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■ LEGAL AND ILLEGAL METHODS FOR CONTROLLING COMMUNITY GROWTH ON THE URBAN FRINGE

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Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe

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CONTENTS

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For other articles by the author in the general area discussed here, see Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality,* 1958 WIS. L. REV. 6; Cutler, *Problems of Urban Growth—Can Local Government Handle Urban Growth?,* 1959 WIS. L. REV. 5; Cutler, *Wisconsin Limits Incorporations,* 49 NAT'L CIVIC REV. 317 (1960).

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I. The Effect of Community Growth Upon Local Taxation

Since 1945 the decentralization of America's metropolitan areas has been proceeding at a rapid pace, which shows no sign of slackening in the early 1960's.[1] The net movement of vast numbers of

[1] The rapid and unplanned growth in the suburbs has been caused by many factors, which have been fully discussed in other articles. In short summary, they are the decentralization of population in our metropolitan centers brought about by such subcauses as the expanded use of the automobile, the post World War II FHA credit for building homes, and the new leisure time which has been made available to people by advances in industry. Other factors which have led to the urban sprawl are the desire of many young couples to live on a larger plot of land and to escape the drab, ugly city neighborhoods. Also, there is the post World War II baby boom which has necessitated a rapid increase in

persons to the suburbs has changed the face of the countryside near our cities. Shopping centers, brand-new residential subdivisions, and new one story factories are strewn across land which was recently vacant. Schools, roads, sewer and water systems, and many other costly improvements had to be built in these new areas.[2] The revolutionary shifts in population have, together with other causes, skyrocketed the expenditures of local government, both in the central cities and the new communities on their outskirts. For example, between 1950 and 1960 municipal and school budgets in the city of Milwaukee doubled, whereas those in Milwaukee county suburbs tripled.[3] The rapid rise in municipal budgets does not mean that metropolitan areas have caught up with the demand for services. If anything, local governments have tended to fall behind in their need for new expressways and sewer and water systems, because they could not be built or financed fast enough to keep up with the rapid moves in population.

II. The Search for Ways to Control Community Growth

From one seacoast to the other, individual municipalities have sought ways and means of controlling the rate and nature of their growth. A few municipalities carefully planned and controlled their growth both effectively and legally. Many communities, acting in desperate haste because of the growing crisis in municipal finance, have adopted measures which they assumed would be effective in controlling growth. However, these measures often proved ineffective or illegal, or both.

Many techniques are so new that their effectiveness and legality remain unproven. Typically, a municipality believes that growth can be controlled by one approach, such as by zoning or subdivision control. Professional land use planners know that a multi-pronged approach would be more likely both to accomplish the desired result and to be upheld in court. However, many of the key decisions along the urban fringe are made, in Wisconsin at least, without professional planning advice or even against it. This article will present a general survey of the comparative legality of many major methods for controlling community growth. If a municipality

dwelling units above that of previous years.

[2] The Southern California Research Council estimated that each family moving into the Greater Los Angeles area in 1958 would, in the following twelve years, require the expenditure of $10,200 for the construction of expressways and roads and $3,090 for all other facilities. Pamona College, The Cost of Metropolitan Growth, (1958).

[3] 48 Citizens' Governmental Research Bureau, Inc. Bull., Report No. 7, Oct. 29, 1960.

wishes to avoid expensive mistakes, the choice of methods should be made only with the advice of a professionally trained planner.[4] His work should then be reviewed by an attorney experienced in municipal law, zoning, and all phases of land use planning.

III. Community Objectives in Seeking to Control Growth

Stated broadly, the legality of a particular technique for controlling growth depends upon the reasonableness of both the objective and the means by which that objective is carried out. The general long range objectives underlying the many different types of control devices are:

(1) To control local property taxes, usually by slowing the rate of increase, by
   (a) maximizing the tax yield to be received from new developments; or
   (b) attracting new development which will minimize the capital and operating municipal costs of serving such development on a per capita basis; or
   (c) controlling new development in such a way as to make it bear a larger than traditional share of the cost of public improvements which are necessitated primarily because of the new development.

(2) To assure that future development maintains the aesthetic concepts of the existing municipality, especially those thought to assure a "rural atmosphere" or certain treasured status symbols, such as houses and residential lots of certain sizes.

(3) To avoid the administrative mistakes and harrassment of local officials where they lack the experience and manpower necessary to cope with abnormally rapid growth.

(4) To maintain the community's existing political or social characteristics. (This objective is often not mentioned in public discussion. It may often be subconscious or submerged in the stated desire to keep houses of a certain size, because the new houses, and their occupants, are therefore likely to be more attractive to the existing residents.)

The foregoing generalized objectives—controlling (1) taxes, (2) aesthetics, (3) the burden of administering rapid growth, and (4)

[4] The relatively new profession of planning is perhaps most closely akin to a cross between landscape architecture and civil engineering. However, land use planning requires the coordination of many professions so that a planning organization will often include persons trained as land use planners, civil engineers, traffic engineers, economists, and political scientists.

the politico-social structure of the community—tend to be transferred into more specific objectives during the discussion preceding the drafting of local ordinances aimed at controlling growth. Or, viewed differently, the specific objective of a particular ordinance may be expressed by the legislators, but in turn may be a form of advancing some combination of the unexpressed general objectives. All of the approximately three dozen different types of local ordinances or policies for controlling growth seem to be directed at achieving one or more of these specific objectives:

(1) To assure that a substantial proportion of the community's land area is developed for industrial and commercial uses instead of residential use.

(2) To assure that residential developments consist of larger size homes on larger size lots. This will produce more real estate taxes per capita, probably less school children per residence, and, in Wisconsin, a larger return per capita to the municipality of its share of the state collected income tax.[5]

(3) To make new residential development bear a larger share of the cost of public improvements which are made necessary by the new development.

(4) To channel growth so that it is
   (a) slowed down; or
   (b) located more logically within the community in terms of the expense and feasibility of providing community services, especially sewer and water.

The comparative legality of varying ordinances can logically be reviewed either in accordance with the specific objective sought to be attained, which we prefer, or in accordance with the manner of approach, such as through zoning, subdivision control, municipal assessment, capital budgeting, building permits, etc.

IV. Ordinances and Policies Seeking to Attract More Industry and Commercial Business to the Municipality

A. Zoning

1. The Suitableness of the Land in General

The first step in attracting more industry to a community is to make certain that land desirable to industry is zoned for that purpose. At the threshold, multiple problems present themselves.

[5] In Wisconsin, approximately 43% of a taxpayer's income tax is "returned" to the municipality where he resides. The percentage has been as high as 50%.

Proper zoning means permitting the particular land to be used for the purpose which is "highest and best" from the point of view of the community as a whole, so long as the use chosen does not (in some states) virtually confiscate the value of the land.

Determining what use is highest and best in the interest of the community as a whole involves complex value judgments, on which opinions can differ. Courts are increasingly inclined to consider such decisions as lying within the prerogative of the legislative branch of the government and subject to reversal only when the zoning is clearly arbitrary.[6] The understandable reluctance of the courts to intervene does not automatically mean that municipalities have generally done as much as they can properly do to zone so as to attract industry. On the contrary, industrial zoning is too often undertaken by local governing bodies on the basis of no advice, amateur advice, or the pressure of neighboring landowners. This frequently results in much unattractive land being zoned for industry while much of the land which would be adaptable for industry is zoned as residential.[7] Some municipalities may have no land which is suitable for industrial development. Vital transportation or utilities may be lacking. In such case, industrial zoning may be so unreasonable as to be arbitrary and therefore invalid.

What is needed, of course, is adequately financed land use studies by trained personnel to discover where the present and potential industrial area lies within the community. The new city of Oak Creek, south of Milwaukee and only 18 percent developed, in recent years engaged land use consultants and thereafter set aside 25 percent of the land area for industry.

2. *The Suitableness of the Stage of Community Development When Industrial Zoning Takes Place*

Unfortunately, the time when industrial zoning is undertaken can, in turn, vitally affect its effectiveness both politically and legally. If large tracts are zoned for industry well in advance of the time of likely development, landowners often subsequently bring political or legal pressure, or both, to change the zoning to residential. The demand for former farm land on the metropolitan fringes is generally made first by residential developers.

[6] State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955); Eggebeen v. Sonnenburg, 239 Wis. 213, 1 N.W.2d 84 (1941); City of La Crosse v. Elbertson, 205 Wis. 207, 237 N.W. 99 (1931). See also 8 McQUILLAN, MUNICIPAL CORPORATIONS § 25.55 (3d ed. 1957).

[7] NELSON-BALL & ASSOCIATES, ANALYSIS, LAND USE AND ZONING 27 (1959), prepared for Land Use and Zoning Committee, Metropolitan Study Commission for Milwaukee County.

The industrial demand often occurs five, ten or fifteen years later. Consequently, the owner may be offered from $1500 to $4000 an acre for residential purposes and have no present offers for industrial use. Often his representatives then persuade the local common council to rezone his land on the basis of hardship (*i.e.*, lost profit) or on the basis that zoning is illegal when confiscatory. Where evidence would show that the property would, within a reasonable time in the future, have a reasonable market for industrial use, a court should uphold the zoning. However, such evidence is difficult to assemble and would always be met by opposing opinion evidence from the broker involved. Furthermore, this question is seldom tested by being submitted to the city attorney or court for evaluation of the legal question.[8]

Zoning for industry in older cities is much more difficult because existing residential development often opposes industry next door and indirectly causes the residential market for the land to exceed a price which is reasonable for industry to pay. Such a price differential alone does not establish that the zoning was not reasonably supported by a comprehensive land use plan for the future development of the community as a whole. If it were, any vacant lot in a dense residential area would be improperly zoned if not allowed for use as a filling station. However, the existence of a price differential is likely to be accepted by a trial court as evidence bearing on the reasonableness of the permitted use for the tract. Also, the differential is apt to provide effective political ammunition in the argument against zoning the land for industrial purposes.

3. The Reasonableness of Quantity of Land Set Aside for Industry

Today, suburbs hard pressed by soaring school costs are increasingly tempted to undertake zoning a percentage of their land for industry which greatly exceeds the present and even the predictable future demand. An appealing argument can be made in legal justification of this practice, but there are certainly other techniques which are legally safer methods for accomplishing the same result. Deliberate overzoning in reality seeks to accomplish two interrelated objectives: (1) to give industry exclusive priority over

[8] Milwaukee county zoned large tracts of farm land in the town of Granville for industrial purposes in 1925 when the land was not in demand for any purpose. The city of Milwaukee annexed the land in 1956 and immediately was subjected to strong political pressure from land owners and real estate developers to rezone some of the land for residential purposes, which it did. The land was well suited for industrial purposes and the city has been losing industry in part because of the lack of large tracts of vacant industrially zoned land.

residential developers in searching for sites satisfactory to them; and (2) to slow down residential development by withdrawing much land from the market. One could argue that such zoning was justified by rapidly rising taxes attributable to excessively rapid residential development which tended to drive industry from the community. Such zoning, however, would be more impressive as to its reasonableness if the ordinance provided for a review of the existing and potential industrial development every five years. This would be with a view to determining whether all industrially zoned areas had, at present, a future potential sufficient to justify continuation of the industrial zoning.

In actual practice, deliberate overzoning as such poses a difficult problem for the landowner desiring to be rezoned for residence. It will be very expensive for him to accumulate evidence showing that the demand for industrial sites in the entire community now exceeds, and in the reasonable future will exceed, the demand for industrially zoned land. Consequently, the landowner is more likely to limit his political and legal case to a showing that his particular land has no industrial market now and is in demand for other uses.

4. Exclusive or Noncumulative Industrial Zoning

A community desiring to attract industry today is apt to forbid residential construction within industrial districts. The construction of residences at random tends to prevent assemblage of large tracts which are needed by modern plants with their one story structure, large parking lots, and room for future expansion. The courts have been slow to recognize the public interest in prohibiting residences in industrial districts. Most recorded decisions hold such exclusive or noncumulative zoning to be arbitrary and invalid.[9] Such reasoning now seems unrealistic in view of the incompatibility of residential and industrial uses side by side. Perhaps, in reality the decisions represent no more than an indirect holding that the land should not have been zoned for industrial use in the first place. It would not appear likely that exclusive industrial zoning in a properly zoned industrial district would be overturned by a court in the 1960's. Judges are not unaware of the profound changes in land use development brought about by the decentralization of

[9] Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956); Corthouts v. Town of Newington, 140 Conn. 284, 99 A.2d 112 (1953); Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955); Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955); Kozesnik v. Montgomery Twp., 24 N.J. 154, 131 A.2d 1 (1957); *cf.* Lamb v. City of Monroe, 358 Mich. 136, 99 N.W.2d 566 (1959).

population and industry and are likely to be increasingly sympathetic to the efforts of hard pressed local communities to solve the resultant problems.

B. Municipal Aid in Developing Industrial Parks

Communities are leaning more and more toward developing industrial parks. In part, they are driven to this by the limitation of industrial zoning as a long range weapon. Too much prime industrial land is rezoned for residential use under political or legal pressure from owners. In some cases, it seems fairer or easier to the common council for the city to buy up sites and hold them for development. Another incentive is that industry will sometimes select a community for a new plant simply because land is quickly available at a good site for a reasonable price. The community has an interest in seeing that plants are not driven elsewhere by the unreasonable demands of local landowners.

How far a city may legally go in assisting development of industrial parks varies from state to state. In Wisconsin, a city may purchase land, install all improvements such as roads, sewer and water, and then sell or lease the land to industry, but may not build and own plants.[10] Cities may also lend money to private nonprofit development corporations, such as are often organized by local businessmen, in order to attract more industry to the area.[11] The availability of improved industrial land and the willingness of the city to permit installment purchases or leasing can be very helpful in attracting industry, and these methods are completely legal in Wisconsin.

The city may not sell land for less than its value, and the sale may not be subsidized.[12] However, there is considerable latitude in the concept of value. Thus a city, in effect, may be able to assemble land and legally make it available to industry at reasonable prices. But the practice in some Wisconsin municipalities of leasing city owned buildings to industry at a nominal rate is clearly illegal.[13]

A city may borrow for the purpose of acquiring industrial sites and installing roads and utilities. In some states, revenue bonds have been used for such borrowing under statutory authority, and the statutes have been upheld against the contention that they were

[10] Wis. Stat. § 66.52 (1959).

[11] Wis. Stat. §§ 66.405-.425 (1959).

[12] Hermann v. Lake Mills, 275 Wis. 537, 82 N.W.2d 167 (1957).

[13] Letter From Robert D. Sundby, former Legal Counsel to the League of Wisconsin Municipalities, to Richard W. Cutler, December 5, 1960.

unconstitutional authorizations of public funds for a private purpose.[14]

C. Tax Assessment Policies Favorable to Industry

Most state constitutions provide that all property shall be assessed at market value. This restriction seems to be a dead letter, except perhaps in New Jersey.[15] Local assessment practices generally give rise to substantial discrepancies between different classes of property, such as industrial, commercial and residential real estate. Variations respecting personal property are even more widespread. Industrially owned personal property in Wisconsin is assessed and taxed in most larger cities, but is often overlooked in some smaller ones. Personal property in residences is generally not assessed, although livestock on farms is assessed. Rising budgets have caused some municipalities to assess industrial real and personal property at a higher percentage of market value than commercial or residential real estate.[16] Such discrimination, if provable in court, is illegal but seldom attacked by local industry. Instead, they limit expansion there and build new plants elsewhere.

Newer tax hungry states and municipalities in the South often give tax freezes for a time. Such direct tax freezes are illegal in Wisconsin, though some Wisconsin communities deliberately underassess industry in order to attract it to locate there. Countywide assessment and better state supervision of assessment would do away with such unfair and illegal competition for industry, and has been proposed by the Metropolitan Study Commission.[17]

Indirect tax relief to encourage industry is available in connection with urban redevelopment. A municipality may by statute freeze for thirty years the assessment on blighted land if the owner submits a municipally approved plan for redevelopment of over 100,000 square feet of space.[18] Such a tax freeze can involve a powerful inducement to redevelopment, but the high cost of land acquisition

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[14] Newberry v. City of Andalusia, 257 Ala. 49, 57 So. 2d 629 (1952); Poole v. City of Kankakee, 406 Ill. 521, 94 N.E.2d 416 (1950); Faulconer v. City of Danville, 313 Ky. 468, 232 S.W.2d 80 (1950); Village of Deming v. Hosdreg Co., 62 N.M. 18, 303 P.2d 920 (1956); Holly v. City of Elizabethton, 193 Tenn. 46, 241 S.W.2d 1001 (1951). Statutes authorizing municipal industrial bonds were held unconstitutional in Village of Moyie Springs v. Aurora Mfg. Co., 353 P.2d 767 (Idaho 1960); State v. City of York, 164 Neb. 223, 82 N.W.2d 269 (1957).

[15] City of Newark v. West Milford Twp., 9 N.J. 295, 88 A.2d 211 (1952).

[16] Report of Revenue Sources and Distribution Committee, Metropolitan Study Commission for Milwaukee County on Property Taxation in Milwaukee County, Apr. 28, 1958, p. 18.

[17] *Ibid.*

[18] WIS. STAT. § 66.406 (3) (c) (1959).

is likely to limit the use of the statute to commercial purposes. Today, industry prefers much larger tracts which can only be assembled inexpensively in the newer, vacant, and therefore, unblighted sections of metropolitan areas.

Municipalities may lawfully favor industry within limits by their policy in assessing for special improvements, such as sewer and water, which are extended to the industrial area. By statute, such assessments are to be based on the "benefit" conferred on the property by the improvement.[19] How benefit is measured is the bane of municipal engineers and attorneys; much discretion is allowed by the courts. Most municipalities assess sewer and water against abutting property at so many dollars a lineal foot. A few by accident or design apply the same policy to industry. Others, like Wauwatosa, charge twice as much per foot for industry as for residence on the theory that industrial users get more benefit. The effect is to distribute a larger proportion of the cost of improvements to industry than would otherwise be the case. Either method would probably be upheld by a court.

D. Comprehensive Planning to Develop Municipal Services Required by Industry

The driest flattest piece of land in the metropolitan area is of no attraction to industry without good highway access and, in most cases, sanitary sewers. It is perfectly lawful for local bodies to favor industry by giving a higher priority to resurfacing roads and extending sewer and water systems in industrial districts, but this discretionary power is often overlooked.

V. Ordinances to Assure That Residential Development Consists of Larger Homes on Larger Lots

There are various methods for trying to control the size and attractiveness of new homes and the lots on which they stand. The five most common are discussed in the following sections.

A. Zoning for Large Minimum Lot Sizes

Governing bodies of municipalities probably turn most often to large minimum lot sizes as their choice of methods for controlling residential growth. They assume that an increase in the required minimum lot size will accomplish one or more of four specific objectives: (1) larger homes having a higher tax value per capita; (2) more attractive setting with green lawns and open space; (3) slower

[19] Wis. Stat. § 66.60 (1) (b) (1959).

development of the community; and (4) maintenance of the established, or thought to be established, superior values of the community against depreciation by the type of resident who would be attracted to a less expensive home. Any legislation believed to accomplish so many fairly basic objectives could be very popular with existing residents. Such popularity not only accounts for the increasing use of such zoning as the chief technique for controlling growth, but also helps explain the widespread court decisions upholding such zoning.

The constitutionality of large minimum lot size requirements has been upheld in at least eleven states,[20] but was struck down in Michigan.[21] Such ordinances have been increasingly under court attack in recent years because of the growing scarcity of land suitable for residential development in metropolitan areas and the substantial increase in market value brought about by decreasing any minimum lot restriction. Indeed, some lower courts have in recent years declared such ordinances invalid on the ground that they exceeded the reasonable limits of the police power, which justifies limiting private property rights in accordance with the need of land use planning for the good of the entire community.[22] Generally, appellate courts have reversed these decisions and adhered to a concept of an almost unlimited zoning power.[23]

The author does not believe that the courts in the next ten years will as consistently uphold minimum lot size requirements. There are several reasons. First, the increasing scarcity of land will increase the price differential per acre between small and large lots. Such differential will lead to more litigation in which the landowner inevitably will become more thorough in his search for facts, planning principles, and law by which he can persuade a court that the restrictions in his case exceed what is reasonable. Second, the effectiveness of large minimum lot zoning in attracting better homes and making the community more attractive is greatly exaggerated.[24] Much land is simply not attractive to that small propor-

[20] VILLANOVA UNIV., ZONING FOR MINIMUM LOT AREA 23 (1959). The most notable opinion was that of Vanderbilt, C.J., in Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952), which upheld five acre minimum zoning in a rural area.

[21] Federation of Livonia Civic Ass'ns, Inc. v. Lewis, 350 Mich. 210, 86 N.W.2d 161 (1957); Ritenour v. Dearborn Twp., 326 Mich. 242, 40 N.W.2d 137 (1949).

[22] Senior v. Zoning Comm'n, 146 Conn. 531, 153 A.2d 415 (1959); Levitt v. Incorporated Village of Sands Point, 6 App. Div. 2d 701, 174 N.Y.S.2d 283 (1958), *aff'd*, 6 N.Y.2d 269, 160 N.E.2d 501 (1959).

[23] *Ibid.*

[24] *The Effects of Large Lot Size on Residential Development*, Technical Bull. 32, Urban Land Institute (1958).

tion of the population possessing the income and desire to build larger than average homes and maintain the grounds attractively. Such zoning in the wrong place tends, in the words of one Chicago planner, to lead to "rural slums."[25] When the myth of the effectiveness of large lot zoning in accomplishing some of its supporters' objectives becomes more widely recognized, and when the disadvantages to the community in increased per capita cost for sewer, road and water systems are appreciated, inevitably counterforces will come into play. For example, "cluster" type permissive residential development[26] is a new idea which demonstrates a way by which a community can stabilize land density, acquire and preserve open spaces for the future, and yet lower the minimum lot size appreciably and with it the cost per capita of sewer, road and water. The compromise cluster type development will be evidence before the courts that open space and aesthetics can be obtained by methods other than large minimum lot zoning. Of course, only experience will tell whether the cluster type development will live up to its proponents' claims and thereby afford an argument for more judicial restraint in upholding large lot zoning when not warranted.

B. Zoning for Homes of a Specified Minimum Size

Although there have been relatively few contested cases, most decisions have upheld zoning requirements that require houses to have a minimum square foot area or cubic footage.[27] However, many existing requirements are stricter than those upheld by the courts. Whether valid or not, they are 100 percent effective in controlling the size of homes.

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[25] Carl Gardner, speaking of Oak Creek, Wis., a new municipality near Milwaukee, The Milwaukee Journal, August 7, 1958, § 1, p. 12, col. 3.

[26] The "cluster" or "planned residential" development allows the developer to divide a large tract into the same number of homesites as would be permitted under existing zoning, but the lot sizes may be appreciably smaller than previously required. In return, the developer agrees to dedicate or reserve for public use or use by the subdivision the open space gained by the decrease in lot sizes. See Goldston & Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241 (1959), and the discussion *infra* at 398.

[27] Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Civ. App. 1948) (minimum floor area 900 square feet); Dundee Realty Co. v. City of Omaha, 144 Neb. 448, 13 N.W.2d 634 (1944) (sliding scale ordinance within discretion of municipality); Flower Hill Bldg. Corp. v. Village of Flower Hill, 100 N.Y.S.2d 903 (Sup. Ct. 1950) (1800 square feet restriction within statutory discretion of village); Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952) (ordinance applying throughout township provided for living floor space of: 768 square feet for one story dwellings; 1000 square feet for two story dwellings with attached garage; and 1200 square feet for two story dwellings without attached garage). *Contra*, Medinger Appeal, 377 Pa. 217, 104 A.2d. 118 (1954).

The earlier cases reasoned that minimum house size requirements for the purpose of avoiding excessive crowding were justified under the police power as measures for the protection of public health and welfare. However, the courts do not discuss the obvious fact that crowding will not necessarily be avoided by these requirements because families vary in size.[28]

Probably, courts increasingly consider, even inarticulately, that minimum house and lot size are interrelated and that both are justified by a reasonable relationship to aesthetic values such as protecting community appearance. Often the underlying aim may be the exclusion of smaller houses because they (1) contribute less per capita to the tax base than larger ones; (2) are today often less attractive in appearance and less well maintained; and (3) are occupied by low income families who are believed by existing residents to detract from the community in many ways,[29] including an eventual lowering of the quality of instruction in the public schools. Preserving the tax base and aesthetics are probably valid objectives within limits. However, it is doubtful whether exclusion of low income families for social reasons would be considered by courts as within either the constitutional power of the legislature or the spirit of the zoning power which the legislature conferred on local municipalities. Yet, minimum house size restrictions can be viewed by the courts as being aimed at the more palatable standards of preserving the tax base and aesthetics.

The frequent use of sliding scale requirements, which require a larger house on larger size lots, demonstrates that the underlying motive behind the larger minimums cannot be prevention of overcrowding. As the Pennsylvania court said in *Appeal of Medinger*,[30] the protection of health would justify only one uniform minimum requirement. However, the majority of the courts view the sliding scale requirement as being justified by the protection of property values and community appearance.[31]

C. Strict Building Codes

Building codes often require the use of materials which make homes more expensive than the reasonable use of modern building

[28] See Haar, *Township of Wayne: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986, 987 (1954), in which the author favors drafting the minimum house size in terms of occupancy.

[29] Builders sometimes characterize these ordinances as being motivated by "snob appeal." The Milwaukee Journal, Dec. 6, 1960, § 1, p. 28, col. 1.

[30] Medinger Appeal, *supra* note 27.

[31] See discussion at note 27 *supra*.

methods would require. Often the codes are simply rendered obsolete by changes in materials and methods. Sometimes, however, they are deliberately used so as to bar prefabricated houses, or avoid the unsightly appearance of concrete exteriors. Just how far an ordinance can legally go in increasing the cost of houses for exclusionary or aesthetic reasons is difficult to say. A Wisconsin circuit court has upheld as reasonable, the requirement in a building code that the exterior of all dwellings be surfaced in natural stone, brick, wood, or stucco, and that concrete walls be veneered in masonry materials or stucco. The aim was to prohibit concrete block surfaces.[32]

D. Requirement of a Garage on Every Lot

Municipalities sometimes specify in the zoning ordinance that a garage be built with every house, or that no more than one car be regularly parked on a residential lot outside of a garage. Such ordinances are probably right on the borderline of legality. It is doubtful that there is a reasonable relationship between garages and car thefts, but there might be some reasonable relationship with aesthetics and the effect on neighboring property values. *Sub silentio,* such restrictions are also intended to inhibit the low cost developer and low income family.

E. Aesthetic Control Over the Design and Layout of New Residences

The quintessence of case by case regulation of the appearance of new residences is the nationally famous Fox Point ordinance which was upheld in 1955, and has since been widely copied in other Wisconsin municipalities.[33] The Fox Point provision was not in the zoning ordinance, as has been widely believed, though it might logically have been. The ordinance provided that the architectural design and layout of all new structures would be submitted to a building board for approval. That board, presently consisting of four architects and one layman, would reject the application for a building permit if the exterior architectural appeal or layout was such as to cause a substantial depreciation in the property values of said neighborhood.[34]

There is very real practical limitation on the legal power to control design by this device. If a large enough fraction of the general

[32] State *ex rel.* Shelstad v. City of Brookfield, Circuit Court, Waukesha county, Wis., Sept. 19, 1956.

[33] State *ex rel.* Saveland Park Holding Co. v. Weiland, *supra* note 6.

[34] *Id.* at 271, 69 N.W. 2d at 223.

public is not offended by what others regard as ugly design, the market value of neighboring properties remains unaffected. Public taste is actually the legally determining factor and it is not synonymous with superior taste. For that reason, and many others, the ordinance has been difficult to administer. Legislating taste has often been said to be impossible and even this ingenious case by case experiment does not seem to have been as effective as the residents of Fox Point (including myself) would desire. The Fox Point decision has been cited elsewhere,[35] but no similar ordinance has been reviewed by the appellate court of any other state.[36]

VI. Ordinances Requiring New Residential Construction to Contribute a Larger Share of the Cost of Public Improvements Which Are Made Necessary by the Construction

Rapid residential development creates the need for substantial public improvements both immediately and later. The need also occurs both "on site," that is, within the new subdivision itself, and "off site," or some distance away from the actual development. The statutes in most states permit at least the cost of on site improvements to be charged either to the developer, the new homeowners (through benefit assessments), or to the entire community. However, the general practice in an area of rapid growth is to insist that an increasingly higher proportion of both on site and off site costs be borne by the developer, and in turn passed on to the new home buyer for whom such improvements are created. Rapidly growing municipalities also learn through experience that it is cheaper and less troublesome if the city requires all or most of the improvements to be installed at the time of development rather than ripping up the streets every few years to install yet another utility. The legality of the various methods for requiring the developer to pay for the public improvements serving his land depends not only on the reasonableness of the quality of the required improvements and the degree of its use by future inhabitants of the developer's land, but also on the form which the ordinance takes. Because form is important in determining validity, the alternative methods will be dis-

[35] Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E. 2d 557 (1955); Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955); Best v. Zoning Bd. of Adjustment, 393 Pa. 106, 141 A.2d 606 (1958).

[36] New Jersey invalidated an ordinance prohibiting flat roof dwellings and any architectural style not in conformity with "Early American" on the grounds that the regulation was arbitrary. See Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 150 A.2d 63 (1959).

cussed according to the form which they take. There are four major forms of control:

(A) subdivision control ordinances requiring improvements clearly on site in nature;

(B) subdivision control ordinances requiring *dedication of land* for parks and public spaces which conceivably serve both residents of the subdivision (on site) and other persons as well (off site);

(C) ordinances requiring *payment in cash* toward cost of parks, school sites, storm sewers, etc., which often are partly off site and partly on site in nature; and

(D) negotiated dedications of land or payments in cash as a condition to plat approval, but not in conformity with any requirements which are written into the subdivision control ordinance.

A. Subdivision Control Ordinances Requiring the Developer to Install at His Expense Public Improvements Which Are in the Street or On Site

Statutes in most states permit municipalities to require developers to install prescribed public improvements as a condition for the approval of the plat of his subdivision.[37] A survey of 95 rapidly growing municipalities in 16 counties in the three state New York region in 1952 disclosed that a majority required the developer to pay the entire expense for installing streets, curb and gutter, sidewalks, water mains, sanitary sewers, and storm water drains. But the municipalities in a majority of the cases paid for fire hydrants, street lights, street signs, and street trees.[38]

In the metropolitan Milwaukee area, the number of municipalities requiring the developer to install or pay for an ever longer list of public improvements increases each year. Such ordinances sharply increase the initial cost of home ownership in new subdivisions by charging now for public improvements which would otherwise be built later and generally assessed against the homeowners. The adoption of strict requirements for the installation of improvements by the developer can as much as double the cost of improved lots and thereby indirectly slow down growth, espe-

[37] WIS. STAT. § 236.13 (2) (1959): "(a) . . . any public improvements reasonably necessary . . . (b) . . . sewerage, water mains and laterals, grading and improvement of streets, alleys, sidewalks and other public ways, street lighting or other facilities designed by the governing body. . . ."

[38] Regional Plan Bull. No. 79, March 1952, Regional Planning Association, Inc., New York, New York.

cially in less attractive land.[39] In some cases, the ordinances are deliberately made unreasonably severe in order to discourage residential development.[40]

There is little direct authority regarding the validity of such requirements.[41] Probably, they are accepted as valid when the number and quality of improvements appear reasonable in the light of soil conditions, terrain, zoning, the level of services provided by the community, and the character of previous development in the community. Where the requirements are excessive in relation to these other factors, and they sometimes are, the author believes the regulations to be capricious and illegal. Even though the statutes permit the municipality to require developers to install improvements at their expense, the courts should and probably would hold that the statute implies that improvements must have some reasonable relationship to the community needs.[42] Thus, paved streets, curb and gutter, and sidewalks would be reasonably needed to serve small lots, but would not in many cases be needed for lots an acre or more in size. In fact, some courts might consider either the improvement requirements or the large lot zoning requirements to exceed the extreme reach of the police power where the two requirements together unreasonably prevented the sale and development of land. These requirements are seldom challenged in court, probably because of the cost of assembling the comprehensive proof necessary to prove unreasonableness. However, legislatures are being asked increasingly to transfer the power to zone or control subdivisions from the local municipality to the county, region or state. Thus far, the legislatures have only rarely heeded these requests, but that situation may change in the 1960's if the arbitrary use of these great twin powers of local municipalities should increase.

B. Subdivision Control Ordinances Requiring Dedication of Land for Parks and Public Spaces

Decisions on the legality of required dedications or reservations

[39] The highest rate of development in the New York region took place in Nassau county, Long Island, which had very demanding requirements. This appears to refute the notion that strict regulations will invariably prevent community growth. Regional Plan Bull. No. 79, *id.* at 2.

[40] Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298 (1955).

[41] Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952); Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28 (1958).

[42] For one of the best and most comprehensive subdivision control ordinances, see the one adopted in Santa Clara, California, in American Soc'y of Planning Officials, Planning Advisory Service Special Report, December, 1959.

of land for parks and other public uses other than streets, are as scarce and confusing as are the statistics concerning the prevalence of such ordinances throughout the country. New York[43] has upheld compulsory dedication requirements as legal, but decisions in other states upholding dedication have done so on the rationale that the particular dedication was voluntary and would have probably been illegal if compulsory.[44] Decisions in one state are not too helpful in another state because each decision turns on the text of the enabling act and the state judicial policy toward the usual constitutional provision prohibiting the taking of property without just compensation, as well as the text of the particular ordinance and the relative need for parks or other public sites in the particular municipality.[45]

The Wisconsin enabling statute is more liberal than many and appears to authorize the required dedication of land for public sites.[46] Section 236.13 (2) (b) of the Wisconsin statutes permits:

> [A]ny city or village . . . [to] require . . . [as a condition for plat approval] that designated facilities shall have been previously included without cost to the municipality . . . such as streets . . . sidewalks . . . street lighting and other facilities designated by the governing body. . . .

Also, section 236.45 (2) delegates the power to enact subdivision control ordinances to carry out the legislative intent of chapter 236. Such intent is specified in section 236.45 (1) as including provisions intended "to facilitate adequate provision for transportation, water, sewerage, *schools, parks, playgrounds and other public requirements.*" (Emphasis supplied.) Probably, but less certainly, these statutory provisions impliedly authorize the charging of fees in lieu of land dedication. These fees would be used for schools, parks, and other public purposes necessarily related to the development in question.

However, even if some dedications of land or levying of fees in lieu of land would come within the scope of the Wisconsin statutes, there is always the question whether the particular ordinance represents a reasonable exercise of the police power and is thereby consti-

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[43] *In re* Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y.S. 809 (Sup. Ct. 1931) *aff'd mem.*, 235 App. Div. 627, 255 N.Y.S. 853 (1932).

[44] Fortson Inv. Co. v. Oklahoma City, 179 Okla. 473, 66 P.2d 96 (1937); Maisen v. Maxey, 233 S.W.2d 309 (Tex. Civ. App. 1950).

[45] See Reps, *Control of Land Subdivisions by Municipal Planning Boards*, 40 CORNELL L.Q. 258 (1955), for a comprehensive survey of the decisions.

[46] Legal Opinion by Robert D. Sundby, former Legal Counsel to the League of Wisconsin Municipalities, Information Bull., Jan. 8, 1959.

tutional. Many ordinances now in existence probably are not constitutional.

The constitutional issue in Wisconsin and elsewhere is this: Is compulsory dedication of land an unconstitutional "taking without just compensation" or is it, in the light of the facts of each case, a reasonable exercise of the police power incidental to the owner's request for authority to dedicate future public streets and thereby open up his land for sale? Courts have long held that compulsory dedication of land for streets was not a taking without just compensation because the landowner

> . . . is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.[47]

The reasoning which applies to streets would logically apply to parks and other public sites so long as there is a reasonable relationship between the quantity and location of land to be dedicated without compensation, and the use of such land by the future inhabitants of the subdivision. The New York court has classified dedication for park purposes with dedication for streets.[48] But the generally more conservative Pennsylvania court has considered parks to be less necessary than streets and, therefore, not subject to the same requirements for dedication or reservation.[49]

Assuming the validity of a properly drafted requirement for dedicating lands for parks and other public purposes, just how is such an ordinance drafted? In theory, the most scientific way to relate the quantity of land to be dedicated to the need for the use of such land would be to require a land use analysis of the particular needs of each subdivision relating to parks, school facilities, storm water drainage, etc. Such a flexible provision is expensive, time consuming, and subject to abuse by overzealous or uninformed officials. Much more common is the arbitrary requirement that some definite percentage, such as 5 or 10 percent, of the land area be dedicated for such purposes.[50] Such arbitrary provisions do not necessarily coincide with the needs of the particular subdivision in two respects. First, the density of use varies in direct proportion to

[47] Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949), and cases cited therein.
[48] *In re* Lake Secor Dev. Co., *supra* note 43.
[49] Miller v. City of Beaver Falls, 368 Pa. 189, 193, 198, 82 A.2d 34, 36, 38 (1951).
[50] See *Dedication for Public Sites and Open Spaces*, League of Wisconsin Municipalities Information Bull., Oct. 3, 1956.

the need for land for public purposes. The more inhabitants per acre, the larger percentage of total area needed for parks, schools, and lift stations. Second, not every subdivision contains a suitable site for any public facility. Usually, land for a park or school or other public site will serve several new subdivisions.

It is most unscientific to take a flat percentage of each subdivision for public land. It would be far more logical to require, as is being done more and more, a cash contribution which would be designed to defray that part of the cost of the public sites required to serve the particular subdivision. For this reason, it is probable that some courts will strike down the flat percentage requirement as too arbitrary a method for measuring the land needed for public sites for the inhabitants of the subdivision.[51] On the other hand, courts might uphold the flat percentage requirement on the same basis as they have upheld the validity of assessing the benefits from sewer and water systems in terms of so many dollars for each and every lineal foot. The front foot assessment and the flat percentage of land area method are both very simple and popular methods for computing a highly flexible and complex relationship between a public improvement and the relative benefit which a particular parcel of land derives from it.

An ordinance which avoids in large part the weaknesses of the flat percentage of area approach is one which: (1) requires a specific amount of land, or its cash equivalent, to be dedicated for each homesite, the percentage being based on a professional survey of the needs of the particular community; (2) allows a developer to ask for a specific determination as to his property by the planning board, which would have the power to vary the ratio of land required according to the needs of the particular subdivision as determined after investigation and hearing; and (3) requires a developer to dedicate the required number of acres if the city's master plan shows a site of that size or larger within his proposed subdivision, otherwise to dedicate the cash equivalent of such land to the city.[52]

C. Payment in Cash Toward Cost of Parks, Public Sites, School Sites, etc.

Land use planners and developers agree that the dedication of a

[51] Pennsylvania has done so, but Mr. Dennis O'Harrow, Executive Director of the American Society of Planning Officials, believes that compulsory dedication will be upheld by the courts in the next decade. Municipal Law Service Letter, American Bar Association, Jan. 1960, p. 7.

[52] Such an ordinance was adopted by the city of Brookfield, Wisconsin, in 1959.

sum of money reasonably calculated to defray the cost of the subdivision's proportionate share of public sites required to serve the subdivision, is more satisfactory than requiring the dedication of land in each subdivision. The latter leads to a hodgepodge of municipal holdings many of which are too small or wrongly situated for the purpose which they were intended to serve. However, both the legislatures and the courts have thus far been more willing to accept the idea of dedicating land worth x dollars than of donating x dollars.[53] Perhaps dedicating land for parks seems more akin to dedicating land for streets.

However, when the matter is more clearly presented to legislatures and courts, it appears inevitable that the levying of fees will be upheld, if fairly done. The New York Legislature, in 1959, expressly authorized towns to require as a condition for plat approval a payment to the town of an amount to be determined by the town board for neighborhood park, playground, or recreation purposes. However, the statue was drawn too broadly and was declared unconstitutional on January 20, 1961.[54] Until such clarifying legislation and court decisions take place, compulsory donation by so many dollars an acre or lot stands less chance of being upheld in Wisconsin and elsewhere than the dedication of land for such purposes. This is especially true where the draftsman attempts to anticipate history by providing, as in the case of the village of Menomonee Falls, Wisconsin, that a percentage of the fees be turned over to the local school districts for school purposes.[55] The larger the fees and the less clear the relationship between the subdivision's inhabitants and the purposes for which the fees will be used, the more likely that a court will characterize the collection of fees as an unlawful fund raising or taxing device.

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[53] Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

[54] Gulest Associates, Inc. v. Town of Newburgh, No. 696, Orange Co. Sup. Ct., N.Y., Jan., 1960, declared NEW YORK TOWN LAW § 277 unconstitutional on two grounds: (1) the statute permitted the funds paid by a developer to be used for parks and recreational facilities anywhere in the town and thus compelled the developer to pay more than his share toward such facilities; and (2) the lack of specific legislative standards to guide the town board in establishing and spending the monies collected in lieu of land. Corrective legislation will be introduced in the New York Legislature. Letter From Hugh R. Pomeroy, Commissioner of Planning, Westchester county, N.Y., to all towns in Westchester county, N.Y., Feb. 1, 1961.

[55] Counsel for the League of Wisconsin Municipalities considered such ordinances probably unconstitutional. Legal Opinion by Robert D. Sundby, *supra* note 42. In the author's opinion, clarifying legislation or an imaginative and well-documented presentation to the court of the planning reasons for fees instead of land would probably persuade a court that the fee approach can, if fairly applied, be constitutional.

D. Negotiated Dedication of Land or Payments in Cash as a Condition of Plat Approval but Not as Part of an Ordinance

In many municipalities, the governing bodies seek to mete out what they consider rough justice by asking developers, as a condition to plat approval, to make concessions which are not required by any written ordinance. Concessions vary from contributing $100,000 toward a school building, to deed restrictions guaranteeing houses of a size larger than required by the zoning ordinance. The lack of written standards as a guide to platting requirements leaves the door open to discrimination and abuse. For this reason, section 236.13 (3) of the Wisconsin statutes expressly provides that no municipality "shall condition approval upon compliance with, or base an objection upon, any requirement other than . . . ." a zoning, subdivision control, official map, or other relevant ordinance. Requiring concessions in accordance with the vague discretionary powers of the governing body would in most cases violate due process, and since the enactment of section 236.13 (3)[56] would violate the statute as well.[57] Some subdivision control ordinances adopted since the enactment of section 236.13 (3) attempt to give to the governing body wide latitude to exact concessions. Where too broad, the ordinances probably violate the statute and the due process requirement that legislative power cannot be delegated, but must be set forth in standards sufficiently definite to permit reasonable ascertainment by landowner and administrator alike.[58]

VII. Policies Seeking to Channel Residential Growth So That It Is (A) Slowed Down or (B) Located More Logically in Terms of the Expense and Feasibility of Providing Community Services, Especially Sewer and Water

Naturally, all of the types of ordinances,[59] which require developers to contribute or underwrite a large share of the cost of capital improvements, can have the indirect effect of slowing residential development. Other types of ordinances, however, have been aimed directly at slowing residential growth. They seek that result in a variety of ways. Some attempt to limit the issuance of building

[56] Wis. Laws 1959, ch. 570.

[57] See Editorial in Zoning Bulletin No. 93, Sept. 1959, Regional Plan Association, Inc., New York, N.Y., attacking the concept of rezoning by contract with property owners.

[58] Smith v. City of Brookfield, 272 Wis. 1, 74 N.W.2d 770 (1956); Town of Caledonia v. Racine Limestone Co., Inc., 266 Wis. 475, 63 N.W.2d 697 (1954).

[59] See Part IV, *supra* at 374.

permits, some purchase land so as to take it off the market, others juggle taxes so as to lighten the load on vacant land, many try to zone against too many homes per block, and still others choke development by stringent requirements for subdividing land. The variety of attempts to channel or throttle growth is virtually endless, but the following fourteen examples are fairly representative of the major techniques, and the principles by which their legality will be determined.

A. Control by Limiting the Number of Building Permits

1. By a Quantitative Quota

The town of New Castle in Westchester county, New York, adopted an ordinance in 1956 which limited the number of building permits to a sliding mathematical formula. The New York Supreme Court, in *Albrecht Realty v. Town of New Castle,*[60] invalidated the ordinance on the dual grounds that the New York statute did not authorize "a direct regulation of the rate of growth,"[61] and that the ordinance violated the constitutional prohibition against taking property without just compensation. The opinion noted that any statutory delegation of power to control growth would be incidental to regulations made in accordance with a comprehensive plan. The court found nothing in the record to connect the flat regulation with a comprehensive plan, and added that the record showed no emergency demanding the exercise of the constitutional police power so as to limit building permits. Most courts probably would concur with the New York court in this result.

2. By Imposing a Large Fee for Building Permits

Any attempt to levy unusually large fees for building permits will generally be viewed by the courts as an unauthorized effort to raise general revenues in the guise of the valid collection of fees to defray the approximate cost of administering the issuance of building permits. In 1959 a proposed $500 building permit fee in a Waukesha county village was declared invalid on that ground by counsel to the League of Wisconsin Municipalities.

3. By Imposing a Moratorium on the Issuance of Building Permits

Courts sometimes uphold a moratorium on the issuance of build-

[60] Albrecht Realty Co. v. Town of New Castle, 8 Misc. 2d 255, 167 N.Y.S.2d 843 (1957).

[61] *Id.* at 256, 167 N.Y.S.2d at 844.

ing permits where undertaken during the drafting of a zoning ordinance.[62]

B. Controls by Buying up Property

1. By the Purchase of Land in Fee Simple

Although seldom invoked, a very direct method of controlling residential growth is for the municipality to buy up vacant land and remove it for a time from the reach of developers. The interest on public funds borrowed for this purpose would often be less than the increase in public expense caused by the deficit between public revenue and public expense which accrue from new residential development. The validity of such purchases depends upon whether the policy is considered to further a public purpose. In Wisconsin and elsewhere, municipalities are held to be limited by implication to functions which are public in nature, but the judicial tolerance of public purpose has noticeably broadened in recent years.[63] Thus, purchase programs should be legal if adopted pursuant to a well conceived comprehensive plan for the community.

2. By the Purchase of Development Rights

A relatively new idea, thought to have originated in California, is for the municipality to purchase only the development rights to the land. Such a purchase accomplishes several results: (1) it prevents development of the land; (2) saves part of the expense of complete purchase; (3) leaves the farmer or other owner in possession and free to continue the previous use of the open land; and (4) legally justifies assessing and taxing the owner at less than would be the case if he retained the right to develop his land. Apparently, many persons consider that the purchase of development rights will be furthered legally and politically by the adoption of enabling legislation. Such purchases are usually found only after enabling legislation has been adopted. However, the purchase of development rights would appear valid so long as undertaken pursuant to a reasonable comprehensive plan, and not chaotically or for the personal gain of political friends.[64]

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[62] Miller v. Board of Pub. Works, 195 Cal. 477, 234 Pac. 381 (1925). See Annot., 136 A.L.R. 844 (1942). *Contra,* Matter of Tappan Zee Bldg., Inc., Sup. Ct., Winchester county, N.Y., N.Y.L.J., Apr. 30, 1959.

[63] See Mills, *The Public Purpose Doctrine in Wisconsin,* 1957 WIS. L. REV. 40, 282; State *ex rel.* Evjue v. Seyberth, 9 Wis.2d 274, 101 N.W.2d 118 (1960); and Note, 12 STAN. L. REV. 638 (1960).

[64] Of course, state governments, as distinguished from municipalities, have for a long time used the easement device to protect scenic vistas or the banks of

C. Lower Assessment for Farm or Vacant Land

Rising taxes against vacant or farm land naturally stimulates the owner's decision to sell. In a predominantly residential community, each sale of vacant land to a developer further increases the spiral of rising demands for schools and services followed in turn by rising taxes. Many communities soon learn that development and taxes can both be controlled somewhat if tax assessments on vacant land are kept low. Most state constitutions explicitly require that all real estate, whether improved or unimproved, be assessed at market value. However, in actual practice vacant lands are often assessed as low as 25 percent of the level of assessment applied to improved property. Although illegal, the discrimination is seldom attacked. Sometimes the underassessment is caused by the steady appreciation in real estate values and a long time lag in the local assessor's reassessment of real estate. Often, the discrimination is deliberately undertaken in order to assist cash-poor owners of vacant land in withstanding the pressure to sell to developers. The legislature has authorized discrimination in one limited analogous area, the deferring for ten years of assessments for special improvements where the owner is not required to use the improvements.[65] Otherwise, the installation of city sewers in front of vacant land often forces the owner to sell the land in order to pay the front foot special assessment.

D. Tax Abatement for Vacant Land

Methods for legally lowering the assessment on vacant land are being discussed more and more. Maryland has recently amended its constitution to permit farm land to be assessed in accordance with its use rather than its market value. Professor Charles W. Elliott of the Harvard School of Architecture introduced a bill in the Massachusetts Legislature which would allow owners of vacant land to procure a substantial abatement of their taxes, provided: (1) the community agreed that the public interest would be served by keeping the tract undeveloped; and (2) the owners agreed to pay up all the abated taxes if and when he or a successor owner develops the land.[66]

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trout steams from destruction through residential or other development. The Wisconsin State Highway Commission has been purchasing scenic easements along the Mississippi River since 1953 and New York State has bought easements along trout streams since 1935, both at the low cost of approximately $650 a mile. The Milwaukee Journal, March 19, 1961, § 2, p. 16, col. 1.

[65] WIS. STAT. § 66.605 (1959).

[66] Bill No. 1681 Mass. H. Rep. (1958).

E. Zoning to Inhibit Development in Special Areas or for a Period of Time

The zoning requirement of a large minimum lot size, discussed above, is the best known and most popular method for channelling residential growth. However, there are countless other zoning techniques which are directed toward the same objective. A few are discussed in the following sections.

1. Zoning for Semipublic or Recreational Use

Golf clubs are frequently driven off land by rising taxes, as assessment must be according to the market value of the land. Usually, the club site would be worth more as a subdivision site than as a golf course. To avoid this, golf courses are often illegally, but wisely, underassessed; but litigation in the San Francisco region has led to a more legal approach to the same result. There, a golf course was rezoned for recreational purposes only and the lower assessment then justified on the ground that residences were prohibited.[67]

2. Zoning Against Development for a Period of Time

a. Insincere Zoning of Entire Municipality for Agricultural or Large Minimum Lot Size Use. At the first impact of the outward urban development, communities often react quite directly, simply, or primitively in their desire to check growth. In Waukesha county and elsewhere, officials have been known to zone an entire town for agricultural use without having any sincere intention of excluding commercial or residential use. This was done to enable the granting or denying of petitions for commercial or residential zoning according to the nature of the proposed development and the possible effect upon taxes. Spot zoning of the most illogical type has resulted and either the original zoning or the pattern of spot zoning, or both, might well be considered to be illegal because based on no comprehensive plan. However, this type of an indirect freeze on development can be defended where it is based on a comprehensive plan, on the ground that the comprehensive plan must consider the impact of the tax rate occasioned by excessively rapid development.[68]

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[67] Actually, many decisions in eminent domain cases hold that market value is influenced by the probability that the zoning would be changed at the owner's request. See decisions cited in Zoning Bulletin No. 86, Dec. 1957, Regional Plan Association Inc., New York, N.Y. However, the California approach is more legally sophisticated than the fairly frequent deliberate underassessment.

[68] See American Society of Planning Officials Newsletter, Nov. 1960, p. 4, *re* Holding Zones.

b. Zoning in Stages. Clarkstown, New York, has pioneered with a more rational approach toward deliberate gradual shifting of zoning districts from low density use to higher density use. Clarkstown's ordinance, which has been upheld as valid,[69] anticipates that some proportion of the land now zoned for 40,000 square foot tracts will be rezoned periodically into 22,500 square foot residential lots. The objective is to control timing. The ordinance now determines the area which in the future will be rezoned for residential use, but withholds much of such zoning until a later date. In contrast, the more primitive approach would zone the entire town for agricultural purposes, without ever studying which area should best be rezoned so as to permit development.

c. Zoning the Urban Services Area. Another bold approach toward channelling residential growth is the concept of an urban services area such as that employed by Ladisloe Segoe & Associates in Oconomowoc and other Wisconsin cities. This approach was recently upheld by a lower court in Kentucky. There, planners noted that municipal expenses rose on a per capita-per acre basis as costly services, such as sewer and water systems, were extended either to less suitable terrain or to excessive distances from central points. The leapfrog chaotic spacing of subdivisions from one hillside to the next imposed fantastic costs when pollution required the extension of sewers across vacant land to isolated subdivisions. To solve this problem, Ladisloe Segoe designed an urban service area within which future development will be confined. The remainder of the community will be zoned against development at least until the urban service area has developed to nearly the population which the zoning permits it to accommodate. The urban services area is the area which planning shows to be most adaptable to the extension of streets, sewer, water, and all the municipal services relevant to the comprehensive plan. In *Provincial Dev. Co. v. Webb,*[70] the owners of a farm two-thirds of which lay outside the urban services area sought to have their land rezoned from agricultural to residential use. They contended that the subsequent denial of the rezoning was unconstitutional because the action was arbitrary and diminished the property value. The court upheld the denial on the grounds that it was sustained by a plan for the "coordinated, adjusted, and harmonious development of the . . . county."[71]

[69] Josephs v. Town Bd., 198 N.Y.S.2d 695 (Sup. Ct. 1960).
[70] Circuit Court, No. 7973, Fayette county, Ky., Oct. 20, 1960.
[71] *Ibid.*

F. Zoning for Cluster Subdivisions or Planned Residential Development

Currently, possibly the most publicized and popular new idea for channelling growth is the cluster subdivision or planned residential development concept. Under this concept, the zoning ordinance permits the governing body to approve subdivision plats which maintain the density of persons per acre permitted in the applicable residential zoning district, but which depart very substantially from the usual ordinance's strict requirements for minimum lot size. In effect, the developer is permitted to group his lots in a cluster, leaving considerable land which can be preserved as open space either by outright dedication to the municipality or controlled leasing to a semipublic use. The community gains by the preservation of open space and the improvement in subdivision design. This will result when the developer is freed from the economic motivation to divide all the land into lots, regardless of natural beauty, terrain, drainage and vegetation. The developer gains by reducing his costs per lot, for road, sewer, and other on site or in the street improvements.

The cluster subdivision concept is still in the experimental stage. Perhaps its proponents' hopes concerning its potential as a planning tool will not be realized. However, it is legal beyond any doubt. The spiralling cost of land and subdivision improvements and the growing appreciation of the community's interest in preserving open space assures a rapid increase in the use of this new device. However, there exists a possibility that a city's willingness to reduce lot sizes in a planned development could jeopardize the reasonableness of an original large lot requirement.

G. Prohibition of Subdividing Unless School Facilities Are Adequate

Often as much as 75 to 90 percent of local taxes are appropriated for schools. Therefore, it is not surprising that fringe municipalities have often tried to prohibit new subdivisions on the ground that the local school facilities were not adequate to cope with an influx of new families. The legality of any such regulation has often been challenged by developers. Certainly, this prohibition in many of its alternative forms is illegal. However, there are increasing indications that professional planners, the courts, and the legislatures believe that the power can be reasonably exercised, and, therefore, is or should be made legal under certain circumstances. Where a municipality rejects a proposed plat because the development

would overburden schools, and there is no express standard provided in the local ordinance for such rejection, then the rejection is probably illegal in most fact situations.[72]

Where the local ordinance expressly authorizes the governing body to consider the adequacy of school facilities, the legality of a rejection would turn on: (1) whether the state statute expressly or impliedly authorizes the local government to so legislate;[73] (2) whether the statutory grant is justified by the constitutional police power; and (3) whether the governing body acted reasonably in the instant case. Reasonableness in a given case might be equated by the courts with the adoption of a comprehensive plan and an unbiased and consistent administration of such plan by the local authorities.[74]

The fact that a municipality does have an absolute duty to provide schools does not, in the opinion of a lower New York court, "bar it from the right to reasonably regulate and control the density of population in specified districts in the interest of public welfare and to avoid unnecessary hardship to individuals and taxpayers."[75]

Some municipalities provide that a stipulated payment to the school authorities shall constitute proof that the school facilities

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[72] Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954).

[73] New York does so expressly: N.Y. TOWN LAW § 263. Wisconsin probably does so impliedly, see WIS. STAT. § 236.45 (1) (1959) which recites that its purpose is, *inter alia*, "to facilitate adequate provision for . . . schools . . . and other public requirements. . . ." WIS. STAT. § 236.45 (2) (1959) states that any municipality with a planning agency is authorized to adopt subdivision ordinances which are more restrictive than WIS. STAT. ch. 236 (1959).

[74] Greenfield, Wis., Ordinance #36, "Regulating the Division and Platting of Land," provides as follows in Section 7. C.: "The owner or subdivider shall, at the time of submitting a plat for approval, offer proof as to the name of the school district or school districts in which the subdivision is to be located, and shall also present proof that adequate school facilities at grade school level are, or will be, available to provide for the educational needs of the potential number of families that will occupy such subdivision. . . ." The legality of this ordinance is now being challenged in the Circuit Court of Milwaukee county by a developer. Milwaukee Sentinel, March 16, 1961, § 1, p. 5, col. 1-2.

Racine County, Wis., Subdivision Control Ordinance No. 78-S, states:

> "The owner or subdivider, at the time of submitting the plat for approval shall offer proof as to the name of the school district or districts in which the subdivision is to be located, and shall also submit proof in one of the methods hereinafter specified that by virtue of the fact that the subdivision is to be located in such school district or school districts, adequate school facilities at grade school level are or will be available to provide for the educational needs of the potential number of families that will occupy such subdivision."

An action to contest the validity of this provision was commenced in the Circuit Court for Racine county not long after its enactment. But it was compromised with the subdivider agreeing to pay a certain amount of money to the affected school district as and when his lots were sold. Letter From Racine county Corporation Counsel to Richard W. Cutler, Nov. 17, 1960.

[75] Josephs v. Town Bd., *supra* note 69, at 699.

are adequate.[76] Such a provision is subject to the considerations previously discussed in connection with a requirement of paying a fee to the school district at the time of platting.[77] In addition, the provision may be viewed, because of its discretionary nature as a thinly veiled, improper revenue raising device. Or, it can be considered as a desirably flexible device to permit a landowner to develop his land in those instances where the inadequacy of existing school facilities would otherwise indirectly suspend the right to develop his land. There have been so few court decisions or scholarly analyses of adequacy of schools' provisions that one cannot be too sure whether a court will hold them to be valid.

A legally sophisticated ordinance was upheld in the celebrated Clarkstown decision in 1960.[78] There the New York statute expressly authorized consideration of the adequacy of school facilities in connection with zoning. By utilizing the zoning rather than the subdivision approach, the draftsmen were very shrewd. The ordinance zoned a residential district for 40,000 square foot lots. It then provided that exceptions might be permitted for 22,500 square foot lots provided that the town board finds, after study, that the existing or proposed plans for community facilities are adequate for the needs of the future residents of the proposed development. This approach strengthens the municipality's position by giving the developer, in effect, the automatic right to develop at one density level (which he will not generally desire to do) and to permit him to seek an exception to that density if community facilities are adequate. The foregoing approach obtains strength from the judicial tradition of upholding zoning regulations for minimum lot size.[79] The more usual ordinance depends upon the platting power, which is not supported by as familiar a chain of decisions as support the exercise of wide and extensive discretion under it.

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[76] CITY OF FRANKLIN, WIS., ORDINANCES § 7.C(1) 1956 (a subdivision control ordinance) provides:

> "The owner or subdivider shall, at the time of submitting a plat for approval, offer proof as to the name of the school district or school districts in which the subdivision is to be located, and shall also present proof that adequate school facilities at grade school level are, or will be, available to provide for the educational needs of the potential number of families that will occupy such subdivision. Such proof shall be evidenced only by a certificate from the school district or school districts that adequate facilities are either presently available or that satisfactory arrangements have been made with the school district to provide the same. Payment of $500 per home to the school district shall be proof of said satisfactory arrangements."

[77] See discussion *supra* at 390.

[78] Josephs v. Town Bd., *supra* note 69.

[79] See discussion *supra* at 380.

H. Requirement That Land Not Be Subdivided Until Local Sanitary Sewer Is Available

Where the conditions of the soil and other factors make the use of septic tanks a probable present or future threat to public health, under its police power a municipality clearly can prohibit subdividing or even building permits on previously platted land until sanitary sewer facilities are available.[80] The great duplication of expense attendant upon the installation of sanitary sewer systems after septic tanks have been built is a further justification for an initial ban on any unsewered development.

In those communities where septic tanks can be used with safety in some areas but not in others, a more flexible ordinance may be used. These ordinances require land to be sewered where it fails to pass percolation and soil tests administered or supervised by the city engineer. Where the use of septic tanks might not pose a threat to health for several years and the elected officials are unwilling, for legal or political reasons, to prohibit septic tanks altogether, the "capped sewer" ordinance idea offers a compromise between the desire to facilitate sewers and the inability of a sprawling municipality to bring sewer mains to each remote area. Such an ordinance requires sewers wherever sewer mains are to be available within a designated number of years or where soil conditions would make septic tanks presently dangerous to health. However, the landowner in other areas is permitted to install septic tanks if he will also install sewer mains under his streets and then cap them until such time as the city's trunk mains are extended to the boundary of his subdivision.[81]

Any ordinance prohibiting the use of septic tanks will channel growth very abruptly toward the area where the municipality's sewer system exists or can soon be extended. Where the municipality is divided into different independent school districts, as is often the case with smaller municipalities in many states, the ordinance will sharply alter the rate of residential growth and school expansion in the various school districts. This effect may not be intended or desirable, but the channelling of growth to one specific area greatly simplifies the municipality's problems in planning for its future growth. Municipal costs for streets, drainage, and other governmental functions are substantially decreased where growth

[80] City of Nokomis v. Sullivan, 14 Ill. 2d 417, 153 N.E.2d 48 (1958).

[81] The city of Brookfield adopted such an ordinance in 1960, which the author drafted.

takes place in one area rather than in leapfrog fashion at widely separated points within the community.[82]

Conclusion

If communities wish to control their own growth, there are, as this article illustrates, an almost unlimited number of devices which, if properly and reasonably utilized, will help achieve the objective. Some techniques are clearly valid but many are of unknown or doubtful legality, especially when applied, as is often the case, without the benefit of a professional study of the relevant facts and alternate solutions. Experience has shown that the effectiveness and legality of the devices used by a particular municipality probably depend more than any other factor on the use and proper appreciation of a professionally drafted comprehensive plan for the community's development.

Community planning is too complex and often too enmeshed in the wants or fears of pressure groups to be wisely handled without the benefit of objective and thorough studies by professionally trained planning personnel. That fact is being increasingly recognized by local governing bodies, the courts, and the legislatures. In the future, planners should largely, but not entirely, supersede attorneys as the customary advisors on zoning and all other types of ordinances and policies relating to land use. That is so because the reasonableness and effectiveness of a particular ordinance can be determined only after an exhaustive inventory of the facts and their analysis by persons professionally trained in engineering, economics, transportation, and land use development. The depth and breadth of such analysis is what underpins the comprehensive plan and the legality of the many ordinances which must carry it out. Although an attorney is not a planner and should not encroach upon his field, a planner is not an attorney either. Thus, many legal pitfalls exemplified by this article demonstrate the necessity of obtaining experienced legal counsel, as well as planning advice, in connection with any effort to control community growth.

[82] Still another device to help channel growth toward one planning area is a requirement that developers lend the cost of oversize design of sewer trunk lines which are built at their request through vacant land in order to reach some more distant land which they have purchased. Brookfield adopted such an ordinance in 1960.