The only sure way to protect yourself from changing politics which will adversely affect your property is to avoid areas hostile to your development plans. This of course is the objective sought by many agencies, and it is best to heed their warning. Where this is not possible, you may be able to reduce your risk through proper structuring of your investment and through careful handling of the administrative process. In the event that despite your careful planning you find yourself in an adversary position with government, there are ways of improving your chances for a successful development project.

Reducing Your Exposure to Risk. It is not difficult to summarize the techniques for reducing your exposure, but it may be very difficult to execute them. The obvious goal is to minimize the front end investment, leaving the least possible exposure to governmental caprice. Generally, the largest front end cost is the land. If you are in an uncertain approval climate and you have not yet purchased the land, leave the risk with the land owner. If you have a large project, you can afford to pay more phase by phase and to allow the land owner to take the risk on the balance. It is his risk anyway, and it would be foolish to make it yours. If possible, condition your purchase on all approvals through the building permit. Approved zoning and subdivision maps are not enough anymore.

Plan your site work and amenities so that each phase relieves your total investment. This is difficult in a competitive market, but can be accomplished through careful planning and neighborhood-oriented rather than community-oriented anemities. If possible, keep your phases small so that a down turn in the market and a subsequent slow down in production does not expose your permits to further review.

Planning the Administrative Process. The best method for avoiding future problems is to insure that all approvals at all levels are complete, well-documented, and proper. The existence of cooperative government now does not guarantee a lack of future problems. Most problems are caused by agencies not in existence at the time of initial approval.

One must become familiar with regulations in effect during the initial review process. Review all procedures independently, and verify that they are proper. Pay particular attention to environmental guidelines, notice provisions and time limits. If you believe that the agency staff is making an error, call it to their attention and work with them to correct the problem.

It is essential to keep complete files. Periodically review agency files, and insure that your files contain duplicative material. Request date-stamped copies for your files. Government files have a tendency to become disoriented and governmental employees with knowledge of a project can leave. Many problems will arise years later and you must be able to reconstruct the original events.

Research the entitlement ruling case law at the time of approval, and attempt to avoid pitfalls encountered by

others. Continue such research after approval, particularly prior to the final decision of subsequent cases; attempt to settle potential problems in your project similar to those encountered by others.

Do not apply for approvals which are not specific and binding. The latitude you leave yourself in construction is the open door through which your approvals can be cancelled. If changes are necessary, they can be applied for at a later date.

You should be certain that all information and exhibits upon which a decision was based are part of the record of the approving body and preferably referred to in the approval. If acceptable, prepare suggested language to be inserted in approvals. The information you have prepared for the approving agency, if not actually relied upon as part of the approval, may not be available for your use in defending a challenge of the approval.

Do not assume you do not have to keep informed of agency activities in your area merely because you have an approval. Constant inspection of agendas and attendance at critical hearings may afford the opportunity to have pending legislation either modified or delayed prior to its affecting your project. This may require becoming involved in the planning process. Public input in the preparation of new plans is required. If you can afford it, challenge the plan before it challenges you. Many companies are properly using the environmental impact report as an aggressive tool to delay changes in public policy until an analysis of the economic impact is completed.

The Administrative Hearing. The least expensive opportunity to secure your approvals is at the administrative hearing. Despite a negative staff recommendation and what appears to be a hostile governing board, the administrative hearing is still your best chance to gain approval. In the event of a denial, the administrative hearing is the best opportunity to build your case for a later lawsuit. If you truly believe in your project and in good faith rely upon governmental decisions, you should go into the hearing with the full expectation of getting an approval.

It is very important to research the agency which will be holding the hearing prior to meeting with them. Premature initial contact may create problems not easily resolved. Your knowledge of the rules, regulations, personalities, and prior actions of the governmental body prior to filing an application will allow you to present material in a format beneficial to your case.

You should always take advantage of the agency's rules. In many situations you will not be bound by formal rules of evidence and may be able to introduce materials into the administrative record which could not be entered into a court record. Supply the agency with your material in written form, well-organized, and bound, in a format which will be easily understood by a court. A well-prepared administrative record will aid in a court review later on. Try to supply everything in written form so that if your oral presentation is limited, essential information will not be lost. If agency rules permit, supply each voting member with a copy of relevant materials.

If allowed, divide the oral presentation between several individuals. Object to insufficient time for presentations. Encourage the reviewing board members to ask questions *during* your presentation and not at the end of it. Such a procedure will tend to establish a momentum and give you the opportunity, in effect, to cross-examine the board members.

Always have the hearing reported by a certified stenographic reporter. Do not rely upon tapes, which will not allow precise determination of who is speaking or which may be unintelligible and contain gaps. Be sure the reporter is experienced with administrative hearings and able to cope with several individuals talking at once.

Do not be afraid to take an aggressive stand, and in particular, do not be lulled into withholding evidence or comments because you are concerned with losing cooperation. Information withheld from the hearing will most likely not be able to be introduced later. You are more likely to retain your rights if you demand them rather than always try to cooperate.

Try to find ways of separating your project from others which may be before an agency. If you can present your project as one-of-a-kind the chances are you will be subject to less agency scrutiny.

Finally, and perhaps most important, attend the hearing yourself, together with an engineer and attorney. It is far easier for an administrative board to inflict injury upon you via your representative than it is if they are facing you in person. Plead your case on a very personal basis. Emphasize your good faith in negotiations and personal contacts with the staff. If you feel that you have been treated fairly, don't hesitate to appear indignant. Be prepared to work with the board at the hearing to resolve differences. This is an excellent opportunity to move ahead with your project, and it should not be missed by sending a representative, who is unable to accept a compromise on the spot.

As many developers are already aware, competition within the industry will not be the principal concern in the future. In many cases the successful developer will not be the one who builds the most competitive house, he will be the one who builds the only house. The ability to conduct one's self successfully in a hostile administrative environment may become the most important implement in the homebuilder's tool box.

Ronald C. Nahas is vice-president of the R. T. Nahas Company of Castro Valley, California. He has been involved with development in Lake Tahoe since 1970. Rocky Ridge is a development of the R.T. Nahas Company.

Neil Eskind is an attorney in private practice in Tahoe City, California. He has represented numerous developers and land owners in the Tahoe area and formerly was deputy county counsel for Placer County, California.

Marketing Shopping Centers

Robert R. Lamm

In the shopping center marketplace sellers are in shorter supply than buyers. Who are these sellers? Primarily developers who create these merchandising complexes at wholesale and later move them at retail. Some shopping centers have changed hands many times, but the typical case is a first sale of a 5- to 10-year old property. There are exceptions, such as when the developer runs into a financial need early in the life of the property or has built it for immediate sale. The reasons for selling usually fit into four main categories.

- To sell at a profit for capital gain.
- A need for capital. This may or may not be an ulterior motive behind the first reason. The developer's bank is encouraging him to become more liquid. He has spread out too far too fast and needs to finance his newer developments by selling an older one.
- The owner has used accelerated depreciation and now has too much taxable income.
- A variety of other reasons—incompatible partners, divorce settlement, death, estate liquidation, and so on.

Of course there are sellers other than the original developer, but these second- and third-time owners have similar motivations for selling.

The Buying Game

The acquisition people generally can be typed as follows:

Individual investors. Primarily these are the smaller investors in neighborhood centers. They are looking for income and equity buildup. Frequently they devote part time to management. Sometimes they will accept a lower return on cash invested than will a professional investor. Their financial limitation makes them better candidates for participation in joint ventures than in individual ownership.

Participations; joint ventures; syndicates; partnerships; public offerings. These are individuals who either cannot afford 100 percent ownership or prefer to diversify by having more participations. Perhaps they want to align themselves with a professional operator who will provide competent management. Syndication on a wide scale reached its peak in the early 1960s. Questionable practices by some syndicators reversed the trend after that. Today public offerings and private placements sponsored by major underwriters have gained wide investor acceptance.

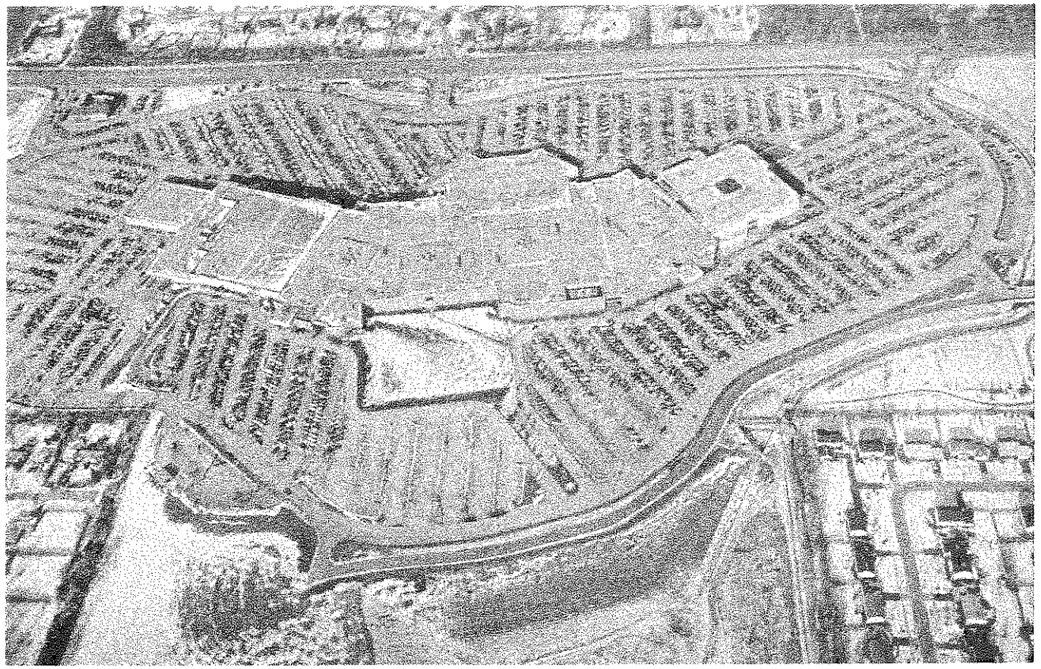
Corporate investors. Some of the early syndicates evolved into public corporations. Other corporations were formed as developers went public to raise capital. Public real estate corporations usually are undervalued by the investment community because earnings are distorted by large, depreciation deductions. Most of these companies develop to sell rather than to make long-term investments in existing centers.

Real estate investment trusts. The trust form for making real estate investments dates back in history, but the present day REIT is a vehicle made possible by Congress in 1960. During the 1960s, equity trusts generally did not find the same favor with Wall Street as did the mortgage trusts. Then over-expansion in the early 1970s curtailed the investment activities of most mortgage trusts. A few of the larger equity trusts are among the better buyers today.

Insurance companies. During recent years the major insurance companies have increased their equity investments in major income-producing properties. Fear of increased inflation has caused some lenders to become more equity oriented. Shopping centers provide an inflation hedge—partly because overage rentals are likely to increase—which is not the case in fixed mortgage investments.

Recently our firm participated in the sale of a $14 million regional mall to one of the country's best known insurance firms. It is interesting that this company was willing to pay more than amounts offered by some of our foreign investor clients.

Pension and profit sharing funds. These funds should be a substantial money source for shopping center investments. This has not been the case except for a few commingled funds sponsored by major banks and insurance companies. Individual



pension and profit sharing funds lack acquisition and management expertise, whereas the commingled funds can make real estate investments on a free-and-clear basis. They acquire only blue chip properties, with a special interest in large malls and high quality office buildings in major metropolitan areas.

Foreign investors. European and Canadian investors are making increasing inroads into U.S. real estate. Foreign investors appreciate our relative political and economic stability. They require less leverage. The foreign buyer often is willing to invest cash of up to 40 percent or 50 percent of the total purchase price.

Some Middle East oil money is reaching our shores in corporate acquisitions or in major placements through large U.S. banks, but little appears to be coming in for the purchase of individual income properties.

Cash Return

The final criterion in most transactions is a satisfactory cash flow in relation to invested capital. Return on cash invested is calculated as follows:

$$\frac{\text{Cash Flow}}{\text{Cash Invested}} = \%\ \text{Cash Return}$$

Cash flow is determined by deducting the annual debt service—the combined principal and interest payments—from net operating income. Let's say a center has a gross income of $300,000, operating expense of $75,000, and a net operating income of $225,000. If the annual debt service is, say, $175,000, the remainder—cash flow—is $50,000.

Most shopping center sales are leveraged, and most investors expect a reasonable return on their equity—or at least the prospect of this achievement. Conventional market mentality calls for an 8 percent to 10 percent cash-on-cash return. In recent years market pressure has forced returns lower for prime shopping centers, especially for successful enclosed malls. The return on cash invested may be as low as 5 percent to 7 percent.

Of course all investors want a higher return. The market *talks* one thing and *does* another. The talk is 8 percent to 10 percent return—and the investor would like to get more—but he may be willing to accept less, possibly much less, if there's a good chance of having a higher future return. A shopping center with low rentals and a 6.5 percent interest loan with only a few years to run, offers an unique opportunity for increasing income and refinancing. It may be possible to turn a 4 percent into a 40 percent return—or maybe an infinite return.

Overall Return

Determining the overall return on a free-and-clear basis is a useful tool in shopping center valuation. The formula for calculating total return is simple:

$$\frac{\text{Net Operating Income}}{\text{Total Purchase Price}} = \text{Overall Return or Capitalization Rate}$$

This calculation ignores debt service. Although few income properties are sold without mortgage financing, this approach is the most widely used practical method of valuation. The components are basic: gross income minus operating expense equals net operating income. The calculation is not affected by gimmick financing, wrap-around mortgages, purchase money mortgages, ground lease arrangements, etc. The capitalization rate represents a return on land and building investment and a recapture of building investment. This concept is more practical than academic and serves as a starting point for calculations and negotiations to arrive at the bottom line—cash flow.

If net operating income is $225,000 and the shopping center sells for $2.5 million, the capitalization rate is:

$$\frac{\$\ 225{,}000}{\$2{,}500{,}000} = 9.0\ \text{percent}$$

The 9 percent return is typical. There are cases of sales in the 8 percent range and lower, on up to 10 percent and higher. Rather than to cite 9 percent as an average, it is better to think of an average range somewhere between 8.5 percent and 9.5 percent.

You may ask how capitalization rates can be 9 percent but loan constants 10 percent to 11 percent on new shopping center developments. The answer is that the *cap* rates shown cover the sale of successful shopping centers with existing loans at lower interest rates or with purchase money financing. An older center usually is under-financed. The loan is paid down, and the equity requirement is high. This is all the more reason to place greater weight on overall return rather than equity return in calculating market value. Also the forces of supply and demand tend to hold the overall rates to a conservative level.

The following table expresses this broker's opinions of the average range of capitalization for good quality shopping centers by size and location:

	Northeast, North Central	Southeast, South Central	Northwest, Southwest, Pacific Coast
Large Enclosed Malls	8.00—9.00%	7.75—8.75%	7.50—8.50%
Small- and Medium-Sized Centers	8.50—10.00	8.25—9.75	8.00—9.50

One may not agree entirely with these opinions, but they are supported by actual sales. They reflect stronger demand for Sun Belt and West Coast properties. As mentioned previously, *cap* rates vary considerably. There are exceptions which do not fit within the ranges shown in the table.

Cap Rate a Myth?

An excellent article appeared in the Spring, 1978 issue of *Real Estate Review* ("Some Myths About Real Estate," by Austin J. Jaffe and C. F. Sirmans) which classified as a myth the premise that value equals income divided by capitalization rate. This writer agrees with the article's contention that this is true if and only if the income flow continues to infinity, the income in each period is equal, and the capitalization rate remains constant. The point is well taken that this formula is applicable only to those projects with infinite holding periods, identical income payments each year, and an unchanging risk.

However, the market needs a common denominator, one that is easy to use. It is fairly simple to make a conservative projection of stabilized net operating income. It is not difficult for a person of judgment and experience to select a capitalization rate that should be applied to the income figure. True, this method of valuation is nothing more than a rule of thumb, but it is the most logical and reliable of the various rules of thumb. A knowledgeable analyst using it can make a close prediction of actual selling price. The two simple approaches to value discussed here—cash return and overall return—have stood the test of time. They are widely used in the marketplace.

Other Approaches to Value

There are more sophisticated appraisal methods which include such textbook approaches as the internal rate of return, Ellwood's investment rate of return, the land residual method, and calculation of discounted cash flow. While some major financial institutions use variations of these, the average investor finds they are rather complicated. There are too many variables. How can true investment yield be determined in advance of a sale? If we could forecast exact cash flow, the timing of its receipt, the period of ownership, the future selling price, and future tax consequences of selling, then the internal rate of return approach would provide an accurate appraisal of the return rate.

Occasionally purchasers use rules of thumb other than cash return or overall return. These other methods are not reliable indicators and are mentioned only for illustration. Purchase price per square foot of gross building area is one method. The range in price is great, running from $15 to $50 or more. This provides weak verification of value and is on a cost basis only. Another method is the gross income multiplier, whereby some factor such as eight or nine times annual gross income is applied to calculate value.

Selling a Partial Interest

An increasingly popular approach used by foreign buyers (and some domestic ones too) is to make a partial purchase with a preferred participation. The investor buys, say, a one-half undivided interest. A joint venture is formed with the developer/seller who retains one-half ownership. The developer continues to manage the center. This can be an advantageous arrangement for the seller if cash flow hasn't reached maturity.

Take the example of present annual cash flow equal to $250,000 including a small amount of overage rentals. The center is only 2 years old. Suppose it is likely that as the property matures overage rentals will increase greatly—perhaps to $300,000 or $350,000 during the next few years. An investor probably will *overpay* for a partial interest, if he receives a preferred return on invested capital.

Assume the parties agree that the total equity value for the transaction is $4 million. Existing cash flow provides only a 6.25 percent return. But what if the investor pays $2 million for one-half interest and receives, say, 8.5 percent preferred return. He will get the first $170,000 and the seller will receive the next $80,000 of the existing $250,000 cash flow. The seller also will be paid a management fee, deducted prior to distribution of cash flow. He will have strong incentive to increase income because he will get all additional cash flow until his share equals the buyer's $170,000. Cash flow in excess of $340,000 will be split 50-50. No doubt many readers are familiar with this effective means of *promoting* anticipated cash flow.

Income/Expense Analysis

It is important to make an intelligent analysis of income and expense. Some key factors are:

Vacancy allowance. Perhaps none is needed if the center is 100 percent full and largely leased to major tenants. There are buyers who will take a nominal 1 percent or 2 percent overall vacancy deduction if the remaining lease terms are not long. It depends on sales trends and whether the key tenants are paying low base rentals. If minimum rent is high in relation to sales, that is, if sales per square foot per year are not satisfactory, then a larger allowance should be made.

Amount of income from major tenants in relation to total income is important, particularly to institutional investors. Some buyers unwisely require that blue chip tenants produce a minimum of 70 percent or 75 percent of the gross income. Our firm has sold excellent centers in which major tenants provided only 50 percent or less of the income. Such items as tenant mix, sales trends, and sales per square foot are more indicative of a healthy center than some arbitrary percentage of income from chain stores. Many investors will use a vacancy allowance of 5 percent to 10 percent of income produced by local tenants. It depends on lease term, net worth, and sales history.

Percentage and overage rentals. What should one do with rentals other than guaranteed minimums? The investor should analyze sales per square foot and sales trends to make a cautious prediction of future income. Overall health of the merchants is a big factor. The purchaser must consider location, accessibility, and existing and future competition.

If variable rental income is small in relation to total income, and if sales trends are favorable, the investor may be willing to count the percentage/overage rentals at par. Our firm has been involved in transactions where the seller was able to *promote* variable income by convincing the investor he should include anticipated overages. If the sales trend is flat or declining, the investor will discount overages by 10 percent, 15 percent, 25 percent or more depending upon the situation.

Management. Most offerings have either skimpy provision for management or none at all. Operating a shopping center is like any other business; yet like no other business. It will not run itself, and ample provision for management must be included. Management expense usually runs between 3 percent and 6 percent of gross income depending upon property size and extent of responsibility.

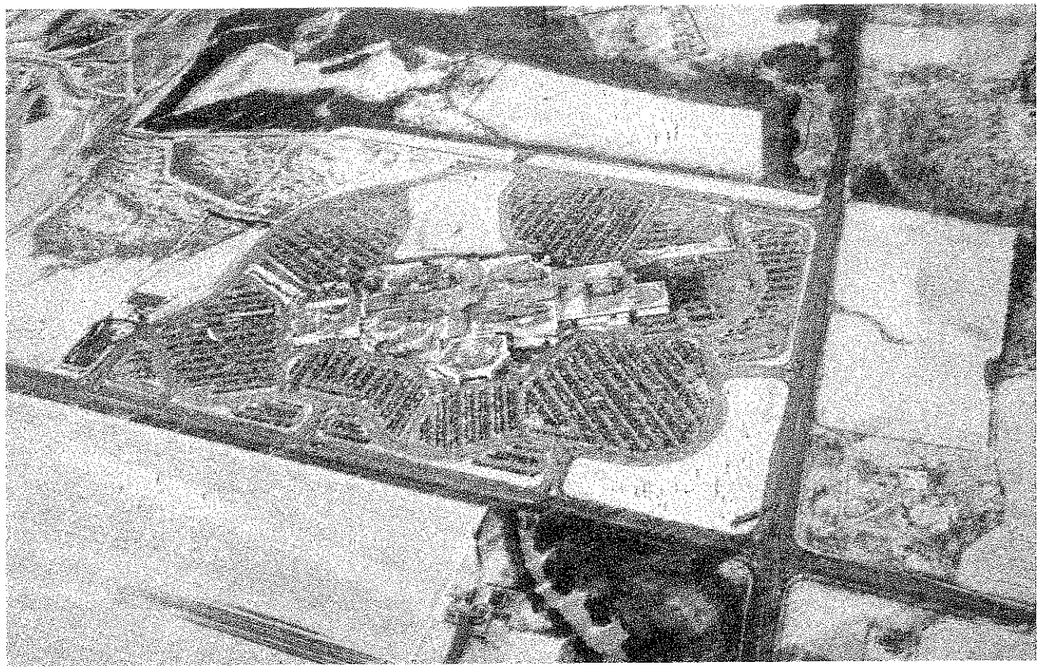
Reserve for repairs. In the case of deferred maintenance of an older center, a reserve is needed to handle anticipated as well as actual maintenance and repairs. Nonrecurring repairs have a habit of recurring. In particular, the buyer should make a careful check for the quality of construction and the condition of the parking area. Probably the single greatest source of repair expense is the parking lot. Check the seller's books carefully for expenditures which have been treated as capital items. The second owner is more likely to have a repair expense than the original developer.

Ad valorem taxes. Check the trend of tax increases and project accordingly. Do the leases have a tax escalation clause? If not, a reserve for tax increases is necessary. In spite of the recent property tax revolt spreading from California, the buyer is unduly optimistic if he believes taxes are going to go down over the long run.

Check List For Marketing Shopping Centers

1. Community and neighborhood characteristics. Drive the trading area.
2. Location and characteristics of existing and proposed competition.
3. Location and characteristics of site. Land area and boundaries. Copy of survey.
4. Characteristics of improvements. Gross floor area. Gross leaseable area (GLA). Parking ratio and number of parking spaces. Copy of site plan showing parking and building layout and location of tenants.
5. Lease and tenant information. *Review leases.*
   - —Name and business of tenant. Credit rating.
   - —Lease term. Lease dates. Options.
   - —Store frontage and depth. Area of store (GLA).
   - —Minimum rental. Rental per square foot.
   - —Percentage rate. Overage/percentage rental paid for prior years.
   - —Sales reported by tenants for prior years. Sales per square foot.
   - —Contribution of tenants to maintenance, merchants' association, et cetera.
   - —Tax escalation clauses.
6. Income and expense data. Operating statements from prior years.
7. Pro forma income breakdown:
   - —Minimum
   - —Overage/percentage
   - —Maintenance
   - —Miscellaneous
8. Pro forma expense breakdown:
   - —Utilities
   - —Cleaning, janitorial, maintenance
   - —Repairs
   - —Management
   - —Leasing commissions
   - —Sign rental
   - —Ground rental
   - —Advertising, promotions, merchants' association
   - —Insurance
   - —Real estate taxes (show net after recapture)
   - —Miscellaneous

   NOTE: It is assumed that expenses such as payroll and payroll taxes are included in the categories above, i.e., maintenance, repairs, and management. These categories do not conform necessarily to standard accounting terminology, but are merely descriptive terms suitable for use in presentations.
9. Ground lease data.
10. Mortgage data.
    - —Name of mortgagee.
    - —Loan term. Commencement and termination dates.
    - —Interest rate. Constant. Type of amortization. Monthly or annual debt service (combined principal and interest).
    - —Original amount and present balance.
    - —Prepayment privilege and penalty.
    - —Reserve or escrow accounts.
    - —Personal liability, if any.
11. Purchase money (second) mortgage arrangement.
12. Purchase price.



Basic Marketing Campaign

Sellers of prime shopping centers may think buyers are standing in line. They sometimes seem to be. There are a multitude of investors and they have much capital—but they part with it *cautiously*. Any knowledgeable owner realizes that today, more than ever, a sound marketing effort is necessary. A competent broker or consultant can be the seller's best friend. An intermediary is a great negotiating asset. Brokerage expense can be more than offset in the selling price if the offering is well merchandised. The basic marketing campaign should consider:

The property. It should look good and show well. Take care of deferred maintenance. The seller or broker should determine the cost of minor facelifting, necessary capital improvements, modernized lighting, and parking lot repairs in relation to possible additional sales proceeds.

The proposition. Does the offering make sense? Will price and terms be acceptable in the marketplace? Look at the transaction through a buyer's eyes. Fuzzy thinking about the economics leads nowhere.

The presentation. The number one mistake the average seller or broker makes is to prepare a short resume in haste. It usually consists of fragmentary data which raise more questions than they answer. The selling price, when stated, is probably inflated for trading purposes. A total marketing effort includes a well-researched and documented brief. A "Check List For Marketing Shopping Centers" is useful in gathering information for a brief.

The prospect. Limit your contacts to a few select buyers, those investors who are known to be prime prospects for your size center in your locality. Work with only one or two at a time. Don't get involved in a competitive bidding contest. You will lose the sale. Conduct straightforward, honest negotiations. You can't beat the *country truth* for establishing credibility.

Above all make sure the buyer receives all the facts. In the business world, just as everywhere else, the rule *do unto others . . .* produces the best results. This may sound naive, but the writer has 250 million reasons, expressed in dollars of shopping center sales, to justify his naivete. Remember, it's easy to *talk* a deal, but difficult to make a sale that actually closes.

Robert R. Lamm is President of an international real estate investment and brokerage firm headquartered in Dallas, Texas. He is known for being an author and speaker on the marketing of shopping centers. For 17 years, he has specialized in the buying and selling of major income-producing real estate.

Supreme Court Defers to Judgment of New York City Council, But Rejects the Judgment of the New Jersey Legislature: A Case of Grand Central and Garbage

Frank Schnidman

Within a period of three days the United States Supreme Court handed down two decisions which dealt with the issue of the presumption which should be afforded the validity of legislative judgment. On June 23, 1978, the Supreme Court handed down *City of Philadelphia v. New Jersey*. This case dealt with the question of whether or not the state of New Jersey could restrict the importation of solid waste for disposal in land fills within the state. The United States Supreme Court held that the state could not do so. Even though the legislation was based upon the protection of the public health, safety, and welfare, it was found to be a simple mechanism for economic protectionism effected through state legislation. The court held the statute as basically a protectionist measure that, even in light of the legislative findings, could not fairly be viewed "as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental."

Three days after *Philadelphia v. New Jersey* was handed down, the Supreme Court decided *Penn Central Transportation Company v. City of New York*. In this case, the court was unwilling to reject the judgment of the New York City Council that "the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . ." (Legal Notes, September 1977, discussed the highest court of New York State's opinion in detail. Also, the author of that opinion, the Honorable Charles D. Breitel, discusses the case in the April 1978 issue of *Environmental Comment*.)

In addition to giving extensive deference to the legislative judgment of the New York City Council, the decision makes a number of important findings. First, the case upholds the principle of landmark designation and the validity of restricting the owner's options concerning use of the site. Second, the court stated that in litigation over land use controls, attention should be focused on whether the restriction can be deemed reasonable in relation to the objectives of the community's land use plan. This may prove to be one of the most important statements of the case. Third, the court held that transferable development rights have value and can be used in calculating reasonable return. In this regard, they become very important as an equitable alternative to harsh regulation. Additionally, in a number of places in its decision, the court points out times when the railroad had a procedural alternative, and in the court's opinion, took the wrong path.

Over the past 50 years, all 50 states and over 500 municipalities have enacted laws to encourage or require the preservation of buildings and areas with historic or aesthetic importance. These laws bolster the concept of historic preservation and will serve as an incentive to many state and local governments to become more actively involved in preservation activities. The New York City law is typical of many urban landmark laws in that its primary method of achieving its goals is not by the acquisition of historic properties, but rather by involving public entities in land use decisions affecting these properties and by providing services, standards, controls, and incentives that encourage preservation by private owners and users. In the city, to date, 31 historic districts and over 400 individual landmarks have been designated. Final designation as a landmark results in restrictions upon the property owner's options concerning the use of the site. The act imposes a duty upon the owner to keep the exterior features of the building "in good repair" to assure that the act's objectives will not be defeated by the landmark's falling into a state of irremedial disrepair. The Landmarks Commission must approve in advance any proposal to alter the exterior architectural features of the landmark or to construct an exterior improvement on the landmark site, thus insuring that the decisions on the landmark are made with due consideration of both public interest in the maintenance of the structure and the land owner's interest in use of the property. There are three separate administrative procedures available to the landowner in obtaining permission to alter the landmark site. He may apply to the commission for a "certificate of no effect on protected arthitectural features." He may also apply to the commission for a "certificate of appropriateness." Such certificate will be granted if the commission concludes that the proposed construction on the landmark site would not unduly hinder the protection, enhancement, perpetuation, and use of the landmark. Finally, the landowner may seek a certificate of appropriateness on the grounds of "insufficient return." This is to insure that the designation does not cause economic hardship.

"On this record . . ." the court held the application of the landmark preservation law as not affecting *taking* of the railroad's property:

> The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but afford appellants opportunities further to enhance not only the Terminal's site proper but also other properties.

Footnote 29 may become one of the most commonly cited sentences in this case. The footnote states:

> When a property owner challenges the application of a zoning ordinance to this property, the judicial inquiry focuses upon whether the challenged restriction can reasonably be deemed to promote the objectives of the community land use plan, and will include consideration of the treatment of similar parcels. . . . When a property owner challenges a landmark designation or restriction as arbitrary or discriminatory, a similar inquiry presumably will occur.

In recent years, an increasing number of courts have recognized a greater role for the comprehensive plan in zoning administration. At least 13 state legislatures have mandated that local governments engage in a comprehensive planning process, and some have also required that local zoning and land use regulations be consistent with an adopted local plan. With support available through Footnote 29, federal and state courts will be less reluctant to view the "community land use plan" as a basis for their decision making, whether it be in a litigation dealing with the presumption of legislative validity, alleged arbitrary or capricious nature of a local government action, discrimination, or violation of due process or equal protection.

Since the publication of the January 1975 special issue of *Urban Land* magazine, dealing with the concept of transferable development rights, the Urban Land Institute has been monitoring TDR activity around the country. In ULI publications, and in many other professional journals, authors have suggested that the legality of the use of TDR was not the problem. It was only the question of administration and enforcement. This decision confirms the opinions of those experts.

> Second, to the extent appellants have been denied the right to build above the Terminal, it is not literally accurate to say that they have been denied *all* use of those pre-existing air rights. Their ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the terminal, one or two of which have been found suitable for the construction of new office buildings. Although appellants and others have argued that New York City's transferable development rights program is far from ideal, the New York courts here supportably found that, at least in the case of the Terminal, the rights afforded are valuable. While these rights may well have not constituted "just compensation" if "a taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation.

This statement by the United States Supreme Court concerning the value of TDR, and the fact that elsewhere the decision states that TDR can be used in calculating reasonable return, cannot help but foster state and local government use of the transferable rights concept.

Finally, in a number of instances the court pointed out to the plaintiffs how they could have better litigated their cause. It found that in the record on appeal, the railroad had not proven its inability to get a reasonable return from the property. It also concluded that because of this and oral statements made, the railroad accepts that the site, in its present state, is capable of earning a reasonable return. It found that the railroad did not seek judicial review of either designation as a landmark or denial of the "certificate of appropriateness." Therefore its argument that the decision to designate the structure as a landmark "is inevitably arbitrary or at least subjective because it basically is a matter of taste," is, in the words of the Supreme Court, "equally without merit." Also, since the railroad did not seek approval of a smaller structure on the site, the court stated it did not know whether appellants would be denied the use of any portion of air space above the terminal.

Finally, in its last footnote, the court stated:

> We emphasize that our holding today is on the present record which in turn is based on Penn Central's present ability to use the Terminal for its intended purposes and in a gainful fashion. The City conceded at oral argument that if appellants can demonstrate at some point in the future that circumstances have changed such that the Terminal ceases to be, in the City Council's words "economically viable," appellants may obtain relief.

Though the Supreme Court chose not to deal with some of the conclusions of the New York State Court of Appeals' decision, it did agree with that court's finding that the railroad should be afforded the opportunity to return to the trial level, for proof that they are incapable of earning a reasonable return through present use of the site.

Summary & Conclusions

In recent cases, the federal courts and the United States Supreme Court have given a great deal of deference to the presumption of legislative validity of local government actions. In the past this column has discussed the issues and the split in litigation over the presumption between the federal and state courts (see Legal Notes, September 1976, November 1976, January 1977, March 1977, April 1977, and May 1978). Those discussions have shown the federal courts' inclination to allow the presumption to stand while the state courts are looking beyond the presumption to the intent and effect of those legislative actions.The *Philadelphia v. New Jersey* and *Penn Central v. New York* cases illustrate what might be viewed as a differing treatment of the presumption by the U.S. Supreme Court, within a 3-day period. As the dissent in *Philadelphia v. New Jersey* stated:

> The Supreme Court of New Jersey expressly found that ch. 363 was passed "to preserve the health of New Jersey residents by keeping their exposure to solid waste and land fill area to a minimum. . . . The Court points to absolutely no evidence that would contradict this finding by the New Jersey Supreme Court. Because I find no basis for distinguishing the laws under challenge here from our past cases upholding state laws that prohibit the importation of items that would endanger the population of the state, I dissent.

On detailed examination of the Commerce Clause of the Constitution, related to issues raised in *Philadelphia v. New Jersey,* an argument can be made for bypassing the issue of presumption of legislative validity. However, the serious question still remains as to how much deference the courts should pay to legislative judgment. Does it not follow that if the Supreme Court looked beyond legislative judgment concerning landfills to the *effect* of such activity, that it should also look to the effect of other types of governmental decision making?

LAND USE ABSTRACTS...

THE CONDOMINIUM COMMUNITY: A GUIDE FOR OWNERS, BOARDS, AND MANAGERS
Institute of Real Estate Management, 430 N. Michigan Ave., Chicago, Ill. 60611

A text outlining "the lessons that have been learned about living in and working with condominium communities. This was accomplished by compiling research materials, ideas, theories, documents, forms, personal accounts, and suggestions provided by a number of professionals who have experience assisting condominium associations." After an introduction to the concept of *condominium,* the book offers guidelines for (1) the association and its governing documents; (2) transferring control from the developer to the association; (3) the board of directors, elections, officers, and responsibilities; (4) conducting effective meetings; (5) the committee structure and guiding association committees; (6) management alternatives: self-management, resident manager, professional management; (7) physical and mechanical maintenance; (8) communications with association members, complaints procedures, rules and restrictions; (9) establishing sound fiscal procedures; (10) insurance; and (11) tax considerations for the association and for the unit owner. A number of sample forms, worksheets, and checklists are provided in an appendix.

Curry, William J., III and Fox, Cyril A., Jr.
STRIP MINING: A ROLE FOR LOCAL GOVERNMENTS IN CONTROLLING STRIP MINING ACTIVITIES
Western Pennsylvania Conservancy, Fallingwater, R.D. #1, Mill Run, Pa. 15464
1978. 53 pp. $5.00.

Describes "the legal tools available to local governments for regulating surface mining . . . The basic legal framework of the Report and model ordinances is provided by the Federal Surface Mining Control and Reclamation Act of 1977 and the statutory and decisional law of Pennsylvania. However, the discussion of legal issues, planning considerations and control strategies should prove workable in most other states. . . . The community has an important interest in assuring that the [mined out] land will be left in an economically and ecologically productive condition, compatible with the projected long-range land uses of the area. The model ordinance provisions offer local governments a range of strategies to accomplish this objective according to the needs and technical abilities of the particular community. These controls include the treatment of strip mining as a permitted use in certain districts, regulation as a special use, and the creation of controls over the pace of mining operations so as to enable the community to respond effectively to problems which these operations can create." Local powers to control road usage are also considered as a means of controlling strip mining activities, and model road use ordinances are provided.

DISPLACEMENT: CITY NEIGHBORHOODS IN TRANSITION
The National Urban Coalition, 1201 Connecticut Ave., N.W., Washington, D.C. 20036
1978. 38 pp. $4.00.

"After decades of lamentation over the flight of the middle class from center cities, a combination of circumstances—concerns over energy and transportation, the rising costs of new housing in the suburbs and the emergence of a new breed of

relatively well-off 'urban pioneers' and developers—has created an uneven but definite in-migration of middle class homeowners and renters who are taking up residence in city neighborhoods that they and financial institutions once shunned. As this occurs, longtime poor, elderly, working class and minority owners and renters are being pushed out or bought out. The benefits of a strengthened tax base and of some gains in residential and commercial revitalization are clashing with deprivation, frustration and anger of those who are becoming the new urban nomads. Some are being displaced from established neighborhoods which were socially, culturally and racially more diverse than the in-town suburban enclaves with which they are being replaced. . . . This report on [the National Urban Coalition's] survey of what has been happening in 44 American cities is offered as a means of bringing to the attention of policy-makers and the public some of the dimensions of a reality whose economic, political and human potential for good or ill should not, we believe, be ignored."

Gimmy, Arthur E.
TENNIS CLUBS AND RACQUET SPORT PROJECTS. A GUIDE TO APPRAISAL, MARKET ANALYSIS, DEVELOPMENT AND FINANCING
American Institute of Real Estate Appraisers, 430 N. Michigan Avenue, Chicago, Ill. 60611
1978. 94 pp. Illustrated, bibliography. $15.00.

"The specific purpose here is to outline and discuss the many facets that must be considered in evaluating a tennis facility. [The book] has been prepared to help the professional appraiser investigate and analyze a particular tennis market, determine location and club size, understand facility requirements, and prepare valuations of differing types of operations." Gimmy provides, with caveats, rules of thumb for analyzing the effective demand for different types of racquet facilities and he discusses physical factors (design, building types, layout, lighting, etc.) that affect the value of racquet facilities as income-producing properties. Lack of financing has kept the demand for tennis facilities much higher than the supply. Gimmy surveyed lending officers and found that their hesitancy to finance tennis facilities arose mainly from their desire to avoid specialized, nonversatile investments or from their uncertainties about the long-term appeal of fixed tennis facilities. Eleven case studies provide a sampling of different types of income and expense performance for different types of racquet facilities. A market analysis checklist and sample appraisals are also included.

Leven, Charles L. (editor)
THE MATURE METROPOLIS
Lexington Books, D.C. Heath and Company, 125 Spring Street, Lexington, Mass. 02173
1978. 319 pp. $21.95.

Thirteen essays commissioned by the Institute for Urban and Regional Studies of Washington University, St. Louis, for a June 1977 symposium, introduced with an essay by editor Leven, "The Emergence of Maturity in Metropolis." While "different metropolitan areas have had and will have different growth experiences, 'slowdown' is a generalized phenomenon related to very basic factors in our national experience." Two essays deal with the "origins of maturity":

- "The Current Halt in the Metropolitan Phenomenon," by William Alonso
- "Social Processes and Social Policy in the Stable Metropolis," by James S. Coleman

Two essays, one by Peter Hall and David Metcalf, describing the European experience, and the other by Piotr Korcelli, focusing on Poland, seek to describe the extent of metropolitan maturity. The next four essays are devoted to the functions and physical organization of the mature metropolis:

- "The Central City in the Postindustrial Age," by Harvey S. Perloff
- "Tomorrow's Agglomeration Economies," by Norman Macrae
- "Transportation and Land Use in the Mature Metropolis," by Alex Anas and Leon N. Moses
- "Environmental Problems in the Mature Metropolis," by Edwin S. Mills and others

The next five essays deal with governmental organization, public sector investment strategies, *basic* economic activities in the metropolis, and the economically disadvantaged in the mature metropolis. A final note by the editor and Robert C. Holland offers a policy *agenda* for the mature metropolis.

Pocock, Douglas and Hudson, Ray
IMAGES OF THE URBAN ENVIRONMENT
Columbia University Press, 136 S. Broadway, Irvington-on-Hudson, N.Y. 10533
1978. 181 pp. Bibliography, indexes. $12.00.

"This work is not about the urban environment *per se* but of man's response to that environment. . . . First, the emergence of perception studies within the interdisciplinary field of behavioural sciences is discussed before turning to an outline of perception, both as a process and as product or image. The formidable elicitative problems facing the researcher are then outlined, before exploring the main types of cognitive response, designative and appraisive. Image formation as a learning process is then discussed, before broadening the perspective to conclude with a consideration of the planning and policy implications of image studies." One important policy implication relates to responses to standardization and uniformity: "The danger of an increasingly uniform environment is that it engages the individual in a less active perceptual response. The general consensus of researchers from a variety of disciplines, studying both human and animal habitat and behaviour, is that a complex environment is essential for optimum stimulation—for man's orientation, security and identity. Absence of such stimulation leads increasingly to environmental numbness and subliminal perception such that some researchers conclude man's survival as an urban animal may be a question, not of food or oxygen, but of his sanity . . . The planning and design of urban space is therefore more than exercise in either physical standards or artistic embellishment."

Small, Leslie E., Kasper, Victor, Jr. and Derr, Donn A.
TDR: TRANSFER OF DEVELOPMENT RIGHTS MARKETABILITY
Cook College, Rutgers University, Department of Agricultural Economics and Marketing, Cook College Office Building, Dudley Road, New Brunswick, N.J. 08903
1978. 56 pp. Tables, bibliography. Free.

Identifies the significant economic conditions necessary for the satisfactory operation of a market for development rights certificates (DRCs) awarded to landowners in preservation zones and applicable to density bonuses for residential developments in transfer zones; and evaluates the extent to which these conditions could be met under a proposed transfer of development rights (TDR) ordinance for South Brunswick, N.J. "DRCs would be utilized by developers who find it economically attractive to purchase them and undertake development at densities greater than would otherwise be permitted. Because demand for DRCs is thus derived from the demand for housing, the analysis of demand must focus on: (1) the behavior of developers, and (2) the housing market conditions faced by developers."

A recursive linear programming model is used to investigate the market for DRCs under different assumptions and different levels of housing market activity. ". . . under current market conditions the TDR program envisaged for South Brunswick . . . would likely encounter an inadequate rate of utilization of DRCs and a DRC price considerably below the amount needed to compensate landowners in the preservation zone for the reduction in land values imposed by the TDR program." In order to make the DRCs marketable, the South Brunswick TDR program would have to reduce considerably the acreage included in the preservation zone, from 6689 acres to about 1140 acres. Other conditions that would increase DRC marketability are a reduction in the number of DRCs required per housing unit built at the bonus density and a shortened time period for the TDR program. Finally, even if a TDR program is structured so as to recompense landowners adequately in a preservation zone, "windfall gains may still accrue to developers and landowners in the transfer zones at the expense of windfall losses imposed on owners of developable land not located in the transfer zone."

OFFER EXPIRES JANUARY 31, 1979

Annual Half Off Sale

ULI has completed its year-end audit. In order to adjust our inventory, we are offering the following books to **ULI members only** at ½ off the regular member price. Now is a good time to build your library of ULI publications or to replace lost copies.

Most of these books are older ULI publications; however, every one of them has current value and many of them still remain landmark publications in their study areas. **Quantities are limited, so place your order today.**

To take advantage of this special offer, use the order form in this issue of **Urban Land. Coupons cannot be used to obtain the publications listed below at the half off sales price.**

Air Rights and Highways (1969)
½ Price: $2.00
Investigates the economic, procedural, engineering, and legal considerations involved in the use of air rights above streets and thoroughfares.

Apartment Communities—The Next Big Market (1968)
½ Price: $2.00
Analyzes four successful apartment communities in Kansas City.

Business Parks—Office Parks, Plazas and Centers (1970)
½ Price: $3.75
Analyzes practical experience from known developments, and highlights various principles, procedures, and practices.

Density: Five Perspectives (1972)
½ Price: $2.00
Discusses the ratio of people to space.

Dollars and Cents of Shopping Centers: 1972—A Study of Receipts and Expenses (1972)
½ Price: $7.50
Reports and interprets dollar figures for receipts and expenses in shopping center operations. Also features 120 pages of computer printouts containing the basic data for tenant characteristics by type of center.

Federally Assisted New Communities: New Dimensions in Urban Development (1973)
½ Price: $2.00
Contains information on new towns, focusing on government assistance.

Industrial Bibliography (1974)
½ Price: $1.85
A reference work on industrial districts, parks, and land use. Its classification system makes it a useful working document.

Industrial Districts: Principles in Practice (Part II) (1962)
½ Price: $4.50
Concentrates on operational considerations of industrial district development, and examines specific experiences in industrial district planning, developing, and management, as reflected in case studies.

Industrial Potential of the Central City (1973)
½ Price: $3.00
An analysis of land and building use characteristics of 20 industrial groups in a major commercial and industrial metropolis and its suburbs. Describes which industrial groups are best adapted to central city locations and why.

Land: Recreation & Leisure (1970)
½ Price: $2.00
Analyzes golf course development, ski resorts, island developments, second home and retirement communities, etc.

Mobile Home Parks: Parts I and II (1971, 1972)
½ Price: $2.00
An overview of the mobile home industry and land planning and land use aspects of mobile home parts and subdivisions.

New Towns Planning and Development: A Worldwide Bibliography (1973)
½ Price: $2.00
A thorough and detailed reference work on new towns. Includes 4,551 entries.

New Zoning Landmarks in PUD (1968)
½ Price: $2.00
Traces the legal aspects of three PUDs—one in Pennsylvania, and two in New Jersey. The only available publication which describes the funded community trust.

Nine Cities—The Anatomy of Downtown Renewal (1969)
½ Price: $2.00
An investigative reporting of the experiences of nine American cities combating the decline of their downtown districts.

Optimizing Development Profits in Large-Scale Real Estate Projects (1972)
½ Price: $3.00
Provides a comprehensive set of analytic techniques for planning and evaluating large-scale developments.

Parking Requirements for Shopping Centers (1965)
½ Price: $2.00
A sampling of shopping centers ranging in type, size, and geographical distribution.

Prospects for Rental Housing Production Under Rent Control (1976)
½ Price: $1.50
Analyzes the impact of the rent control program in the District of Columbia on rental housing development. Examines return on investment, municipal tax revenues, and tenant protection.

PUD: A Better Way for the Suburbs (1971)
½ Price: $3.00
Provides a basic understanding of planned unit development.

The Puerto Rico Plan: Environmental Protection Through Development Rights Transfer (1975)
½ Price: $3.00
A detailed description of the Puerto Rican study of the use of transfer of development rights.

Real Estate Financial Reporting (1972)
½ Price: $2.00
Defines and analyzes terms involved in describing real estate reporting practices.

Securing Open Space for Urban America: Conservation Easements (1959)
½ Price: $2.00
Describes all the major mechanisms available to encourage or obtain the preservation of open space in rural or urban areas.

Shopping Center Zoning (1973)
½ Price: $3.00
Focuses on the need for sound and rational zoning controls that induce well-designed and well-conceived shopping centers.

Site Value Taxation in Central Business District Redevelopment—Sydney, Australia (1972)
½ Price: $2.00
An analysis of the Australian site value tax system and its role in Sydney redevelopment since 1956. Discusses the merits and failings of the site value tax.

ALSO AVAILABLE—**ULI Panel Service Reports** which set out in detail the findings, conclusions, and recommendations of a panel of experts analyzing specific land use problems.
½ Price: $2.50 apiece

Alexandria, Louisiana—urban redevelopment (1975)

Bethlehem, Pennsylvania—urban redevelopment (1976)

Cambridge Center—urban redevelopment (1976)

Englewood, New Jersey—urban redevelopment (1974)

Pottstown, Pennsylvania—urban redevelopment (1976)

Order Form

Please send me the following ULI publications at the below listed prices (½ off regular price). **NOTE: Due to low prices, all orders must be prepaid. Offer expires January 31, 1979. This form must be used for all ½ price orders.**

Quantity	Title	Price
_____	(A01) Air Rights & Highways	$2.00
_____	(A04) Apartment Communities	$2.00
_____	(B08) Business Parks	$3.75
_____	(D01) Density: Five Perspectives	$2.00
_____	(D05) Dollars & Cents of Shopping Centers: 1972	$7.50
_____	(F02) Federally Assisted New Communities	$2.00
_____	(101) Industrial Bibliography	$1.85
_____	(103) Industrial Districts	$4.50
_____	(105) Industrial Potential of the Central City	$3.00
_____	(L04) Land: Recreation & Leisure	$2.00
_____	(M10) Mobile Home Parks: Parts I and II	$2.00
_____	(N06) New Towns Planning & Development	$2.00
_____	(N07) New Zoning Landmarks in PUD	$2.00
_____	(N08) Nine Cities	$2.00
_____	(N11) Optimizing Development Profits	$3.00
_____	(P03) Parking Requirements for Shopping Centers	$2.00
_____	(P16) Prospects for Rental Housing	$1.50
_____	(P17) PUD: A Better Way for the Suburbs	$3.00
_____	(P19) The Puerto Rican Plan	$3.00
_____	(R01) Real Estate Financial Reporting	$2.00
_____	(S02) Securing Open Space	$2.00
_____	(S07) Shopping Center Zoning	$3.00
_____	(S09) Site Value Taxation	$2.00
	Panel Reports	
_____	(A03) Alexandria, Louisiana	$2.50
_____	(B03) Bethlehem, Pennsylvania	$2.50
_____	(C01) Cambridge Center	$2.50
_____	(E04) Englewood, New Jersey	$2.50
_____	(P09) Pottstown, Pennsylvania	$2.50

Amount $ _____
Subtotal $ _____
D.C. residents add 5% sales tax $ _____
Non-U.S. residents add 10% for extra postage $ _____
All purchasers add $1 handling charge $ 1.00
Total Order $ _____

☐ Ship priority mail (First Class or UPS) and bill me for additional postage. Regular delivery takes 4-6 weeks.
☐ Send me a publications catalog

ULI member identification number _____

Name _____ Phone no. _____

Street _____

City, State, Zip _____

Business or Profession _____

☐ Payment Enclosed ☐ Charge to the following credit card:

_____/Exp. Date_____
Master Charge or VISA Acct. No.

Signature _____

Return to:
Publications Orders, the Urban Land Institute
1200 18th Street, N.W., Washington, D.C. 20036

Make check payable to ULI–the Urban Land Institute

Statement of Condition

Statement Required by the Act of August 12, 1970, Section 3685, Title 39, United States Code, showing the ownership, management and circulation of Urban Land.

Published monthly (July-August issues combined) at 1200 - 18th Street, N.W., Washington, D.C. 20036. Statement filed September 29, 1978.

The names and addresses of the Publisher, Editor, and Managing Editor are: Publisher, ULI-the Urban Land Institute, 1200 - 18th Street, N.W., Washington, D.C. 20036; Editor-in-Chief, Ronald R. Rumbaugh, 1200 - 18th Street, N.W., Washington, D.C. 20036; Managing Editor, Frank H. Spink, Jr., 1200 - 18th Street, N.W., Washington, D.C. 20036

The owner is: ULI-the Urban Land Institute, a nonprofit, educational and research organization, chartered under the laws of the state of Illinois, located in the District of Columbia, 1200 - 18th Street, N.W., Washington, D.C. 20036.

The known bondholder, mortgagee, and other security holders owning or holding one percent or more of total amount of bonds, mortgages or other securities are: None.

The above paragraphs include, in cases where the stockholders or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting. Also, the statements in the above paragraphs show the affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner. Names and addresses of individuals who are stockholders of a corporation which itself is a stockholder or holder of bonds, mortgages, or other securities of the publishing corporation have been included in the above paragraphs when the interest of such individuals are equivalent to 1 percent or more of the total amount of the stock or securities of the publishing corporation.

Extent and Nature of Circulation	Average No. Copies Each Issue During Preceding 12 Months	Actual Number of Copies of Single Issue Published Nearest to Filing Date
Total No. Copies Printed	8,500	8,500
Paid Circulation		
Sales Through Dealers and Carriers, Street Vendors and Counter Sales	264	52
Mail Subscriptions	6,884	6,958
Total Paid Circulation	7,148	7,010
Free Distribution by Mail, Carrier or Other Means, Samples, Complimentary, and Other Free Copies	317	321
Total Distribution	7,465	7,331
Copies Not Distributed		
Office Use, Left-Over, Unaccounted, Spoiled After Printing	1,035	1,169
Returns From News Agents	0	0
Total	8,500	8,500

I certify that the statements made by me above are correct and complete (signed)
Ronald R. Rumbaugh
Executive Vice President