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Henry J. Schmandt

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Associate Professor of Political Science, University of Wisconsin (Milwakee)

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*HENRY J. SCHMANDT**

THE 1960 census returns, once again dramatizing the "explosive" population increases that are occurring in metropolitan areas, revealed that over eighty per cent of the Nation's total population jump of twenty-eight million during the last decennial period took place in these agglomerations. More significantly, they showed that the overwhelming percentage of this growth continued to occur outside the central cities. Suburban sectors accounted for approximately two-thirds of the total national increase while a substantial number of core cities showed actual population losses. Moreover, at current growth rates, the United States will have approximately fifty million additional inhabitants by 1975, at least seventy per cent of whom are expected to live in the suburbs.

As the census enumeration indicates, the tidal wave of metropolitan growth is engulfing the suburbs and bringing them face to face with the realities of urban expansion. Visions of semi-rustic life have vanished in the ring communities as the urbanized sectors have pushed outward, bringing in their wake new roads and expressways, huge shopping centers and industrial plants, and blight and congestion. The situation is familiar even to the most casual observer of the urban scene. Increasing service demands, mounting governmental costs, rising tax rates, and land use sprawl have become the common lot of outlying local units situated in the path of this growth.

Although the phenomenon of expansion is one of concern to the entire metropolitan community,[1] the task of guiding and controlling it is divided among the numerous political subdivisions that blanket the countryside around the central cities. Whether desirable or not, political realities make major changes in existing local governmental patterns unlikely in the foreseeable future. For example, efforts made to place certain key functions such as planning and land use control in metropolitan agencies with area-wide authority habitually have met cold public receptions in this country. The likelihood is that suburban governmental entities will continue indefinitely to struggle with the pressures of expansion individually rather than collectively. Under these circumstances it is reasonable to anticipate that most of the major zoning and subdivision control cases during the current decade, just as in the last, will arise in outlying municipalities and townships.

* Associate Professor of Political Science, University of Wisconsin (Milwaukee).

1. The term "community" is used here in the sense of a functionally interdependent entity—an area in which the resident population is interrelated with reference to its daily requirements. Hence it includes both central city and suburbs.

Suburban communities have viewed with mounting alarm the patent consequences of poorly ordered growth. Convinced of the need for exercising greater direction over the expansion within their boundaries, they have sought to exploit their zoning and subdivision powers more fully and effectively. In the process, the traditional uses of these controls have been greatly modified. With the aid of zoning, many suburbs endeavor to regulate not only the character of their growth but its timing and sequence as well.[2]

Zoning has been employed to assist in the development of a balanced tax base not alone by establishing industrial districts but, equally important, by protecting them against encroachment from other uses. And through subdivision regulation, the communities seek to place on the developers a share of the burden of providing the additional school and other public facilities necessitated by new residential projects.

The purpose of the present article is twofold: to review two of the major legal tools—zoning and subdivision regulation—that are available to local governments for controlling growth, and to discuss the new uses of these instrumentalities in the light of existing and emerging conditions in the Nation's urban areas.

Zoning Controls

In planning for expansion, cities, villages and towns must make certain basic policy decisions, two of which pertain to land use: how intensively should their vacant land be developed, and what should be the character of this development? These determinations can be made intelligently only in the light of many variables, such as the location and general characteristics of the area, existing land uses, community resources and objectives, potential service demands, housing needs, and availability of utilities. Intensity of land development is regulated largely through population density controls imposed under the zoning powers of local governments. The devices commonly employed for this purpose are establishment of minimum lot specifications and placing of limitations on the bulk or size of residential buildings.

Minimum Lot Size

Since *Simon v. Town of Needham*,[3] courts have generally regarded minimum lot standards as a valid exercise of the police power. The legal question at issue in each case is whether the particular zoning requirement bears some reasonable relationship to the health, safety, and general

2. See Fagin, Regulating the Timing of Urban Development, 20 Law & Contemp. Prob. 298 (1955).

3. 311 Mass. 560, 42 N.E.2d 516 (1942).

welfare of the community. In making this determination, courts have usually been guided by criteria of such general nature that empirical substantiation of the test of "reasonableness" would be difficult to make. In *Needham*, for example, where a zoning requirement of one acre per residence was in question, the opinion merely stated that "advantages enjoyed by those living in one family dwellings located upon an acre lot *might be thought* to exceed those possessed by persons living upon a lot of ten thousand square feet."[4] Admitting that there might be differences of opinion as to whether one-acre zoning would result in a "real and genuine enhancement of the public interests," the court declined to substitute its judgment for that of the people who voted in favor of such an ordinance.[5]

The same pattern is followed in most of the minimum lot size cases. While the courts frequently speak of such objectives as lessening congestion on the streets, securing safety from fire, providing adequate light and air, and preventing overcrowding, they seldom refer to the criteria or standards for making these determinations. Even in *Flora Realty & Inv. Co. v. City of Ladue*,[6] where the court entered into an extensive discussion of the municipality's comprehensive plan of development and noted that it would be "unbalanced by increased density," little was said of the standards employed to reach this conclusion. In fact, a careful reading of the case leaves the impression that the most persuasive factor influencing the decision was the intrusion of smaller lots into an area of large estates and the likely effect on property values.

Minimum lot zoning as high as five acres has been upheld in some jurisdictions,[7] although the larger the restriction, the more difficult its justification. It seems safe to say, given present judicial attitudes, that a requirement of one half acre would be universally sustained, a minimum of one acre seldom invalidated, and restrictions above one acre scrutinized more carefully before acceptance. In the few instances where minimum lot sizes have been invalidated, the decisions have rested primarily on the rationale that the prescribed requirements were excessive in view of

4. Id. at 563, 42 N.E.2d at 518. (Emphasis added.)

5. Ibid.

6. 362 Mo. 1025, 246 S.W.2d 771, appeal dismissed, 344 U.S. 802 (1952) (three-acre zoning requirement upheld).

7. See, e.g., Fischer v. Township of Bedminster, 11 N.J. 194, 93 A.2d 378 (1952). See also Senior v. Zoning Comm'n, 146 Conn. 531, 153 A.2d 415 (1959) (four-acre requirement sustained); Bogert v. Township of Washington, 25 N.J. 57, 135 A.2d 1 (1957) (one-acre standard approved); Harrison Ridge Associates Corp. v. Sforza, 6 App. Div. 2d 1051, 179 N.Y.S.2d 547 (2d Dep't 1958) (one-acre standard approved); Dillard v. Village of North Hills, 195 Misc. 875, 91 N.Y.S.2d 542 (Sup. Ct. 1949), rev'd mem., 276 App. Div. 969, 94 N.Y.S.2d 715 (2d Dep't 1950) (two-acre minimum upheld); Mellis Realties, Inc. v. Town Bd., 14 Misc. 2d 854, 179 N.Y.S.2d 50 (Sup. Ct. 1958) (one-half acre restriction upheld).

properties already developed in adjacent areas on considerably less space per lot.[8]

Courts have issued caveats in several minimum lot cases that the zoning power cannot be used to bar certain economic classes from the community. In *Gignoux v. Village of Kings Point*,[9] the court declared by way of dictum that "a zoning ordinance may not be used for . . . setting up barriers against the influx of persons who are able and willing to erect homes upon lots which are reasonably restricted."[10] Yet in no recent case *has* such a minimum been invalidated because of its exclusionary character. The issue was raised in the *Flora Realty* case, but the court simply remarked that it did not "view the ordinance as an attempt to segregate economic classes by zoning or as an attempt to restrict the . . . districts to particular classes of residents."[11] How it could justify this conclusion is not clear from the opinion. The community was situated directly in the path of urban expansion and was virtually surrounded by other municipalities with far lower zoning requirements than the three-acre minimum which was in force throughout most of the defendant city. The facts would seem to raise a strong inference of exclusion which the decision completely ignored. Thus despite dicta about economic segregation, it appears evident from *Flora Realty* and similar cases that courts are not prepared to strike down zoning on this ground alone.[12]

Size of Dwelling

Another means of controlling density relates to size or bulk of dwelling units. These restrictions take several forms: height controls expressed in simple footage statements of maximum height; floor area ratios prescribed as a function of the lot area; or minimum floor space or cubic content for buildings.[13] The first two forms are used primarily in districts where multifamily or apartment dwellings are permitted, the third, in single family districts. Bulk regulations are employed to achieve two ends in addition to control over density of population: adequate day-

8. County of Du Page v. Halkier, 1 Ill. 2d 491, 115 N.E.2d 635 (1953); Hitchman v. Township of Oakland, 329 Mich. 331, 45 N.W.2d 306 (1951).

9. 199 Misc. 485, 99 N.Y.S.2d 280 (Sup. Ct. 1950).

10. Id. at 489, 99 N.Y.S.2d at 284.

11. 362 Mo. 1025, 1041, 246 S.W.2d 771, 779 (1952).

12. See generally Williams, Planning Law and Democratic Living, 20 Law & Contemp. Prob. 317, 343-48 (1955).

13. Lower density of course can be assured by completely banning multifamily developments from all or a large portion of the community, as many suburban municipalities have done. For a case approving total exclusion, see Guaclides v. Borough of Englewood Cliffs, 11 N.J. Super. 405, 78 A.2d 435 (Super. Ct. 1951).

lighting of buildings, and sufficient open space around dwellings for rest and recreation.[14]

Reasonable regulations over building heights were early upheld as a valid exercise of the police power.[15] The original motivation was the daylighting of buildings rather than the regulation of density. These controls were later welded into the machinery of zoning, with their original justification shifting to a limitation on density. The more recent bulk regulations, while varying in form, turn on the relationship between floor area and lot size. An Olivette, Missouri, ordinance is typical of restrictions in this group. It prescribes that every building used for multiple dwelling purposes shall provide a lot area of not less than 2000 square feet per family.[16] Other ordinances employ a floor area ratio expressed as a multiple by which the floor space of a building may exceed the lot size. Thus a floor-lot area ratio of two permits a total floor area of not more than twice the size of the lot.[17] Proper use of this device not only regulates density but also insures the preservation of open space even where high-rise apartments are permitted.

The control of density through minimum house size requirements has been the subject of more vigorous controversy. Objectors on social or ethical grounds view the principal purpose of such restrictions as economic segregation; they point out that these limitations achieve the same effect as minimum cost requirements on homes, which courts have never approved. Until the now celebrated *Lionshead Lake, Inc. v. Township of Wayne*,[18] the constitutionality of minimum floor area ordinances had been in question.[19] The *Lionshead Lake* case explicitly declared that such standards are justified since "the size of the dwellings in any community

14. As to the nature and purposes of bulk controls generally, see San-Lan Builders, Inc. v. Baxendale, 28 N.J. 148, 145 A.2d 457 (1958).

15. Brougher v. Board of Pub. Works, 205 Cal. 426, 271 Pac. 487 (1927); Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), aff'd, 214 U.S. 91 (1909); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925).

16. Olivette, Mo., Rev. Code § 280.076 (1957). See also Carey v. Cassidy, 81 R.I. 411, 103 A.2d 793 (1954), upholding a similar provision.

17. The question of the validity of this device has appeared in only one case, in which approval was indicated by dictum. Pritz v. Messer, 112 Ohio St. 628, 635, 643, 149 N.E. 30, 32, 35 (1925).

18. 10 N.J. 165, 89 A.2d 693 (1952), appeal dismissed, 344 U.S. 919 (1953). See DeMars v. Zoning Comm'n, 19 Conn. Supp. 24, 109 A.2d 876 (C.P. 1954), aff'd, 142 Conn. 598, 115 A.2d 655 (1955).

19. See Senefsky v. City of Huntington Woods, 307 Mich. 728, 12 N.W.2d 387 (1943); Baker v. Somerville, 138 Neb. 466, 293 N.W. 326 (1940); Brookdale Homes, Inc. v. Johnson, 126 N.J.L. 516, 19 A.2d 868 (Ct. Err. & App. 1941). One of the first cases to uphold a minimum floor area provision was Thompson v. City of Carrollton, 211 S.W.2d 970 (Tex. Ct. Civ. App. 1948). See also Flower Hill Bldg. Corp. v. Village of Flower Hill, 199 Misc. 344, 100 N.Y.S.2d 903 (Sup. Ct. 1950).

inevitably affects the character of the community and does much to determine whether or not it is a desirable place in which to live."[20] The Supreme Court's dismissal of the appeal left little doubt as to the validity of such restrictions.[21]

It is interesting to note in passing that the *Lionshead Lake* decision purported to take into consideration the average income of residents of the area in relation to cost of houses of the required size. The dissenting opinion also touched upon this point, noting that the ordinance precluded individuals who could not pay the estimated cost range for homes of the specified minimum from establishing residence in the community. This case marked one of the first instances where courts have examined, albeit in a cursory and superficial fashion, a zoning requirement in terms of the needs and economic resources of prospective purchasers.

Industrial Zoning

Although not directly related to density, industrial zoning is a major factor that cannot be overlooked in any discussion of urban expansion. Suburban municipalities situated in the path of growth are subject to strong demands for residential development. The more immediate demand for homes than for industrial sites induces builders to utilize the land for this purpose. Confronted with this pressure, local legislative bodies frequently permit the elimination of prime industrial sites by residential subdivision. In recent years, however, suburban municipalities have come to look with increasing favor on industrial development as a palliative to their fiscal ills. Not only have many of them set aside land for future industrial use but they have also erected protective barriers around these areas by mutually exclusive zoning. Some of them, moreover, have sought to facilitate industrial location by adopting performance zoning rather than the conventional type regulations.

Traditionally, one of the major objectives of zoning has been the isolation of industrial uses from residential districts in order to protect property values in the latter and to guard against the intrusion of noise, smoke, and congestion in home areas. The reverse—protection of industry from residential development—has long been ignored. This neglect is at least

20. 10 N.J. at 174, 89 A.2d at 697.

21. The Lionshead Lake case has generated much discussion. See, e.g., Haar, Zoning for Minimum Standards: The Wayne Township Case, 66 Harv. L. Rev. 1051 (1953); Nolan & Horack, How Small a House?—Zoning for Minimum Space Requirements, 67 Harv. L. Rev. 967 (1954); Haar, Wayne Township: Zoning for Whom?—In Brief Reply, 67 Harv. L. Rev. 986 (1954). Among other objections to the decision, critics have charged that a minimum floor space requirement without reference to the number of occupants is meaningless. The opinion did take notice of the logic in relating minimum living space to actual occupancy, observing that perhaps some later ordinance would attempt to deal with this complex subject. 10 N.J. at 180, 89 A.2d at 700-01.

partially attributable to conventional zoning, sometimes referred to as pyramidal or cumulative, which permits a carry forward of all previously defined uses to each successively lower classification. Thus, residential use, as the most restricted, may be allowed in the lower categories of commerce and industry. The fallacy of this practice has become increasingly apparent in recent years as suburban areas have experienced the need for industrial development. There is now strong feeling that industrial districts also require protection against encroachment by uses that reduce the space suitable for plant expansion. This conviction has prompted some municipalities to break away from the common zoning pattern by prohibiting other uses within industrial zones.

Exclusive industrial zoning was regarded with little sympathy or understanding in the initial cases involving its use. In *Corthouts v. Town of Newington*,[22] the first test of the validity of such an ordinance, the court refused to exclude residences from an industrial district. Two years later the New Jersey Supreme Court permitted the construction of a retail shopping center in a district zoned exclusively for light industry despite the plea of the city that such use would be detrimental to the orderly development of the area for limited industrial purposes.[23] The same year a Michigan decision[24] held a similar ordinance unreasonable as to an owner who wanted to build a motel in an industrially-zoned district. The court noted that "the construction of a motel of the type planned by plaintiff would have . . . [no] tendency to affect injuriously the health, safety, or welfare of occupants of such motel, residents in the vicinity, or the public generally."[25] No mention was made of the possible deleterious effects on industrial development.

It was not until 1956 that the first decision clearly upholding exclusive industrial zoning was handed down.[26] However, the opinion was based on the protection not of industry but of residential property. The court found it undesirable from the standpoint of health and blight to permit residential development in an area surrounded by heavy industry. It stated, nevertheless—and this was a major advance—that it found nothing arbitrary or unreasonable per se in a zoning plan which prevented so-called higher uses from invading a lower use area.[27] The final step was

22. 140 Conn. 284, 99 A.2d 112 (1953).

23. Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955).

24. Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955).

25. Id. at 479, 70 N.W.2d at 817.

26. Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (Dist. Ct. App. 1956). See also Newark Milk & Cream Co. v. Township of Parsippany-Troy Hills, 47 N.J. Super. 306, 135 A.2d 682 (Super. Ct. 1957), upholding exclusion of all other uses from an area zoned as "specialized economic development district." For a less sympathetic treatment of this question, see City of Toledo v. Miller, 106 Ohio App. 290, 154 N.E.2d 169 (1957).

27. 138 Cal. App. 2d at 746, 292 P.2d at 532. See also Kozesnik v. Township of Mont-

taken in 1959 when the Illinois Supreme Court based its approval of an exclusive zoning ordinance squarely on the protection of industrial expansion.[28] Observing that an ordinance of this type is "a radical departure from our thinking and opinion in the past," the court declared that "in final analysis, it seems clear that industry and commerce are also necessary . . . and that a proper environment for them will promote the general welfare of the public."[29] The court acknowledged the necessity of providing industry and commerce with a favorable climate and noted that the sale of a few lots for residential purposes at important points in a nonresidential district might make industrial or commercial expansion impossible or unduly expensive. The two controlling factors, as listed by this court, in determining the reasonableness of an exclusive zoning ordinance of this nature are the suitability of the land for industrial or commercial purposes and the likely need and demand for such use in the near future.[30]

In addition to protecting industrial districts from encroachment by other uses, a number of municipalities have endeavored to provide a more flexible system than the conventional light-heavy industry classification for regulating nonresidential use. The device employed for this purpose has been performance zoning, which seeks to avoid branding some industries as undesirable per se and either prohibiting them entirely or relegating them to a "heavy industry" district. In jurisdictions where performance zoning has been adopted, standards relating to such matters as smoke, noise, waste, and traffic are established in the ordinance to measure the external effects of industry upon adjacent uses. Any industry able to meet these standards is permitted to operate in an industrial district. In other words, more weight is given to the actual and potential effects of the plant on the surrounding area than to the type of industry.

Performance standards ordinances are tailored to reward those establishments which design their plants and install modern controls in such a way as to minimize the normal effects of industrial operations on nearby uses. These ordinances also place the community in a better position to accommodate industries which might otherwise be barred under conventional zoning codes. Performance standards for industrial location have been adopted in Columbus, Ohio, Bismarck, North Dakota, Palm Springs, California, and Warren Township, Michigan, to cite but a few instances. To date, there is little in the way of judicial pronouncement on the sub-

gomery, 24 N.J. 154, 169, 131 A.2d 1, 9 (1957), where the court stated that there is no rule of law which ordains that any one use has an exalted position in a zoning scheme.

28. People ex rel. Skokie Town House Builders, Inc. v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959).

29. Id. at 188-89, 157 N.E.2d at 36.

30. Id. at 188-90, 157 N.E.2d at 36.

ject. As long as reasonable and sufficiently definite standards can be devised—a task presenting some difficulties—performance zoning presumably meets the test of legality.

Subdivision Control

Subdivision regulation, like zoning, is of relatively recent vintage. Both are major tools for carrying out land use planning; both serve similar functions in that they attempt to achieve controlled development of a community by limiting what an owner may do with his land. Subdivision controls were prompted by the many problems and abuses which flowed from unregulated division of land holdings for development purposes. Disconnected street patterns, failure to provide essential utilities, and poor planning in general were among the difficulties that arose in the wake of extensive land division.

The earliest statutes and ordinances dealing with subdivisions were designed to insure that plats dividing land into lots were accurate and usable for recording and tax assessment purposes. Later, qualitative controls were employed requiring the subdivider to grade and pave streets according to certain standards, provide water and sewer utilities, and plan the development in a manner conducive to the well-being of the prospective occupants and the community in general.[31] It is today conceded that a municipality has the power to impose these controls on the developer and to require him to build at his own cost on-site public improvements such as roads, sewers, and water mains.[32] Whether he can be compelled to provide or pay for improvements that are not directly related to the subdivision is now the subject of much litigation.

In recent years, expanding suburban communities have found themselves confronted with large service needs. The development of numerous new subdivisions has placed severe strains upon capital plants and other local government facilities. Cities and towns in the path of the population surge have found it necessary to provide new school buildings, additional police and fire stations, larger sewage treatment systems, more recreational facilities, and enlarged office space to house the added administrative personnel. In fact, each new house in a suburban sub-

31. As to subdivision control and administration generally, see Note, 65 Harv. L. Rev. 1226 (1952).

32. Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); In the Matter of the Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y. Supp. 809 (Sup. Ct. 1931); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960). See also Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 171, 2 Cal. Rep. 94, 103 (Dist. Ct. App. 1960), where the court held that a developer could not be required to pay the cost of improving off-site streets in the adjacent area.

division requires public services that entail capital outlays of $2,500 to $3,500 or more, only a portion of which is recouped through normal subdivision regulations requiring the builder to install streets, sewers, and other on-site improvements. Evidencing a growing sentiment that new residents should somehow be charged with a greater share of the capital burden precipitated by their presence, some municipalities have sought to increase substantially their building permit fees; other have turned to new uses of subdivision control as a means of accomplishing the same result. Neither effort has met with warm judicial approbation.

An ordinance increasing building inspection fees to more than 700 per cent of the cost of inspecting the buildings and regulating the construction was voided by the New Jersey Supreme Court in *Daniels v. Borough of Point Pleasant.*[33] Noting that the admitted purpose of the ordinance was to raise revenue for defraying the increased cost of school and other governmental services, the court declared that "the philosophy of this ordinance is that the tax rate . . . should remain the same and the new people coming into the municipality should bear the burden of the increased costs of their presence. This is so totally contrary to tax philosophy as to require it to be stricken down. . . ."[34] Similarly, in a late Michigan case,[35] where fees for building permits were raised to more than $200 for an average residence, the court disallowed the use of the police power as a subterfuge to enact and enforce what was in reality a revenue measure. "[W]hat was sought to be defrayed [here]," the opinion observed, "was 'the general cost of government under the guise of reimbursement for the special services required by the regulation and control of new buildings.' "[36]

Subdivision regulations designed for the same purpose have generally met a like judicial fate: consider, for instance, *Kelber v. City of Upland*[37] and *Rosen v. Village of Downers Grove.*[38] *Kelber* invalidated an ordinance requiring a subdivider, as a condition precedent to approval of a plat, to pay thirty dollars per lot into a park and school site fund and a large sum into a drainage fund. The city argued that the provision, designed to help meet its growing needs, was in line with the modern tendency to extend the police power to include a broader field of public welfare. Although the case was determined on grounds of lack of statutory authority, language in the opinion casts doubt on the validity of such a requirement even with express legislative authorization. For ex-

33. 23 N.J. 357, 129 A.2d 265 (1957).
34. Id. at 362, 129 A.2d at 267.
35. Merrelli v. City of St. Clair Shores, 355 Mich. 575, 96 N.W.2d 144 (1959).
36. Id. at 588, 96 N.W.2d at 150, quoting the Daniels case, supra note 33.
37. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).
38. 19 Ill. 2d 448, 167 N.E.2d 230 (1960).

ample, the court pointed out that the prerequisites established in the ordinance were actually fund-raising methods designed to help meet future needs not of the subdivision itself but of the entire city.[39] If only the needs of the subdivision are relevant to the test of reasonableness, as *Kelber* and subsequent decisions seemed to indicate,[40] local governments should view some of the new-platting preconditions with caution.

The *Rosen* court voided an ordinance requiring payment of $325 per lot in new subdivisions to provide for schools. As in *Kelber*, the decision was grounded on lack of statutory authority. Illinois law specified that no subdivision plat "shall be entitled to record or shall be valid unless the subdivision shown thereon provides for streets, alleys, and public grounds in conformity with the applicable requirements of the official plan."[41] The court held that this language, while perhaps sufficient to cover the dedication of school land (under the category of "public grounds"), did not authorize a municipality to provide for schools by requiring subdividers to pay a specified amount for each lot in the development. Thus, "regardless of advantages of flexibility in equalizing financial burdens that might be secured by substituting monetary charges for the dedication of land . . . the plain fact is that the statute does not authorize this technique."[42]

Whether the court would have viewed the requirement more favorably had the necessary legal authorization existed was not stated. Yet here again, as in *Kelber*, the opinion contained language indicating general disfavor with devices of this kind. First of all it noted that because plat approval affords an appropriate point of control as to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve every foreseeable problem.[43] Second, it observed that valid subdivision requirements are based on the theory that developers should assume those costs which are specifically and uniquely attributable to their activity and which otherwise would be cast upon the general public.[44] It was on this theory, the court stated, that it had pre-

39. 155 Cal. App. 2d at 638, 318 P.2d at 565-66.

40. See, e.g., Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rep. 493 (1960).

41. 2 Ill. Laws 1941, at 19. This section was amended in 1959 to include requirements for "ways for public service facilities, storm or floodwater runoff channels and basins." Ill. Ann. Stat. ch. 24, § 53-3 (Smith-Hurd Supp. 1960).

42. 19 Ill. 2d at 454, 167 N.E.2d at 234. See also Ridgemont Dev. Co. v. City of East Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960), where the court set aside for lack of statutory authority a requirement that one lot in each subdivision be conveyed to the city for playgrounds.

43. 19 Ill. 2d at 453, 167 N.E.2d at 234 (1960).

44. Id. at 453, 167 N.E.2d at 233-34.

viously upheld a requirement calling for the installation of curbs and gutters by the subdivider.[45]

As the *Kelber* and *Rosen* cases indicate, two questions loom large in current litigation over subdivision regulation: (1) whether a municipality may compel the dedication of land within a new development for public purposes other than streets and utilities; and (2) whether it may compel the payment of sums of money in lieu of dedication for such purposes. Underlying these two questions is the more basic issue as to whether a subdivider can be required to provide land or funds for municipal projects and improvements not directly related to and for the exclusive benefit of the land to be developed and its subsequent owners.

Several hypothetical instances, entitled A, B, C, D, and E, might be cited to illustrate the point at issue here. In case (A) a municipality constructs, equips, and pays for a new fire station. Later, new subdivisions are developed which are to be served by this station. To compel new residents to pay a share of the cost of the already built and paid-for facility, the community demands a special fee of the subdividers as a condition to plat approval. In case (B) a subdivider is required to pay a hook-in charge for each lot connecting into the city sewerage system. In case (C) the developer is compelled to dedicate land for park and recreation purposes in an amount that would be reasonably needed by potential residents of the new subdivision. In case (D) the subdivider is required to dedicate land for a future school building; and in case (E) he is compelled to either dedicate park and school land or pay a fee in lieu thereof.

Case (A) presents little difficulty from a legal standpoint. The courts have uniformly insisted that subdivision controls cannot be used to raise funds for general municipal purposes. A situation is conceivable, however, where the fire protection needs of a large new development would require an additional station to serve the subdivision only. In such a situation, could the developer be required to contribute to the cost of the capital facility? This perhaps farfetched instance indicates the kinds of difficulties that can arise when subdivision controls are extended into the field of municipal financing.

Case (B) involves a question of concern to many municipalities. Sewage treatment plants and trunk or outlet sewer lines are constructed on the basis of anticipated future needs. The original capital investment is therefore usually much larger than would otherwise be required to meet present demands. Many municipalities charge a connection fee to new users in order to offset the additional original burden assumed by the community for their benefit. The issue was raised in a recent California

45. See Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

case in which the validity of a fee for connection to the city sewerage system was upheld over the objection of the subdivider.[46] The fees were placed in a special trust fund of the municipality to be used exclusively for the construction of outlet sewers. In sustaining the requirement, the court rejected the argument that others had already paid for the system. It held simply that "new subdivisions should be required to pay their fair share in the use of this vitally essential service."[47] Although the validity of sewer connection fees as a prerequisite to subdivision plat approval has not been universally accepted, the California opinion appears to indicate the general trend.

The dedication or setting aside of land for park and recreational purposes, as illustrated by case (C), is acceptable to many courts as a means of preserving open spaces. The *Rosen* decision found no occasion to quarrel with the Illinois statutory requirement that the developer provide "public grounds." Similarly, in *Reggs Homes, Inc. v. Dickerson,*[48] a late New York case, the court held that a planning board may legitimately demand the inclusion of park facilities in approving a plat.

The dedication of land for school purposes, as postulated in case (D), was separated from the question of park lands because of a possible legal distinction in the two types of uses. It is much easier to show that park and recreational land is an on-site improvement for the direct and almost exclusive benefit of the subdivision residents than it is to demonstrate the same result in the case of land for school grounds. The latter is more likely to be for the use of the general area than solely for subdivision occupants and is therefore vulnerable to the objection that it is a revenue-raising device.

Case (E) is another version of (C) and (D). The requirement of money payments in lieu of land dedication is becoming more popular since the latter frequently results in the acquisition of land by a municipality in places where it is not needed or in parcels that are too small for

46. Longridge Estates v. City of Los Angeles, 183 Adv. Cal. App. 531, 6 Cal. Rep. 900 (Dist. Ct. App. 1960).

47. Ibid.

48. 16 Misc. 2d 732, 179 N.Y.S.2d 771 (Sup. Ct. 1958), aff'd mem., 8 App. Div. 2d 649, 186 N.Y.S.2d 215 (2d Dep't 1959). New York law provides that planning boards as a condition of approval may require that "a park or parks suitably located for playground or other recreational purposes" be included in the plat, such parks to be of "reasonable size for neighborhood playgrounds or other recreation uses. . . ." N.Y. Gen. City Law § 33.

Connecticut laws also call for the inclusion of open spaces for parks and playgrounds in places deemed proper by the planning commission. Conn. Gen. Stat. § 8-25 (1960). The Oregon Legislature has given broad powers to local governing bodies to adopt standards in addition to those provided by law. These standards may include requirements "for facilitating adequate provision of transportation, water supply, sewerage, drainage, education, recreation, or other needs." Ore. Rev. Stat. § 92.044 (1957).

any practical use. If requirements for the dedication of land are valid, it seems logical to conclude that money stipulations in lieu thereof are also legal. The fee route, however, is more susceptible to the criticism that funds so collected are for general community use rather than for the exclusive benefit of the subdivision. Most opinion to date looks askance at fee provisions. For example, the 1959 report of the Committee on Zoning and Planning of the National Institute of Municipal Law Officers warned municipalities against the use of this device.[49] It called attention to the probable unconstitutionality of such provisions and the possibility that communities employing this device might find themselves required to pay back money collected and even spent. The report also noted that the Planning Advisory Commission to the Governor and Legislature of New Jersey had endeavored unsuccessfully to find a constitutional way of providing legislation to validate the fee practice.

While most of the pertinent cases on fee provisions have thus far turned on the question of statutory authority, a recent New York lower court decision declared unconstitutional that portion of the state's Town Law which authorized town boards to require money payments in lieu of land as a condition of plat approval.[50] The Town of Newburgh, acting under this law, had required a subdivider to pay a fee of $50 per lot into a special fund earmarked for future acquisition or improvement of recreational facilities in the town. Although the statute was invalidated for failure to set out sufficient standards to guide the holders of the delegated authority, the opinion strongly intimated that developers cannot be compelled constitutionally to pay for improvements that are for the benefit of the community as a whole and not directly related to the subdivision. The same point was made in a late Oregon case in which the court struck down a county ordinance permitting the planning board to require money in lieu of park land.[51] Here again, while the decision was formally based on lack of statutory authority for such a requirement, the court observed that the ordinance contained nothing to relate the money or its expenditure to the land being subdivided.

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49. Stickel, Report of Committee on Zoning and Planning, 22 NIMLO Municipal L. Rev. 422, 428 (1959).

50. Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960). The portion of the Town Law at issue in this case provides: "If the planning board determines that a suitable park or parks of adequate size cannot be properly located in any such plat or is otherwise not practical, the board may require as a condition to approval of any such plat a payment to the town of an amount to be determined by the town board, which amount shall be available for use by the town for neighborhood park, playground or recreation purposes including the acquisition of property." N.Y. Town Law § 277.

51. Haugen v. Gleason, 359 P.2d 108 (Ore. 1961).

THE TIMING OF URBAN DEVELOPMENT

Urban communities are far more planning conscious today than a decade ago. As the unfortunate results of planless growth have made themselves increasingly manifest, public official and private citizen alike have become more receptive to the idea of comprehensive planning. This attitude has been particularly evident in the relatively new suburban cities and villages experiencing the swelling tide of population growth. Officials and residents in these units have become concerned not only with community amenities but also with the attainment and preservation of a tax base that will permit adequate public services at reasonable rates. Community planners and policy makers are well aware that commercial and industrial properties contribute two to three times as much in local taxes as they receive in services, while among residential uses only the highest cost property pays its own way. As the demand for and cost of municipal services have increased, the need for communities to maintain a balanced economic base has become more acute. It is largely for this reason that suburban cities and villages long hostile to it now vie with each other to attract industry within their boundaries. Only the wealthy residential enclaves have been able to withstand this trend.

Plagued with present and potential fiscal woes, many suburban communities are attempting to exercise some control over the increasing demand for public services and the resulting burden on the municipal tax base by regulating the rate and character of their development. Instead of usual methods of slowing and upgrading the quality of growth through zoning and subdivision regulations, some municipalities are now approaching the problem of timing urban growth and shaping a balanced community by more systematic means. The controls employed are closely related to carefully drawn plans for integrating all aspects of community development. These efforts, while differing from community to community, seek essentially to accomplish two objectives in addition to the over-all goal of providing a pleasant and livable environment: the prevention of excessive sprawl and premature land subdivision, and the assurance of a balanced economic base that will permit the effective operation of local government at a reasonable tax rate.[52]

52. These objectives are well stated in the following planning goals of Menomonee Falls, Wisconsin, a rapidly growing community on the periphery of the Milwaukee metropolitan area: (1) The creation of a pleasant, satisfying, and attractive living and working environment, with convenient shopping and service areas, ample open space and recreation areas, provision of an adequate level of public services, protection, and schools, availability of cultural and entertainment facilities, and a safe and efficient circulation system. (2) The attainment of a balanced and stable municipal economy with the resources and capacity to achieve the first goal and still maintain a predictable and moderate tax rate, and with sufficient broadness of base to survive possible changes in patterns of tax distribution, economic

The first objective has been sought in various ways, most of them designed to encourage growth around existing settlements before opening additional land to intensive use. These methods include: (1) public purchase of outlying land (or development rights thereto) to be placed on the market as needs dictate; (2) limiting the number of building permits that are issued each year; (3) demarcation of an urban service district and zoning of all land outside this area for agricultural uses exclusively until such time as the city is prepared to extend its service zone; (4) high zoning in the outlying sections of the municipality with the understanding that the requirements will be lowered when a certain percentage of development has been attained in the intervening area; (5) high zoning restrictions in the outlying sectors of the community with the intention of reducing these when the city is ready to extend sewer and water utilities.

Municipal purchase of land or development rights in order to control sprawl and preserve open spaces rests on sound legal footing. Such an approach would, of course, require new enabling legislation in most states.[53] The principle here is similar to that involved in cases where municipalities have been permitted to purchase and assemble land for industrial parks and then lease or sell it to private operators. It is unlikely, however, that this device will be widely pursued in view of the inadequate fiscal resources at the local government level, the high cost of land, and potential public opposition to the city entering the real estate business.

Unlike the purchasing method, use of building permits to control the rate of municipal growth is a dubious legal device. In the one case where this question arose, the opinion was adverse to such practice.[54] The Town of New Castle, New York, had enacted an ordinance specifying that no more than 112 building permits could be issued annually for any land within a special residential district. (Practically all undeveloped residential land in the town had been placed in such districts.) The court held that nothing in the state statutes authorized the town to regulate its rate of growth, and that even if such power had been conferred, the ordi-

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conditions, or population and service demand. Village of Menomonee Falls, Wis., General Plan for Community Development (1960).

53. California has enacted statutes designed to preserve open spaces by permitting expenditure of public funds by cities and counties to annex uninhabited territory. It would also permit the local units to lease back such land to its original owner or others under covenants that will keep the property as open space. Cal. Gov't Code §§ 6950-54. New York has enacted similar legislation, except that the municipality must retain the land. The former owner may, by agreement, continue to occupy and use it for a period not exceeding five years, during which period it remains on the tax rolls. N.Y. Conserv. Law §§ 875-85.

54. Albrecht Realty Co. v. Town of New Castle, 8 Misc. 2d 255, 167 N.Y.S.2d 843 (Sup. Ct. 1957).

nance would be unconstitutional as an unreasonable deprivation of the owners' beneficial use of their land.

The last three devices are similar in character. Each relies on high zoning restrictions to accomplish its objective: one by exclusive agricultural zoning, the others by minimum lot and house size requirements. Zoning exclusively for agricultural purposes has been used, particularly in California,[55] to protect farm land. Whether it could be used to control the timing of urban expansion is another question.[56] The other two methods utilize upgraded zoning to discourage development in the outlying districts while permitting more intensive use of land closer to the urban center. At the same time, the peripheral districts are designated for change to lower minimums once the initial lands near full utilization. The use of sewer and water extension as a means of control is probably the most practical of these devices. A municipality can budget funds for the extension of these utilities to coincide with the development of the intervening area. The rationale here is that the higher requirements will discourage premature subdivision of outlying areas and yet meet the judicial test of reasonableness since larger lot areas are normally needed for individual septic tanks and wells.[57]

All of these devices, by establishing a pattern of orderly progression outward from the service area of the city, represent efforts to prevent scattered leapfrog subdividing. Such a pattern minimizes sprawl, places less strain upon community facilities and services, and permits a more economical and efficient extension of streets and utilities, thereby reducing long-term municipal expenses.

The second and closely related objective—a balanced economic base—also contemplates use of several of the above controls. Communities seeking this objective usually rest their general plan of development on three major premises: (1) necessity of maintaining a practical balance between the residential and nonresidential elements of the community composition; (2) responsibility to provide for various densities in residential districts so that no economic class will be excluded because of uniformly high zoning restrictions; and (3) importance of preventing disproportionate low-cost residential expansion beyond the reasonable capacity of the supporting tax base.

55. See Cal. Gov't Code § 35009.

56. One of the few cases dealing with the encroachment of other uses in a district zoned for agriculture is County of Cook v. Glasstex Co., 16 Ill. 2d 72, 156 N.E.2d 519 (1959). The court in this instance upheld an ordinance which barred a light industrial use from an area zoned for farming.

57. In Bogert v. Township of Washington, 25 N.J. 57, 135 A.2d 1 (1957), a one-acre minimum requirement in a block adjacent to lower zoned areas was sustained due to lack of sewer facilities. The court held it reasonable to put the block in a more restricted category since septic tanks had to be used.

These premises are given expression in multifaceted but closely integrated plans that emphasize the following features: (1) careful assessment of the community's role and position in the metropolitan complex of which it is a part; (2) zoning which establishes residential districts of varying densities geared to the community's existing and potential economic base; (3) zoning which protects prime industrial and commercial land from encroachment by other uses; and (4) systematic conversion of selected undeveloped areas through rezoning to smaller lots at a rate and quantity carefully keyed to increases in the community's commercial, industrial, and high quality residential base.

If communities are to fulfill their social responsibility, they must provide home sites for the lower as well as higher income groups. Many suburban cities and villages have ignored this responsibility by establishing high zoning restrictions—some because of fiscal necessity, others through a sense of social exclusiveness. As long as land is available for lower cost residential construction in other parts of an urban area, high restrictive zoning will probably continue to meet judicial approbation.

This issue was touched upon in *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*,[58] in which exclusive residential zoning for an entire community was sustained. After noting that substantial amounts of land peculiarly adapted to industrial use remained undeveloped in other sections of the same geographic region, the court concluded:

> What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been or may be put most advantageously.[59]

The same point was made in *Valley View Village v. Proffett*,[60] in which zoning of a municipality solely for residential purposes was held to be not per se unreasonable as an exercise of the police power. The court stated in effect that the legislative body of a city should not be required to shut its eyes to conditions beyond its own boundaries in determining the purposes for which land shall be used but may consider facilities offered by nearby areas.

This condition of abundancy cannot be expected to continue in view of the rapid consumption of land in urban areas. What is reasonable zoning today may well become unreasonable with tomorrow's land scarcity. The time is not far off in many metropolitan communities when the residential housing demands of lower income groups will exceed the land zoned to meet their needs and resources. When that day comes, the pressure for

58. 1 N.J. 509, 64 A.2d 347 (1949).
59. Id. at 513, 64 A.2d at 349-50.
60. 221 F.2d 412 (6th Cir. 1955).

smaller lot zoning and higher densities in the undeveloped suburban sectors will intensify. It seems inevitable that sooner or later the courts will take this fact into consideration in determining the reasonableness of zoning restrictions. The issue thus far has not been joined specifically in these terms nor has a "Brandeis brief" been presented on this point in any of the suburban zoning cases. Yet language used by the courts in several instances underscores the possibility that the test of reasonableness may soon be enlarged to include the relationship of questioned zoning to the needs of the larger urban area as well as the local municipality. As early as the historic decision of the United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*,[61] courts have implied that metropolitan or regional needs may so far outweigh the interest of a local municipality that the latter may not be allowed to stand in the way of the larger public interest.[62]

Recognizing the implications inherent in the present and emerging situation, a number of suburban communities have sought rational and equitable solutions to their growth problems through plans embodying several or all of the objectives and premises listed above. Their comprehensive plans call for a gradation of zoning restrictions in the various districts of the city or town in order to accommodate income groups of different levels.[63] Assuming a given economic base, they determine that the community can afford a residential mix consisting of a certain percentage of small, medium, and large size lots. To prevent low cost residential development from shooting too far ahead of its supporting industrial, commercial, and high quality residential tax base, they employ one of the systematic conversion devices previously described. In this way, they seek to base the development of the community on a realistic evaluation of its resources and potential and to direct its growth within economically tolerable limits.

How well will these new plans and their accompanying devices stand up under legal attack? First of all, it is evident that many of the methods which they rely on—minimum lot requirements, bulk controls, and subdivision regulations—are judicially acceptable. Second, the fact that they are used for purposes other than those originally intended should not affect their validity. As long as zoning requirements meet the test of reasonableness, courts have been reluctant to inquire into the motives prompting their enactment. Thus in *Ward v. Township of Montgomery*,[64] where a district was zoned for industrial use with the manifest intention

61. 272 U.S. 365 (1926).

62. See Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 173, 89 A.2d 693, 697 (1952), appeal dismissed, 344 U.S. 919 (1953).

63. See, e.g., City of Mequon, Wis., Zoning Ordinance, April 5, 1960.

64. 28 N.J. 529, 147 A.2d 248 (1959).

of strengthening the town's tax base, the court held that the pursuit of such an objective through land use regulation "will not warrant judicial condemnation as long as it represents an otherwise valid exercise of the statutory zoning authority."[65] Similarly, in *Rockaway Estates, Inc. v. Rockaway Township*,[66] the New Jersey Superior Court stated that "so long as such grounds exist for zoning as are demanded by the statute, there is no sound objection to the consideration of cost of municipal services in the establishment of the zones."[67]

The mere fact that growth leads to an increased tax rate does not of itself justify restrictions on the use of property. Yet a persuasive consideration for land use regulation is the fact that uncontrolled growth adversely affects the community and the area since it precipitates the construction of schools, roads, and other public facilities in a haphazard, poor and inadequate fashion. The major issue in each instance should be whether the zoning ordinance has been enacted mainly to exclude rather than insure orderly and planned growth. If it can be shown that the planning program and the instruments used to carry it out are based on careful studies of the community's economic potential and its relation to the housing needs of the urban area of which it is a part, the restrictions (even though novel) will likely be viewed with favor by the courts.

It is worthy of note that during the past decade, courts have manifested a noticeably more sympathetic and tolerant attitude toward community planning. A broad reading of *Berman v. Parker*,[68] for example, indicates that the Constitution will accommodate a wide range of community planning devices as local governments seek new ways to meet the pressing problems of growth.[69] Carefully drawn plans, well conceived from the standpoint of land use and community needs, are the surest safeguard against legal invalidity. The integrated approach which is being tried or considered by some communities admittedly has a utopian flavor. Whether it can be carried out under the pressure of growth or under present local governmental arrangements is a matter of sheer speculation. Yet what is important is the indication it gives that many local officials and planning boards are beginning to think in broader and more enlightened terms.

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65. Id. at 535, 147 A.2d at 251.

66. 38 N.J. Super. 468, 119 A.2d 461 (Super. Ct. 1955).

67. Id. at 477, 119 A.2d at 466.

68. 348 U.S. 26 (1954).

69. See generally Johnson, Constitutional Law and Community Planning, 20 Law & Contemp. Prob. 199 (1955).