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TECHNICAL REPORT NUMBER 6 (2nd Edition)

PLANNING LAW IN SOUTHEASTERN WISCONSIN

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TECHNICAL REPORT
NUMBER 6
(Second Edition)

PLANNING LAW IN SOUTHEASTERN WISCONSIN

Prepared by the

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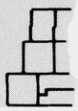

April 1, 1977

STATEMENT OF THE EXECUTIVE DIRECTOR

In any sound planning and engineering effort, it is necessary to investigate the legal as well as the physical and economic factors affecting the problem under consideration. Because of the many and often conflicting interests involved, this is particularly true in the area of planning and plan implementation law. Careful attention to the legal framework within which plan preparation, adoption, and implementation must be carried out is an essential element of any comprehensive planning effort if the plans produced are to be legally feasible and capable of effective and efficient implementation. If the legal constraints bearing upon the planning or engineering problem are ignored during plan formulation, serious obstacles may be encountered during plan implementation.

In recognition of this importance of the law, the Commission in August 1966 published SEWRPC Technical Report No. 6, Planning Law in Southeastern Wisconsin. This report was authored by the late Professor Jacob H. Beuscher of the University of Wisconsin Law School and served as a manual of planning law for the Commission staff in preparing the evolving comprehensive plan for development of the Southeastern Wisconsin Region. It was observed in that report that planning law was not a static entity but rather was in a state of flux due to statutory amendments and court decisions; and that, therefore, it would be necessary to continue to monitor developments in this important but transitory area of the law.

Because of a number of important changes that have taken place in the body of planning law since publication of SEWRPC Technical Report No. 6, the Commission staff in 1975 undertook preparation of a revised edition of this report. The revised edition was authored by Mr. Peter V. McAvoy, Attorney at Law, and is presented herein as the second edition of SEWRPC Technical Report No. 6. The major substantive areas discussed in the original edition by Professor Beuscher are again discussed. Where the original matter has remained relevant and valid, it has been retained. The report has, however, been somewhat reorganized and expanded in scope, with these changes a reflection of recent developments in the law itself.

In using this report, it should again be noted that planning law is not a static entity but is in a state of flux. The users of the report, therefore, are cautioned to consult with the Commission staff, appropriate officials of state and federal agencies, and practitioners of law regarding the effects of new laws and court actions in modifying the findings and conclusions presented here.

Respectfully submitted,

Kurt W. Bauer
Executive Director

PREFACE

In the mid-1960's the Southeastern Wisconsin Regional Planning Commission authorized a study to be conducted by the late Professor Jacob H. Beuscher of the University of Wisconsin Law School on planning and plan implementation law in Wisconsin. The results of that legal analysis were published in Technical Report No. 6, Planning Law in Southeastern Wisconsin. Since the completion of that original work, certain significant developments have taken place in this sphere of the law. In recognition of the importance of these new developments, the Commission has directed that the original report be revised and updated.

On comparing the earlier report to this one, some general observations can be made. Perhaps the most significant one, and one which is a great tribute to the foresight of Professor Beuscher and the individuals who worked with him on the original study, is that their choice and emphasis on certain substantive areas of planning remain extremely relevant. For example, the original report dealt extensively with the concept of placing development in space and time; that emphasis seems well justified upon reviewing many of the leading professional journals and developments of law in recent years. Moreover, the commentary found in Technical Report No. 6 focused on many of the critical problems facing the implementation of effective areawide planning, such as: the wide dispersal of authority to plan in Wisconsin and the concomitant pressing need for better coordination or the difficulty of addressing areawide problems on an areawide basis. These and other problems remain and in certain instances have grown to even more significant levels. Finally, one last observation can be made. The initial report noted that there will always be a need for continuing legal research in this area of law given its dynamic state. That fact is amply proven by this revision, and it is again reiterated. Furthermore, the need to update promises to be even greater in the near future as there is clear evidence of growing pressure at all levels of government to develop policies that will more adequately address the mounting problems associated with inopportune or misplaced development.

Peter V. McAvoy
Milwaukee, Wisconsin

ACKNOWLEDGEMENTS

In the revision of this report, numerous individuals provided a great deal of assistance and advice on the overall scope and content of the report. In particular, the Commission would like to take this opportunity to acknowledge the extremely thoughtful comments of the following individuals on specific drafts of this revision to the report: John Murphy, Assistant Attorney General, Wisconsin Department of Justice; Richard Lehmann, Assistant Professor, Institute of Governmental Affairs, University of Wisconsin-Extension; David Owens, Staff Attorney, Wisconsin State Office of Planning; Art Doll, Director of Bureau of Planning, Wisconsin Department of Natural Resources; Bruce Wilson, Chief, Urban and Regional Planning Section, Wisconsin Department of Transportation; Kenneth C. Kaemmerle, Planner, Local and Regional Planning Assistance Unit, Wisconsin Department of Transportation; Guy Phillips, Economist, Wisconsin Bureau of Revenue; Richard I. Bonser, Planning Analyst, Bureau of Regional Planning and Community Assistance, Wisconsin Department of Local Affairs and Development; and Professor Douglas Yanggen, Agricultural Economics, University of Wisconsin. It should be noted that any opinions, interpretations, or conclusions contained within this report do not necessarily reflect those of the above-named reviewers or their agencies.

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Chapter I

CONTENT AND ORGANIZATION OF REPORT

INTRODUCTION

Within the past several decades, the conversion of the land from rural to urban use in the United States has proceeded at an awesome pace. Many social and economic reasons have contributed to this phenomenon, such as an increasing population, more leisure time, a rise in overall income levels, increased productivity in agriculture and industry, and increased mobility. There are severe problems, however, linked with the concentration of increasing numbers of individuals first into the large cities and then their subsequent dispersion outward into the surrounding countryside. These problems are caused in large part from the fact that the urban development which accompanies the movement of populations often proceeds without first giving full consideration to such questions as: Whether the development should occur at all, or at this time? Whether the site for and the type and intensity of development chosen are sound? What is the impact of the development on those lands and persons immediately adjacent to it on the community, on the Region, the State, or on the nation? The failure to ask such questions has often resulted in improper development and the creation of serious and costly problems such as traffic congestion, air and water pollution, flooding, inadequate public facilities and services of various kinds, the mixing of incompatible land uses, and the unnecessary destruction of important elements of the natural resource base such as prime agricultural lands, woodlands, wetlands, and wildlife habitat.

All of the above problems can be found to some degree in the seven counties which make up the southeastern portion of Wisconsin. This Region containing 5 percent of the land and water area of Wisconsin has experienced a significant growth in terms of population to a level now approximating 1.8 million people.[1] Moreover, the problems enumerated above and others are compounded by the fact that there are 154 local units of government in the Region, often acting independently and with little awareness of the effect of their actions upon one another.[2] Recognizing this situation, the Wisconsin Legislature under Section 66.945 of the Wisconsin Statutes authorized the formation of regional planning commissions in order to more appropriately address and resolve areawide problems which transcend the political boundaries and fiscal capabilities of local governments. Pursuant to that enabling legislation, the Southeastern Wisconsin Regional Planning Commission (SEWRPC) was created in 1960. The Commission, in fulfillment of this statutory mandate, assists local, state, and federal governmental agencies in solving areawide problems and is engaged in an ongoing process of gathering information, designing long-range plans for the development of the Region, and encouraging the adoption and implementation of these plans. An integral feature of this process is an understanding of the legal authority which permits the planning process to be advanced at all levels of government and a familiarization of the legal tools available to implement the resulting plans. This report analyzes the legal authority to effectuate that planning process. It is designed to assist the Commission in its many functions and to apprise officials of government, attorneys, and interested citizens of the private sector of current developments in planning law in Wisconsin.

DIVISIONS OF THE REPORT

The major focus of the report will be directed at the legal authority and mechanisms which promote sound comprehensive planning and plan implementation efforts. It has been organized into five major parts which represent one alternative for dealing logically with numerous aspects of the planning process. But, it should be noted that the various parts of the report are strongly interrelated and the reader must be aware of this relationship from the outset. In fact, as the report indicates, particularly in the latter chapters, the segmented approach to problem solving, e.g., one unit of government acting without consulting other units, or the mere focusing on functional problems to the exclusion of a more comprehensive approach dealing with numerous interrelated issues, is one of the more critical if not the most critical problem in reaching sound decisions on development.

The report progresses through the five parts from the more general to the specific. The first segment, entitled Governmental Authority to Shape Community Development Objectives, provides a broad discussion of the various forms of authority that effectuate planning in Wisconsin and the southeastern Region. Specifically, Chapter II deals with the sovereign powers of the State and the dispersion of that power among the units of government. Chapter III deals with the federal authority

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[1] *SEWRPC, A Regional Land Use Plan and a Regional Transportation Plan for Southeastern Wisconsin—2000, Volume One, Planning Report No. 25, 1975, at pp. 2 and 3. This report indicates that of the total population growth of the State in the years 1960-1972, 47 percent of it occurred in the southeastern Region, at p. 5.*

[2] *Id., at p. 2. This figure is exclusive of school and other special purpose districts.*

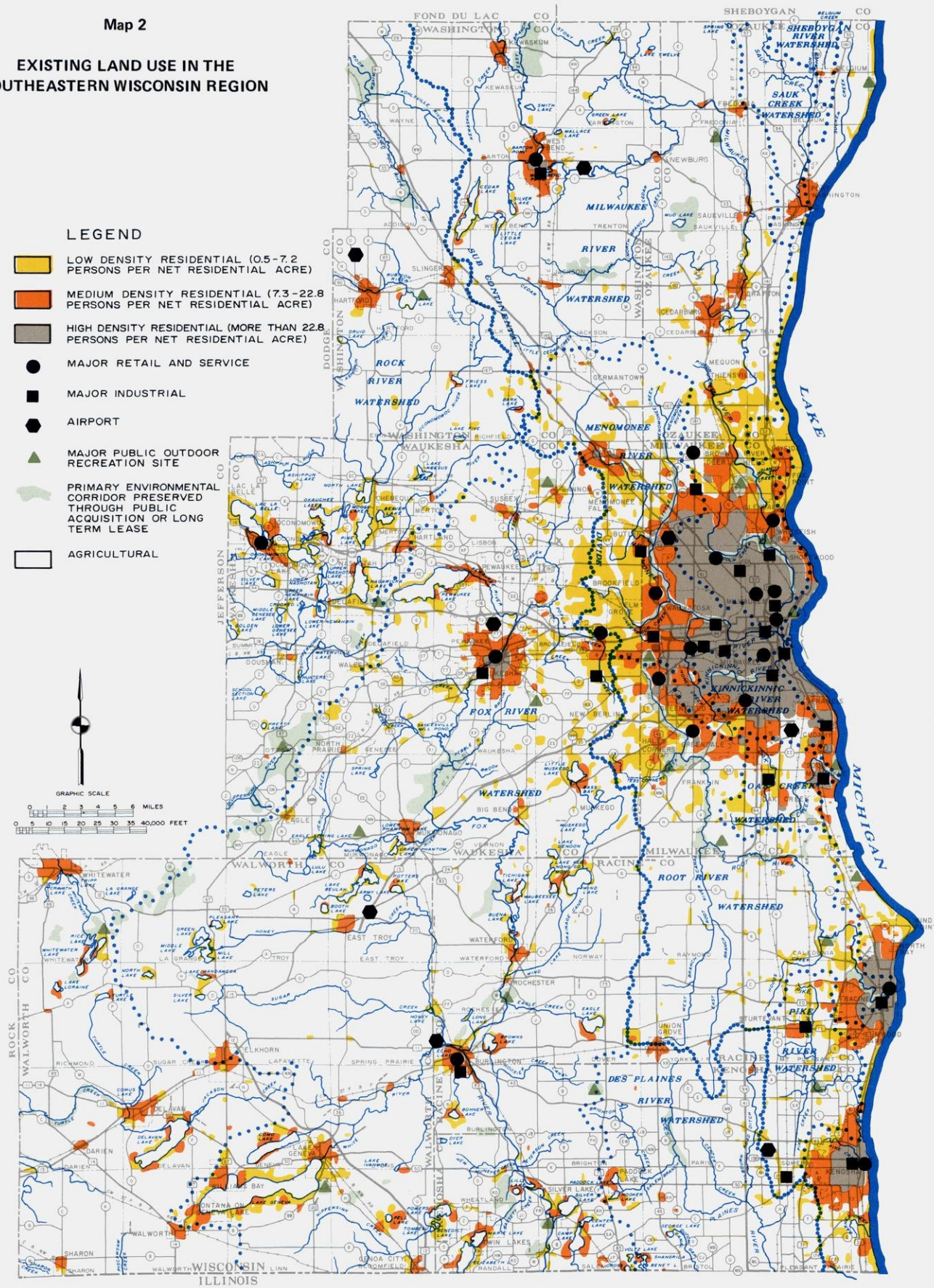
Map 1

THE SOUTHEASTERN WISCONSIN REGION

Source: SEWRPC.

Map 2

EXISTING LAND USE IN THE SOUTHEASTERN WISCONSIN REGION



Source: SEWRPC.

which influences community development plans either through its proprietary powers or through the general welfare and commerce clauses of the United States Constitution. Chapter IV highlights some of the limitations placed on both federal and state authority due to the constitutional protections of the private property owner. And the last chapter of Part I (Chapter V), discusses the types of information and data required to sustain government attempts to implement plans for development.

The second part of the report, entitled Specific Planning and Plan Implementation Powers in Wisconsin, starts out in Chapter VI with a review of the statutory authority of the state agencies and local governments which are permitted to plan for development in Wisconsin. Chapter VII then surveys some of the basic regulatory tools available to implement planning, concentrating on the powers of zoning, building regulations, subdivision controls, and the formulation of official maps.

Drawing upon the foregoing, the third part of the report, entitled Growth Management According to Location and Timed Intervals, explores in the respective Chapters VIII and IX the application of appropriate land use control techniques to effect the proper placement and pace of development.

The fourth part of the report, entitled Planning for Specific Land Use Objectives, concentrates on three specific land use objectives of great importance to the Southeastern Wisconsin Region. Chapter X points up the necessity of open space reservation and the policies and methods for ensuring that enough lands will remain open for the future needs of the Region. Similarly, Chapter XI discusses the reservation of right of way for and protection of highways while Chapter XII further explores the recent impetus at the federal level to encourage development of a coordinated urban mass transportation system.

Finally, the last two chapters of the report form the fifth part, entitled Current Problems Associated with Land Use Planning and Decisionmaking. Specifically, Chapter XIII notes the growing movement of many communities to erect barriers to exclude certain groups of people. This problem is becoming more evident in the Southeastern Wisconsin Region as it continues to urbanize. The final segment of that Chapter advances some alternatives as potential solutions to the exclusionary practices. And, lastly, Chapter XIV takes up the issue of fragmentation in land use planning, with a discussion of various institutional possibilities for achieving greater cohesion in planning for development.

Part One

GOVERNMENTAL AUTHORITY TO SHAPE COMMUNITY DEVELOPMENT OBJECTIVES

The broad authority for the states and the federal government to direct development according to certain preconceived notions has its origin from civilizations that flourished long before the colonization of North America by European nations. The methods chosen by these early peoples to encourage development into specific patterns was enormously diverse but generally sought to meet some common objectives, such as the supply of water, shelter, roads, or even the minimizing of conflicts between people.

Drawing upon this history and learning from its experiences, the founders of the republican form of government in the United States sought to institutionalize in the structure of government certain unique concepts. One of these was the recognition that the sovereign power of government resided in the people as a whole and not in any one particular individual or family. This structure and the philosophy encompassing it has had a profound influence on the management of development in the United States. But from the outset, the early leaders realized that for government to exist, it must continue to have at its disposal fundamental powers to tax, to spend, to acquire property, and to regulate for the common welfare of its citizens. Balanced against these necessary powers were certain constitutional limitations and safeguards which proscribed use of the enumerated and unenumerated governmental powers. Among these came to be the Fifth and Fourteenth Amendments of the United States Constitution which require just compensation for the taking of property and provide that no individual shall be deprived of property without due process of the law. Arising from this balancing process, as could be expected, have been extensive refinements in these doctrines resulting from the many court opinions and legislative enactments. And while the process remains extremely fluid, given the changing nature of federal and state policies along with the interpretation of the law by the courts, some fundamental concepts are evident. Thus, it is toward providing a better understanding of these concepts and in addition supplying a foundation for the remainder of the report that this initial part and its four chapters are devoted.

Chapter II

STATE AND LOCAL POWER TO IMPLEMENT PLANNED COMMUNITY DEVELOPMENT

INTRODUCTION

This chapter includes some general observations about the state's sovereign power to realize community development objectives in physical development plans. The state is the basic reservoir of governmental power in the United States. It derives all such powers from the consent of the governed, retaining all those powers not specifically prohibited to the states or delegated to the Federal Government in the Federal Constitution. Thus, state legislatures, subject to the provisions of federal and state constitutions, have the authority to create, dissolve, or otherwise control the existence, powers, and functions of all political subdivisions within the state. Local units and agencies of government are creations of the state and, as such, can exercise only those powers specifically delegated by the state through enabling legislation or the state constitution. In addition, the sovereign power of the state can be asserted through state level administrative agencies when authorized by the state legislature and as enunciated by the state court system.

Inherent sovereign powers are, therefore, available to the State of Wisconsin; there is no need that the power be expressly mentioned in the State Constitution in order for the State to have it or to exercise it.[1] There are, of

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[1] *While this report will discuss various powers of the State to act on behalf of its citizens, it is well to emphasize from the outset that the sovereign powers mentioned here and the general authority of the State of Wisconsin, the other states and the Federal Government to act for the general welfare emanates from the people collectively. This is different from the "old world" concept of sovereignty residing in a personal head of state who was acting as an agent of God. Cf. Wis. Const. Ann. Art 1, sec. 1 ". . . governments are instituted among men, deriving their just powers from the consent of the governed." Or Ekern v. McGovern 154 Wis. 157, 207 142 N.W. 595 (1913) in which the court states, "When it was established, the people had in their keeping the whole power of sovereignty. Sovereign Authority was to be regarded as in the people, exercisable by the people through their chosen agencies and for the people" (emphasis added). See also Yannacone in a paper, "The Origins of Our National Environmental Policy," published in Future Land Use (1975). The author comments on land use and the questions of sovereignty citing various United States Supreme Court decisions which hold that the people of the Limited States collectively never relinquished their right to require that land be used for the optimal good of all—now and for the future, at pp. 159-169.*

course, limitations imposed upon the exercise of this reserved sovereign power by both the Federal and the Wisconsin Constitutions: for example, the due process and equal protection limitations of the Federal Constitution and the prohibition against the State being a party to a work of internal improvement in the State Constitution. Limitations like these will be treated in more detail in later parts of this report. Here it is sufficient to emphasize: 1) the unwritten origin and great scope of the State's power to act in the public interest and 2) the unity of this power in the sense that it all springs from the deep well of state sovereignty and not solely from the language or implications of general clauses in a written constitution.

THE TRADITIONAL APPROACH TO GOVERNMENTAL POWER

The traditional approach of the planner and of many capable lawyers to the implementation phase of a broad planning program is to compartmentalize the pertinent powers of the state into four categories: the police power, the power of eminent domain, the power of taxation, and the power of appropriation.[2] The next step is to subcompartmentalize the police power into different types of regulatory activities which can be used to implement community development plans, such as zoning, subdivision control, official mapping, setback ordinances, and limited access control.

Such a compartmentalized and incomplete description of the state's powers to implement community development objectives tends to unnecessarily restrict an imaginative approach to plan implementation. Thus, for example, the familiar list of the four powers of government does not account for the ability of the public sector to persuade, educate, communicate, and mold public opinion. The public sector also has the ability to enter into an agreement with a landowner or developer at the point in the development process where governmental approval is being sought. This power is of growing importance in connection with planned unit developments; subdivision plat approvals; and zoning special use permits, variances, and amendments.

Not only is the traditional listing of governmental powers incomplete, but because of compartmentalization there has been a failure to effectively integrate eminent domain, taxation, appropriation, and regulatory tools for the attainment of community development objectives. While it is often convenient for legal purposes to differentiate between the eminent domain, taxation, appropriation, and police powers, the fact is that the first three are often used as regulatory devices. There is much truth in John R. Commons' penetrating statement:

> The American distinction between the taxing power and the police power is to a great extent a legal fiction growing out of our system of government, and it is unnecessary from the economic standpoint and fiscal standpoint. . . for the police power is none other than the sovereign power to restrain or suppress what is deemed by the dominant interests to be disadvantageous to the commonwealth. Taxation, then, is the most pervasive and privileged exercise of the police power.[3]

What has been said is not a purely academic exercise in the semantics of governmental powers. The time for a return to simple fundamentals is long overdue. The focus should not be on the niceties, the subtleties, the particular limitations and potentials or individual legal tools. The focus should be on the accomplishment of the community objectives themselves as expressed in properly prepared development plans.

With this focus in mind and standing firmly on a concept of unity so far as concerns governmental power, the following questions must be considered:

1) Is there no middle ground between full fee simple purchase at full price on one hand and wholly uncompensated regulation on the other? Or is it

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[2] *The power of appropriation includes the broad authority to decide whether or not to expend money for grants-in-aid; for public improvements, such as sewerage, water supply, and transportation facilities; and for a wide variety of other purposes that may involve no regulation under the police power or compulsory purchase under the power of eminent domain but may be exceedingly important in plan implementation.*

[3] *Commons, Institutional Economics (1934), p. 280. There have been many attempts to use the power of taxation to regulate the use of lands, cf. The California Land Conservation Act of 1965, Calif. Ann. Gov. Code sec. 51200 et seq., but for the most part it has been used in other countries. England, for example, attempted to use a betterment levy to capture unearned increments in property value. The rationale was that the increase in property value was attributable to society's demands for certain types of land use (usually more intensified development) and not to the labors of the landowner; thus, that increment (unearned) should be recaptured by the government for the citizen.*

Within the United States, the State of Vermont has taken another tack by applying a heavier capital gains tax on the profits realized from land sales than on other capital assets, 32 V.S.A. sec. 1001 et seq. The theory is to tax the profits so severely so as to discourage short-term speculation in land. For a discussion of these techniques, see Donald Hagman, "Windfalls for Wipeouts," an article published by the Urban Land Institute in Management and Control of Growth, Vol. I, 1975, at pp. 281-285. Hagman remains skeptical that the recapture of windfall profits, i.e., land value taxation, is possible but he does believe that the other side of his equation, "wipeouts" or depreciation in land value caused by regulation, can be mitigated by compensating the landowners for the more restrictive regulations on the land. For further elaboration on methods, see footnote 4 infra.

possible to conceive of a spectrum of possible actions, with purchase at full compensation at one end of the spectrum and regulation with no compensation at the other end? Is it possible to evolve valid control devices that lie between the two extremes on the spectrum?

a) Suppose a local unit of government has the alternative of achieving open space either 1) by outright purchase of private land or 2) by regulating its use through zoning. Suppose the zoning would reduce the market value of the land by 30 percent. If the local unit of government decides to buy, should it be permitted to deduct the value it could have taken without compensation by zoning?

b) Is "compensated regulation" possible? That is, could regulations be imposed with an opportunity for the landowner to collect compensation if he is able either to prove a loss in value or to prove a loss below a specified percentage of market value?[4]

c) Is it necessary, where purchase is decided upon, to purchase the full fee simple? Or is it possible to make a less than fee purchase which leaves the owner a meaningful range of alternatives in the use of his land and yet reserves to the public for a minimal but fair price an interest in the land which permits accomplishment of the desired public purpose?

2) What are the possibilities of combining, for the purpose of achieving community development objectives, regulation of private land and tax incentive inducements or grants-in-aid payments? Is it possible to combine land use regulations with a responsive and equitable tax program to achieve community development objectives?

Is it possible to achieve integration between the capital budgeting for public improvements and regulatory controls?

In general, why must it be one control tool or another or one governmental power or another? Why not greater use of two or more in combination? Why not integration as between regulation measures promulgated at differing levels of government?

3) Is it possible to be more precise and forthright in defining the potentials of, and limitations on, the power of government to negotiate agreements with landowners and the integration of this power with regulatory controls?

These questions are raised here to indicate the importance of the unity of sovereign power and the need to shed outmoded categorizations of governmental powers. This report is intended in part to respond to these questions.

One further point should be made about an integrated and coordinated approach to plan implementation. Decentralization of controls has been encouraged by the historic approach taken in Wisconsin in the enactment of enabling legislation for plan implementation. The problem has not been approached as it has in Great Britain with a single, integrated "Town and Country Planning Act," but on an ad hoc basis, a legislative piece at a time.[5] Wisconsin has a separate enabling act for

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[4] *As the need to regulate the use of land becomes more evident, increasing interest has centered on the possibility of compensating for the reduced value of the land that a regulatory device may impose rather than going the more expensive route of outright public ownership of the fee simple title. For example, in the most recent draft of the Model Land Development Code, April 15, 1975, formulated by the American Law Institute, provision has been made for acquiring partial interests in land, e.g., development rights or scenic easements, either on a permanent or temporary basis, cf. secs 5-101(3), 5-103, 5-105, and 5-106.*

One method being advanced by many individuals (see Hagman, supra) for carrying forward this concept of compensation for regulation is the transfer of development rights (TDR). Basically, the process of TDR's allows the right to develop a parcel of land to be separated from the fee simple title to that land and to be transferred to another unit or parcel of land for compensation. Thus, the owner of a parcel of property which will be extensively regulated could sell the development rights to another landowner thereby increasing (with governmental approval) the density or concentration of development upon the latter's property. An example of extensive regulation is that the permitted use may only allow certain lands on the urban fringe to be used for agricultural purposes. This concept, however, makes some very important assumptions: that there will be a demand to clear the market at a price at least comparable to the value of the development opportunity lost; that governmental decisionmakers are capable of separating those lands most suited to the concentrated development from those that should remain undeveloped; and that an efficient system can be devised that will adequately manage the transfer of rights and compensation. These are all difficult factors to contend with. However, the TDR concept is not lacking for proponents, one of the leaders being John Costonis in "The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks," 85 Harv. L. Rev. 574, 1972; see also a collection of various comments on TDR's by Rose, Transfer of Development Rights, 1975. Further discussion of TDR's can also be found in Chapter XIII, infra.

[5] *Efforts, however, are now being made to provide an institutional structure which would integrate planning for the use of land among state agencies. The Governor of Wisconsin in a directive issued to the Director of the State Planning Office, Department of Administration, April 18, 1975, has authorized that Office to coordinate such plans at the state level. But for Wisconsin the problems outlined above in the main text clearly remain, particularly at the local level of government.*

county zoning, one for town zoning, and still another for city and village zoning. Subdivision regulatory authority appears in quite a different part of the statutes than do any of these zoning enabling acts and without any attempt to mesh the two regulatory tools. Official mapping is clearly authorized for cities and villages; while town and county authorization, in another part of the statutes, is cloudy. Eminent domain powers; building and safety code authorizations; limited access controls; authorizations for special setback ordinances; power to construct and finance public improvements; authorizations for park, playground, and other public facilities; scenic and conservation easement purchasing powers; authorization for soil and water conservation—all these plan-implementing authorizations, and many more, appear in a random, uncoordinated way throughout the statute books.

The Dispersion of the State's Power to Implement Planning Goals Among State Agencies and Local Units of Government

The Legislature of Wisconsin has dispersed among various state agencies and among many local units of government the sovereign power to implement community development plans. This is an obvious but also an enormously important phenomenon. To talk about integration of powers to achieve comprehensive development plans without immediately taking into account this wide-scale dispersion among agencies and levels of government is to ignore the real world of intermixed and complex governmental hierarchies. Consider how in Wisconsin the Legislature has allocated various review powers, for example, over the subdivision of land to numerous state line agencies. As the law presently stands, a subdivider may, after receiving all the requisite local approvals, require review and approval from the Department of Natural Resources,[6] the Department of Health and Social Services,[7] the Department of Local Affairs and Development (DLAD),[8] and the State Highway Commission.[9] And consider that the important planning powers of the State are dispersed among all of the above agencies, as well as others, such as the Department of Administration's State Planning Office, or that the basic powers of judicial review are vested in the various levels of our state courts.

This is but a partial list. It suffices to underscore some of the difficulties facing the achievement of full-scale integration of state governmental powers for plan implementation.

Even more diffuse is the dispersion of authority among 72 counties, over 1,200 towns, and hundreds of cities and villages, to say nothing of such special purpose units of government as school districts, soil and water conservation districts, housing authorities, sanitary districts, drainage districts, and metropolitan sewerage districts. The state agencies, diverse though their powers may be, can at least tackle problems on an areawide basis. The complicating factor is that the Region may be criss-crossed with the artificial boundary lines of towns, villages, cities, counties, school districts, drainage districts, and other governmental units. Moreover, each unit may be holding by delegation from the Legislature some portion of the power needed for a sound, areawide solution.

Attempts to Coordinate Dispersed Powers

In some areas of the State, regional planning commissions have been established under Wis. Stats. 66.945 which include many local units within their areawide jurisdiction. But these commissions are special or single-purpose, not general-purpose, agencies. They can only prepare advisory plans. They have no direct legal authority to implement the plans they make.

Counties in Wisconsin seem to offer both a larger geographical and a more powerful approach to regional plan implementation. Counties, however, have no plan implementation powers inside village and city limits;[10] and outside corporate limits county zoning is subject to town approval. Soil and water conservation districts, which in Wisconsin are coterminous with county boundaries, are tied by their enabling statute to primarily implementing measures which will improve the agricultural lands and waters of the district. Their legal authority is simply not broad enough for full-scale resource plan implementation.[11]

The Wisconsin Legislature has not authorized the creation of regional units with broad, multiple-purpose plan implementing powers.[12] Consequently, individual towns, villages, cities, counties, and other local units and agencies of government must be depended upon for the piecemeal implementation of regional development plans.

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[6] *Wis. Stats. sec. 236.13(2m).*

[7] *Id., secs. 236.13(1)(d) and 236.13(2m).*

[8] *Id., secs. 236.12(2)(a); 236.16(3); 236.20; and 236.21 (1) and (2).*

[9] *Id., sec. 236.13(1)(e).*

[10] *Wis. Const., Art. XI, sec. 3, empowers cities and villages to determine their local affairs and government, subject to acts of the State Legislature of statewide concern. Wis. Stats. 66.01 specifies how a village or city can, in order to implement its home rule powers, enact a charter ordinance; and almost all of Wisconsin's villages and cities have enacted such an ordinance.*

Counties, on the other hand, are auxiliary arms of the State and have only such powers as are conferred by statute. See Frederick v. Douglas County, 96 Wis. 411, 71 N.W. 798 (1897). It follows that, unless the State clearly grants powers to the county to regulate land inside an incorporated municipality, the home rule powers of the incorporated unit and the general limitations on county powers bar the county from exercising such regulatory authority within villages or cities. For example, in Milwaukee County the Legislature found it necessary expressly to authorize county service activities within villages and cities and then only when the incorporated units expressly consented. Wis. Stats. 59.083.

To aid villages and cities that face land use problems which outrun municipal boundaries, the Legislature has delegated the following powers:

1) Adoption of a master plan for those areas beyond the corporate limits which the plan commission believes has a relation to the development of the municipality.[13]

2) Extraterritorial control powers in unincorporated areas lying within one and one-half miles of a village or fourth class city or within three miles of first, second, or third class city limits for purposes of subdivision plat approval,[14] official mapping of future streets,[15] and zoning, the latter only if certain procedures involving town representation on the municipal plan commission are fulfilled.[16]

3) Slight improvement in their annexation authority.[17]

4) Broad permission to local units to band together by contract to do jointly whatever they could do separately.[18]

These are all piecemeal and partial measures. They recognize aspects of the problem but are not totally curative. How then can a region organize for a more effective and efficient solution of regional and local planning problems?

Some suggest turning more and more to the State for comprehensive solutions, although in light of the recent failure of legislation calling for such action, this course does not seem imminent.[19] It should be pointed out, however, that state level agencies are to a considerable degree involved in regional and local planning and plan implementation. For example, the State Highway Commission may purchase scenic easements, in addition to its basic authority to construct highways. In addition, it has important authority to limit access to state trunk highways and thereby to accomplish at least some restrictions on the use of land along these arteries.[20] And, under section 84.295(10) Wis. Stats. the State Highway Commission has also been granted limited official mapping powers.

Moreover, as already indicated above, there are several state agencies involved in approving subdivision plats. Also, in most cases the Department of Local Affairs and Development reviews and must approve all proposed municipal incorporations and, where annexation of territory is being proposed, the Department will determine if the annexation is against the public interest, notifying the annexing village or city and the respective towns of its reasons if it finds that to be the case.[21] Through the exercise of these powers, the Department can, to a major extent, prevent the excessive formation of local governments in metropolitan regions; but it can do little to assemble the local units of government already formed.

Still another example of the State playing a more direct role in matters affecting development plans is the enactment of the Water Resources Act of 1965 which calls for the regulation of shorelands and floodplains.[22] This Act provides that the local communities, cities, villages, and counties must adopt land use control ordinances that meet certain state standards for all lands bordering on navigable waters. In the event that such local ordinances were not adopted, or if they failed to meet such stan-

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[11] *Their boards of supervisors are the members of the agricultural and extension committees of the respective county board. The powers of the board of supervisors were specifically extended by Chapter 323, Laws of 1971, to include consideration of measures designed to conserve and improve natural resources in general and navigable and nonnavigable waters in particular. Furthermore, this amendment provides that such district planning and programs to meet the legislative objectives must be in conformity with regional plans if the district is located within a jurisdiction which has a regional planning commission, sec. 92.08(4) Wis. Stats.*

[12] *In the 1973 Assembly Bill 882, which did not pass, authority would have been provided to the Department of Administration to develop a statewide plan for protecting the land and water resources of statewide significance. The Bill specifically called for identification of the significant land resource areas and development of multi-jurisdictional impact and the setting of standards by the Department to guide local government decisions on those lands and uses which fell into one of the above categories.*

[13] *Wis. Stats. sec. 62.23(2).*

[14] *Wis. Stats. sec. 236.45.*

[15] *Wis. Stats. sec. 62.23(6)(d).*

[16] *Wis. Stats. sec. 62.23(7a)(c).*

[17] *Wis. Stats. sec. 62.021.*

[18] *Wis. Stats. sec. 66.30.*

[19] *See the discussion of Assembly Bill 882, supra, note 12.*

[20] *Wis. Stats. sec. 84.25.*

[21] *In the annexation of town islands, the Legislature will make the necessary determination, sec. 66.021(15), and the Town of Germantown v. Village of Germantown, 70 Wis. 2d 704, 235 N.W. 2d 426 (1975). The procedure for incorporation of villages and cities can be found in sec. 66.014, and the role of DLAD in annexation proceedings is defined in sec. 66.021(11).*

[22] *The relevant Wisconsin Statute sections are 59.971, 144.26, and 87.30.*

dards, the Department of Natural Resources is authorized to adopt an ordinance for the respective area.[23]

Another possible approach lies in the direction of local units of government sharing plan implementation powers with regional planning commissions. This could be accomplished under the authority granted under sections 66.30 and 66.945(11) Wis. Stats. and such an arrangement would permit more effective use of planning staffs and budgets of the regional planning commissions.

A further approach to the problem of areawide plan implementation lies in the direction of state legislation granting at least limited plan implementation powers to regional planning commissions or other regional associations of local governments. One example is found in section 66.066 Wis. Stats. which permits joint bond issues by commissions created by contract between local units of government pursuant to section 66.30 Wis. Stats. The lack of a regional constituency, however, together with the nonexistence of regional legislative or executive bodies, constitute major hurdles to significant progress along these lines.

Enough has been said to underline the familiar problems created in the face of areawide urbanization by dispersion of plan implementation powers over many agencies and units of government. This chapter concludes with the suggestion that the challenge is two-fold: 1) integration of plan implementation tools, premised on a unitary concept of the State's sovereign power and 2) the necessity for developing regional plan implementation tools to solve areawide development problems.[24]

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[23] *Further elaboration on the shoreland/floodplain legislation can be found in Chapter VI.*

[24] *Discussion of areawide problems and possible alternatives for their resolution can be found throughout the remainder of this report with particular emphasis in Part 5 which encompasses Chapters XII and XIII.*

Chapter III

FEDERAL POWERS WHICH INFLUENCE COMMUNITY DEVELOPMENT PLANS

INTRODUCTION

The influence and programs of agencies of the Federal Government have spread so widely and deeply into the fabric of land, water, and other resource use that it has become difficult to convince people that the Federal Government is actually a government of limited, that is, delegated powers. The instrument of delegation is, of course, the United States Constitution. The language of delegation in the Constitution is broad; and, in addition, it has been generously interpreted by the United States Supreme Court. Nevertheless, the key point remains: a State has the full imperium of a sovereign to implement resource policies and plans; the Federal Government has only such powers as are delegated to it by the Constitution. In spite of the broad sweep given some of these delegated powers, there are certainly some implementation measures which are in the exclusive domain of the State and unavailable to the Federal Government. Thus, although the Federal Government may attempt to influence the content of a zoning or subdivision control ordinance through its numerous grants-in-aid or mortgage insurance programs, a federal zoning or subdivision control law which attempted to regulate land uses directly in all, or a part, of any state would undoubtedly be declared unconstitutional as not being based on any power delegated to the Federal Government by the Constitution.[1]

Nevertheless, a discussion of three powers of principal importance for plan implementation which have been delegated to the Federal Government, with illustrations of how they have been or might be used in the Region, is important to this report. No attempt is made to be exhaustive, however, since such an effort would expand this chapter into a stout volume. It is hoped, that this summary sketch will contribute to a general understanding of the present and potential role of the Federal Government in plan implementation in the Southeastern Wisconsin Region.

THE AUTHORITY TO ACT UNDER THE GENERAL WELFARE CLAUSE

First to be considered is the so-called general welfare power of the Congress. The Constitution delegates to Congress power to "lay and collect taxes, duties, imports, and excises to . . . provide for the . . . general welfare of the United States."[2] Note that this is not a power to regulate in the general welfare; it is a power to tax and to raise and spend money for the general welfare. Here is the constitutional basis for federal grants-in-aid—a most important source of influence on plan implementation. Open space grants, land and water conservation grants, water pollution control grants, community facility grants, highway grants, and housing grants are all important illustrations of the exercise of this power to encourage plan implementation. Of major significance to the development of the Southeastern Wisconsin Region over the past two decades have been the various federal highway aid programs. This federal assistance, emanating from the highway trust funds and other sources, however, has continually been reshaped over the years to reflect specific problem areas. An example of this is the attempt to integrate local, state, and regional planning to more effectively predict the quantitative and qualitative impacts of highway projects upon the economy, social structures, and environment of a particular region.[3]

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[1] *Perhaps the most familiar efforts by the Federal Government to influence certain patterns and types of development can be found in the FHA home insurance program or the more recent Flood Disaster Protection Act of 1973, Pub. L. 93-234 Title I, sec. 108(a), Dec. 31, 1973, 87 Stat. 979, 42 U.S.C.A. sec. 4001 et seq.; the latter discourages development in flood-prone areas by excluding federally backed insurance for a community that has failed to prohibit certain development in floodplain areas through appropriate zoning.*

[2] *U. S. Const., Art. 1, sec. 8.*

[3] *Cf. 23 U.S.C.A. sec 109 which requires that these factors be considered in any federally funded highway project. Included are the costs of eliminating or minimizing the adverse effects of: 1) air, noise, and water pollution; 2) destruction or disruption of man-made and natural resources, aesthetic values, community cohesion, and the availability of public facilities and services; 3) adverse employment effects and tax and property value losses; 4) injurious displacement of people, businesses, and farms; and 5) disruption of desirable community and regional growth. And, under a different section (23 U.S.C.A. sec. 134) Congress has mandated that the Secretary of Transportation may only approve projects designed for urban areas (of more than 50,000 population) which are based on a comprehensive transportation planning process which involves State and local cooperation and conformity with the federal objectives and standards.*

Statutory objectives such as these have subsequently been upheld in Arlington Coalition on Transportation v. Volpe, 458 F 2d 1323 (CA 2 1972) cert. den. 93 S. Ct. 312, 409 U. S. 1000, 34 L. Ed. 2d 261, in which the Court of Appeals, at p. 1337, found that a public hearing must be held on plans for federally assisted highway projects and it must consider the socioeconomic impacts of the proposed project. In this case the finding was made even though the project had been initiated prior to the enactment of the legislation. And, in State of Nebraska Department of Roads v. Tremann, 510 F. 2d 446 (CA8 1975) the court, at p. 448, found that a State is constitutionally free to operate its own highway system but the Federal Government would not be bound constitutionally or statutorily to grant funds if the State has not met the federal guidelines.

Closely related to federal grants-in-aid for functional programs, such as highways, are funds which have been made available to the states, local communities, and regional agencies to facilitate comprehensive planning. Notable among this type of funding have been "701" planning grants, which seek to stimulate an ongoing comprehensive planning process that will more adequately deal with the problems of both urban and rural areas. More specifically, these grants are designed to instill among the various levels of government within the states a technical and management capability for effectively guiding decisions on growth and development.[4] In order to further stimulate the above planning objectives, the Federal Government through the A-95 review process requires that proposed federal public works projects take cognizance of existing state, regional, and local development plans to prevent their working at cross purposes with the other projects and to encourage intergovernmental coordination on solving areawide and community problems.[5] Involvement of regional planning commissions in the advisory review of application for federal grants, pursuant to this and other federal law and administrative regulations has become an increasingly important vehicle for regional plan implementation. The regional agency in this way is able to induce local units of government to consider broader regional plans and objectives when applying for federal funds under these programs.

Another aspect of the federal presence in influencing plan implementation—and a direct one—is the provision of technical services of federal employees. Technical services by U. S. Soil Conservation Service, U. S. Geological Survey personnel, and educational services of county agents, who are in part federal employees, are illustrations of this important source of assistance to state, local, and regional planning efforts, a source premised fundamentally on the congressional power to tax and thus to provide for the general welfare.

Beyond the provision of money and services, the Federal Government under the general welfare clause of the Federal Constitution has major influence on the development of land for housing and the clearance and redevelopment of land. While the majority of land use planning has traditionally been conducted at the local level, the effect of federal activity on residential development patterns throughout the country is considerable. Illustrative of the federal ability to effect housing patterns are the mortgage insurance programs, which have been in existence for over 40 years.[6] The U. S. Department of Housing and Urban Development and its predecessor agencies through these insurance programs and other recent programs designed to assist low- and moderate-income families have had a profound impact on subdivision layout, site planning, and local building codes. This influence has been achieved by requiring compliance with federal standards in order to qualify for the various insurance programs.[7]

Moreover, the United States Congress, in responding to severe destruction of life and property, has taken a further step in indirectly affecting long-range development patterns in areas subject to flooding through the use of yet another insurance program. This program, initially begun in 1968 and subsequently amended by the enactment of the Flood Disaster Protection Act of 1973, authorizes the Secretary of the U. S. Department of Housing and Urban Development to provide insurance against damage and losses caused to real and personal property by flooding.[8] However, the major provisions of the Act require that all flood-prone areas be identified and that the states and local communities, in order to participate in the insurance program, adopt adequate floodplain ordinances and enforcement provisions which preclude development in areas subject to future flood losses.[9] The program gains leverage by the fact that all

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[4] *40 U.S.C.A. sec. 461 et seq. The "701" program is administered by the U. S. Department of Housing and Urban Development which establishes the criteria and reviews the various projects for their content and direction. The congressional purposes were to: "encourage the formulation of plans and programs which will include the studies, criteria, standards, and implementing procedures necessary for effectively guiding and controlling major decisions as to where growth should take place within such states, regions, or areas," sec. 461(n). Other examples of federal assistance for planning are the grants for water resources planning, 42 U.S.C.A. sec. 1962 et seq., and economic development planning, 42 U.S.C.A. sec. 3151a.*

[5] *The authorization of A-95 clearinghouse review procedures is found in 42 U.S.C.A. secs. 4231-4233. The U. S. Office of Management and Budget is the administrator and promulgator of the various rules and regulations embodied in that review process.*

[6] *The authorization of mortgage insurance grew primarily out of the depression years. Cf. 12 U.S.C.A. sec. 1707 et seq., Chapter 847, Title II, sec. 201, 48 Stat. 1247, June 27, 1934, which deals with the FHA.*

[7] *An example of a more recent program is the congressional authority granted to the Secretary of Housing and Urban Development to enter into contracts to reduce interest payments of owners of rental housing designed for lower income families. Entitlement to this reduction, however, is conditional upon the rental housing project having met various construction and financial requirements, 12 U.S.C.A. sec. 1715 Z-1.*

[8] *42 U.S.C.A., sec. 4001 et seq. Originally the program was set in place as the National Flood Insurance Program of 1968, Pub. L. 90-448 Title XIII, sec. 1302, 82 Stat. 572, 42 U.S.C.A. sec. 4001 et seq.; the program also covers damage caused by waves, currents, and subsidence, sec. 4121.*

[9] *42 U.S.C.A. secs. 4002(b)(2) and (3). The floodplain delineation is based on the 100-year recurrence interval flood levels. The congressional objectives of the Act are clearly centered on future development with the intent of preventing new development in flood-prone areas. Those owners having property already located in high risk areas would be able to obtain flood insurance under the existing program provided the State and/or local communities have adopted adequate floodland use control ordinances.*

federally assisted development projects, which include not only direct grants but federally backed mortgage insurance, and loans for public and private building equipment and fixtures be conditioned on compliance with the floodplain zoning ordinance that meets the federal standards.[10]

The full reach of the federal power to tax and to spend for the general welfare has not yet been specifically defined and probably never will be. Undoubtedly, we can expect additional federal programs premised on this power, with major impact on state, regional, and local resource planning and plan implementation. The pattern and objectives of those future expenditures will more than likely continue to assist and persuade decision-makers and planning efforts to proceed along certain defined lines as can be found in the current programs for transportation or housing and flood insurance. Indications are that the federal role to tax and appropriate funds for the general welfare will continue to be an expansive and important one.

THE PROPRIETARY POWER

A second source of federal authority important to plan implementation is the proprietary power of the Congress. The Constitution provides:

> The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States. . . .[11]

In some areas the Federal Government is a large landowner. It is within the power of Congress to make this land subject to state or local controls. In the absence, however, of express consent by Congress, federal lands are immune from state or local plan implementing measures. As a matter of fact, Congress has the power to institute uses and rules quite inconsistent with state, regional, or local laws or plans. This might be true of federally operated institutions, military establishments, parks, forests, monuments, and scientific areas. Where the Federal Government in the exercise of its general welfare or commerce powers builds structures or produces power or other products, the operation of the structure and the distribution of the products may under the proprietary power be free of, and be inconsistent with, state, regional, or local planning controls.[12]

In a fairly recent development which combines the proprietary power of Congress and its power of condemnation, the Federal Government has been able to induce local zoning of lands adjacent to federally owned property in accordance with federal standards without having to acquire the nonfederal property. As previously indicated, the Federal Government lacks the power to zone lands which it does not own. But, starting with the legislation to establish the Cape Cod National Seashore, Congress has developed a unique mechanism to circumvent this limitation on its power.[13] The process which incorporates this land use control mechanism involves the designation of property suitable for federal acquisition. However, for certain portions of the identified property, the power of condemnation is suspended so long as the local community has adopted and enforces a valid zoning ordinance which meets specific federal regulations and standards for the nonacquired property adjacent to the federal lands.[14]

The effect of this induced zoning is to permit the Federal Government through the threat of using its condemnation power to have considerably more influence over a larger segment of land than it actually owns. This concept was subsequently broadened with the acquisition and creation of the Pictured Rocks National Lakeshore to include an inland buffer zone comprising private property adjacent to the national lakeshore.[15] The congressional purposes for establishing that buffer zone were to:

> . . . stabilize and protect the existing character and uses of the lands, waters, and other properties within such zone for the purpose of preserving the setting of the shoreline and lakes, protecting the watersheds and streams, and providing for the fullest economic utilization of the renewable resources . . . .

The possibility of using this device for property surrounding other federal landholdings certainly is feasible. If it is utilized, it will of necessity entail strong local public participation in the overall program, as it has in previous applications. The expected benefits to be derived from implementing the concept of induced zoning are: that a sizeable portion of land will remain in the private sector but with a greater assurance that the use of those lands will not adversely affect the federally owned prop-

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[10] *42 U.S.C.A. secs. 4003 and 4012(a); the latter section permits the granting of federal assistance. However, the recipient must show an amount of insurance coverage at least equal to the amount of the federal loan, and obtaining such insurance outside of the federal program given the risks involved could prove to be very expensive. Further discussion of the Flood Disaster Protection Act of 1973 can be found in Chapter IX of this report and also in SEWRPC Technical Report No. 2, Water Law in Southeastern Wisconsin, Second Edition, Chapter VI.*

[11] *U. S. Const., Art. IV, sec. 3.*

[12] *Ashwander v. TVA, 297 U. S. 288 (1936).*

[13] *16 U.S.C.A. sec. 459 b et seq.*

[14] *Sec. 459 b-3 et seq. In the event that a nonconforming use occurs or the zoning ordinance is amended or not enforced without the approval of the administering federal agency, the condemnation power would no longer be suspended.*

[15] *16 U.S.C.A. secs. 460s-8 and 460s-9. Other examples where induced zoning has been utilized are: Fire Island National Seashore, 16 U.S.C.A. sec. 459e-1 et seq. and Whiskeytown-Shasta-Trinity National Recreational Area, 16 U.S.C.A. sec. 460 q et seq.*

erty; and that this greater certainty can be achieved at far less cost to the Federal Government than if it were to acquire the fee simple title of the adjacent property.

THE COMMERCE POWER

The third major source of power capable of influencing and, if used in an uncoordinated manner, disrupting state, regional, or local plan implementation is the so-called commerce power. The Constitution grants to Congress power "to regulate commerce with foreign nations, and among the several states."[16] This simple statement has spawned an enormous number of widely differing federal regulatory enactments: for example, child labor laws, equal accommodation laws, pure food and drug acts, federal water acts, regulation of railroads, and the Securities and Exchange Commission Act. These are but a few pieces of legislation in the enormous and ever-expanding body of federal legislation regulating activities that have a bearing on commerce between the states. No attempt is made to fully discuss herein this rapidly expanding source of federal regulation. Instead, an outline of how the commerce power has developed in the water field is included. Statements made in relation to water resources are intended to impart some feel for the expansion of federal power over time concerning the regulation of so-called interstate commerce. In addition, it is essential to be aware of the reserved power of the State which continues to apply, at least until it is preempted by special congressional interstate commerce enactments.

The Federal Government has asserted dominant regulatory authority over the waters of the United States since the formative years of the nation. For almost two centuries, the use of the commerce power by Congress to control the nation's waters was tied to the test of navigability; that is, if the waters could be used to transport commerce, then Congress could regulate their use. However, with time, the extension of control over the flow of commerce and, thereby, the waters grew considerably. The effect was to negate for the most part the limiting effects that navigability may have had on the exercise of the commerce power. Finally, in 1972, with the Amendments to the Federal Water Pollution Control Act, the requirements of navigability were intentionally dropped altogether.[17] The result of that Amendment is that all waters of the United States are under the jurisdiction of Congress if their use will have an impact on commerce. Presumably this means intrastate, as well as nonnavigable waters, and as of this date judicial interpretation of the Act has upheld the Congressional expansion of jurisdiction.[18]

One of the more important planning features to result from the Federal Water Pollution Control Act Amendments of 1972 was the requirement under Section 208 of the Act to develop and implement areawide waste treatment management plans.[19] The congressional objective under this section was to institute an ongoing planning process that will develop alternatives that effectively deal with wastes generated in a particular region or area. Among the factors to be considered and included within this planning process are: the identification of treatment works necessary to meet the expected municipal and industrial needs over a 20-year period and the identification of nonpoint sources of pollution resulting from the practices of agriculture and silviculture, along with procedures to reduce nonpoint source pollution. Furthermore, this section of the Act requires that an institutional framework be established that will implement and enforce the plans as they are formulated.[20]

Within Wisconsin the Southeastern Wisconsin Regional Planning Commission has been designated by the Governor of Wisconsin to develop the areawide waste treatment management plans for the Region. That task is a significant one which promises to have far-ranging impact on

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[16] *U. S. Const., Art. 1, sec. 8.*

[17] *At least for the elimination of pollution, 33 U.S.C.A. secs. 1251 et seq. 86 Stat. 816. See sec. 502(7) where it states that "the term navigable waters means the waters of the United States."*

[18] *In U. S. v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974), the United States brought an action to enjoin allegedly unlawful landfilling operations on lands above the high water mark which were subject to periodic inundation by nonnavigable waters. The defendant had not obtained a permit under the Federal Water Pollution Control Act, and the Court found that even though these intertidal wetlands were above the mean high water line they were subject to the requirements of the Act. The Court went on to say: that Congress has wisely determined that federal authority over water pollution properly rests on the Commerce Clause and not on past interpretations of an act designed to protect navigation, at p. 676. And for a similar conclusion, see U. S. v. Ashland Oil and Transportation Co., 364 F. Supp. 349 (W.D. Ky. 1973). And, in the most recent case of Natural Resources Defense Council v. Callaway, 392 F. Supp. 685 (D.C. D.C. 1975) the Court, at p. 686, found that the U. S. Congress in defining navigable waters, "to mean 'the waters of the United States, including the territorial seas,' asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used in the Water Act (FWPCA), the term is not limited to the traditional tests of navigability."*

[19] *Supra, note 18.*

[20] *One of the mechanisms of enforcement available to a governmental body authorized to implement the areawide waste treatment management plans is the ability to refuse any wastes from any municipality or subdivision that does not comply with the provisions of the plan, sec. 208(c)(2)(h). Another is that no monies will be granted for publicly owned treatment works unless there is compliance with the plan, sec. 208(d).*

the future development of the Region as the process and plans envisioned under the federal legislation are set in place.[21]

By way of summing up these brief references to the federal powers as they affect or might affect plan implementation in the Southeastern Wisconsin Region, it can be said that, while direct zoning or other regulation of land uses by federal action is not constitutionally possible, nevertheless, under its proprietary and commerce powers the Federal Government can intervene to aid or disrupt state, regional, and local plan implementation. Under its power to tax and spend for the general welfare, the Federal Government does play an important plan-implementing role in a wide variety of grants-in-aid (including highway aids), federal technical services, and insurance programs. This role will increase in importance as new programs are evolved and especially if the Federal Government undertakes in the Region a project so major that it can be said to be in the general welfare and not just local in its impact.

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[21] *Further discussion of SEWRPC's Section 208 responsibilities will follow. Another federal enactment which could have considerable influence on land use and transportation plans and parallel somewhat the water pollution control legislation is the Clean Air Act, cf. 42 U.S.C.A. sec. 1857 c-5(a)(2)(B).*

Chapter IV

THE PRIVATE PROPERTY OWNER AND LIMITATIONS ON STATE AND FEDERAL POWER

Previous pages explored some of the important powers of the federal, state, and local governments which enable them to engage in the planning process. It is equally important to discuss the decisionmaking dominion of the private landowner as an integral feature of that same planning process. If largely private and decentralized, decisionmaking is to continue to play a major role in community development, the plan implementation power of government must be carefully balanced against private property rights. This chapter, therefore, considers the nature of private property in land and the safeguards erected by the Federal and State Constitutions to protect the rights to this property. Consideration also is given to the evolutionary character of court-made case law, which is constantly molding and reshaping the interpretations to be placed both on constitutional safeguards and on the nature of the private property interest itself.

Blackstone in the latter part of the eighteenth century wrote:

> Regard of the law for private property is so great . . . that it will not authorize the least violation of it, not even for the general good of the whole community.

This was not true when Blackstone wrote it, and certainly it is not true today. There has always been involved, implicitly or explicitly, a notion that it is the State which, through the courts, declares and enforces property interests and that what the State gives it can, within the limits of constitutional restraints, also take away. Here it is important for the reader to understand that the substantive content of what is today called "private property in land" is the product, to a major extent, of court-made case law developed over many hundreds of years, decision by decision, in Anglo-American courts.

Over a century ago when a settler received an original United States patent deed to a tract of virgin land in southeastern Wisconsin, this patent conveyed a full fee simple estate in the land. But this fee title was encumbered by a number of public claims and powers from the very instant ownership passed to the settler. For example, the law of nuisance, enforced by the courts, required that the new owner use his land so as not to interfere substantially either with his neighbors in the use of their lands or with members of the general public in the exercise of their rights as citizens. In addition, there was reserved in the government a power to tax the land and to take the land from the owner if he failed to pay the tax. Also reserved was a power to take the land by compulsory purchase for a public purpose on payment of just compensation. In addition, there was reserved a broad power to regulate with respect to use of the land. In the early history of our State, fencing laws and drainage laws evidenced the use of this reserved regulatory authority.

The following mid-nineteenth century statement by Chief Justice Shaw of the Supreme Court of Massachusetts is worth repeating:

> We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community . . .
>
> There are two reasons of great weight for applying this strict construction of the constitutional provision to property in land: 1st, such property is not the result of productive labor, but is derived solely from the State itself, the original owner; 2nd, the amount of land being incapable of increase, if the owners of large tracts can waste them at will without State restriction, the State and its people may be helplessly impoverished and one great purpose of government defeated.[1]

More subtle than these reserved public interests in private land is the capacity of American courts, using our systems of case law and judicial review, to mold and shape the substantive content of private property in land as changing needs require. Thus, private property in our country, far from being a static concept devised to protect and maintain the status quo, has instead been an instrumentality of dynamic growth in a free enterprise system. A leading economic-legal historian has put it this way:

> As a people we were too much committed to faith in the beneficient dynamics of increased productivity to permit past claims to thwart future promise. We did not evolve sharply defined principle on this matter. But in practice we tended to uphold vested rights only so long as they were felt to yield substantial present returns in social functions.[2]

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[1] *Commonwealth v. Alger*, 7 Cush. 53 Mass. (1851).

[2] *James Willard Hurst, Law and Social Process in U. S. History (Cooley Lectures, 1960), p. 236.*

Considering a fee simple property interest in land further, it should be noted that property, as used in this sense, is a concept which exists only in the mind of man. This property interest is frequently likened to a bundle of sticks. A cable with many strands is a better analogy. There are three major groups of strands constituting the whole property interest cable: 1) rights to keep others off the land, to have the land exclusively for one's self; 2) powers to dispose of that which one owns in whole or in part, by conveyance, grant, lease, mortgage, or gift; and 3) privileges to use the land that one owns.[3] In the absence of any statutory regulations, these privileges are very extensive although, as indicated, even then they are limited by the requirements of the law of nuisance.

It is clear that some takings (eminent domain proceedings) require just compensation while others (regulatory limitations) do not. A reading of the Fifth Amendment of the Federal Constitution and Article I, Section 13, of the Wisconsin Constitution, however, seems to assure just compensation for any and all losses resulting to the private property owner from governmental action. The Federal provision says:

> . . . nor shall private property be taken for public use without just compensation.

The State of Wisconsin provision is substantially the same. It provides:

> The property of no person shall be taken for public use without just compensation therefor.

The answer to this seeming inconsistency lies in the definition of the three major terms found in both of the quoted passages: 1) What is a "taking" of property? 2) What is a "public use"? and 3) Assuming a taking for a public use, what is "just compensation"?

The "just compensation" provisions are not the only constitutional prohibitions against the taking of property. The Fifth Amendment and the Fourteenth Amendment of the Federal Constitution forbid the Federal Government and the states, respectively, from depriving persons of their property without "due process of law." Comparable limitations exist in all state constitutions.

These two sets of constitutional limitations as a measure of justice reject confiscation. But they provide no definite criteria by which to test when compensation must be paid and in what amount. They contain no specific guides telling when governmental action is in the domain of legitimate regulation for which no compensation need be paid and when the outer limits of constitutional regulation have been reached and a compensable taking has occurred.

Instead, the courts, state and federal, have been left to wrestle with specific cases and through them to try to define the rights protected and the circumstances under which recovery (if any) might be had for a deprivation of property rights. The courts have tried to evolve guides somewhat more specific than the very broad constitutional language. In the process they have defined, at least partially, the terms "taking," "public use," and "just compensation." They have developed the familiar public health, safety, morals, and general welfare formulas and have sustained without compensation, regulatory action by government on one or more of these grounds.

A CASE EXAMPLE

To define more adequately the distinctions that the law places on the rights of the private landowner versus the governmental efforts to regulate the uses of land on behalf of its citizens, the recent landmark case of Just v. Marinette offers some further practical insight.[4] In that decision the Wisconsin Supreme Court addressed the property rights issue directly and, in so doing, the judiciary forged some rather unique concepts which further illustrate the evolutionary nature of the law.

The Just case involved a constitutional challenge to the Marinette County shoreland zoning ordinance which was adopted pursuant to State of Wisconsin enabling legislation. That legislation mandated the regulation of lands adjacent to navigable waters in order to maintain the quality of these waters for all the State's citizens.[5] The conflict with the ordinance and the subsequent appeal to the Wisconsin Supreme Court arose over the fact that the private landowner had filled in a portion of the wetlands contained on his property in violation of the County's ordinance.[6] The landowner argued that the

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[3] *See Vol. 1, Restatement of the Law of Property (1932).*

[4] *56 Wis. 2d 7, 201 N.W. 2d 761 (1972).*

[5] *The relevant Wisconsin Statute sections are 144.26 and 59.971. Sec. 59.971 Wis. Stats. authorizes the counties of the State to enact ordinances to regulate all shorelands including floodplains within the unincorporated areas of the counties. Cities and villages under sec. 62.23(7) are also permitted to adopt such regulations for shoreland areas, see Wis. Stats. sec. 144.26(2)(e). The purposes for which ordinances are adopted pursuant to Wis. Stats. sec. 59.971 are deemed to embrace all of those as found in Chapter 144, 60 OAG 209, June 3, 1971. The regulations will apply to strips of land 1,000 feet from a lake, pond, or flowage and 300 feet from a river or stream or to the landward side of the floodplain, whichever distance is greater. Under the Administrative Code NR 115.02(2) it further states that "to comply with the Water Resources Act, it is necessary for a county to enact shoreland regulations, including zoning provisions, land division controls, sanitary regulations, and administrative provisions ensuring enforcement of the regulations."*

[6] *The amount of fill exceeded that permitted under the County ordinance and as such required a conditional use permit. Just (the landowner) failed to obtain this permit, thus violating the ordinance and subjecting himself to a $10-$200 fine for each day of violation.*

restrictions placed on his use of the property constituted a constructive taking of the land without compensation and was therefore unconstitutional. Marinette County and the State of Wisconsin on the other hand argued that it was a proper exercise of the police power of the State and it did not so severely restrict the use or depreciate the value of the property to amount to a taking. In rephrasing this classic confrontation Chief Justice E. Harold Hallows stated:

> It is a conflict between the public interest in stopping the despoilation of natural resources, which our citizens until recently have taken as inevitable and for granted, and an owner's asserted right to use his property as he wishes.[7]

The opinion went on to differentiate between the use of the power of eminent domain and the police power: namely, that under eminent domain there is a taking of property because it is useful to the public and compensation is required whereas, under the police power, the reasonable regulation or the restriction on the use of land does not require compensation because it has as its objective the prevention of potential harm to the public.[8]

Having thus established this basic construct, the Court's analysis in Just proceeded to touch on some very important factors. The Justices emphasized the critical interrelationships between wetlands, swamps, marshes, and other land areas adjacent to the waters. The Court reasoned that the State's efforts to restrict uses on such land did not constitute improvements to the public sector but only preserved nature from unrestricted activities of humans.[9] And it went on to state:

> It seems to us that filling a swamp not otherwise commercially usable is not in and of itself an existing use, which is prevented, but rather is the preparation for some future use which is not indigenous to a swamp. Too much stress is laid on the right of an owner to change commercially valueless land when that change does damage to the rights of the public.[10]

Furthermore, in responding to the Justs' arguments that their property had been severely depreciated in value by the restrictions, the Court found:

> This depreciation of value is not based on the use of the land in its natural state but on what the land could be worth if it would be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling.[11]

Thus the Court concluded that the public's right to pure waters within the State was a present right and one that would be protected constitutionally by regulating adjacent land with shoreland zoning, and therefore the police power and not the power of eminent domain was involved. Also, since the value of the lands was to be determined as the lands then existed in their natural state, and not on speculative value after improvement, that value had not depreciated and a constructive taking had not occurred and the restrictions under the ordinance would remain in place.

A PERSPECTIVE

The reasoning in Just v. Marinette illustrates the evolution of the law in responding to the values and interest of society over time. But, as in the past, the goal will be to strike a balance between needed public programs and regulations on one hand and private interests on the other. It is not possible to distill out of the case law infallible guides. It is difficult to predict whether a court will be impressed with the importance and community need for a given governmental action and uphold uncompensated regulation or, in spite of public benefits, will call the action a taking of private property which must be compensated. Certainly, as is suggested in the next chapter, a solid empirical underpinning of facts and analysis explaining why the public action is needed and its importance to the total community may make the difference between the upholding or annulling of uncompensated regulation.

There often exists a proper judicial suspicion and watchfulness for official overreaching, unfairness, or precipitous, unstudied action. The association of any such improper

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[7] Supra, *note 4, at pp. 14-15.*

[8] *But when the police power imposes such restrictions on the use of land as to effectively negate the reasonable use of the land, it will generally be deemed a "constructive taking" even though the actual ownership has not been transferred to the State. Under that situation compensation would have to be made or the restrictions lifted.*

[9] Supra, *note 4, at pp. 23-24. And for one commentator's view of broadly applying this new valuation process on a wide scale, see Large, "This Land is Whose Land? Changing Concepts of Land as Property," 1973 Wis. L. Rev. 1039, at pp. 1074-1083. The possibility of wide application, however, as the author himself admits, at p. 1079, would seem to be unfounded since presumably the Court would limit this reasoning to lands which have unique environmental characteristics and lands which also have been so designated by the Legislature. The Court's continued emphasis on the importance of wetlands to navigable waters, for example, would seem to bear this out.*

[10] Supra, *note 4, at p. 22.*

[11] Supra, *note 4, at p. 23. This represents a significant departure from the traditional legal position of incorporating such speculative value into the present worth or value of the land.*

actions, even remotely, with a plan implementation regulation or program may result in the invalidation of the regulation or program which on its face may seem important and needed.

It is not possible to conclude that if a governmental action reduces the value of private property by more than a specified percentage, it is invalid as a regulation and can only be carried out by payment of compensation. Again variables enter and may control the case. The utility and importance of the governmental action, the location of the land, whether or not the owner will still be able to earn a return on the land, what kind of a use the owner wishes to make of his land and in what kind of a neighborhood—these are only some of the considerations which explain why in one case an enormous uncompensated reduction in value may be upheld, while in another a relatively slight reduction is declared invalid.

The question may be asked: "How can this be? The Constitution says if private property is taken, just compensation may be paid. Why shouldn't the government be required to pay for every action which adversely affects the value of private land?" The response focuses on the meaning of the words "taking" and "property" as they have evolved in judicial decisions over the years.

The consequences of declaring every diminution in value resulting from governmental action a compensable taking would be an astronomical addition to costs of government. An ordinance establishing a setback, the creation of a one-way street which diverts a portion of the former two-way traffic flow, limiting access to an abutting highway, and dozens of other typical cases involving landowners and governmental regulation would give rise to claims for compensation. The point is that the courts have felt compelled to search out rationales for denying such indemnity. Courts have developed a concept in which the meaning of property is different when a private owner stands matched against his government than when one private owner is matched against another.

In the first half of the nineteenth century, property was thought of as the land itself. Accordingly, taking was thought to mean a physical occupancy of the land itself. Of course, an actual physical occupation and taking of privately owned land still requires just compensation. But today property is conceptualized as an intangible bundle, or cable, of interests. One or more of these interests (sticks in the bundle or strands in the cable) may be interfered with (taken, in a sense) without either physical occupation of the land or such a complete diminution in the value of the full cable of property interests as to require the payment of compensation. Clearly, such land use regulations as those upheld in the Just case and other governmental programs which deprive landowners of some alternative use privileges and which, in turn, may affect dollar values fall into this definitional framework.

In other words, in order to arrive at the meaning of property in the owner v. government cases, it is necessary to recognize that certain interferences by government are to be expected from the concept of property that would exist as between two private parties. Involved are tradition and social policy and the balancing of interests of individuals against the purposes and needs of society. Further embellishment of these concepts and their relation to functional planning goals will follow in the remaining chapters.

Chapter V

FACTUAL ANALYSIS AND EMPIRICAL DATA AS A BASIS FOR SUSTAINING LAND USE CONTROL

WHEN DO FACTS COUNT FOR MORE THAN LAW?

What counts for more, when the issue is the constitutional validity of a land use regulation—facts and analysis or black letter rules of law? In determining whether or not a regulation is, in legal essence, a taking requiring just compensation, which is more important: empirical data showing the reasons for the regulations or quotations from the Constitution or from prior court decisions? Is the presumption of constitutionality of regulatory statutes or ordinances best protected or overcome by planning studies and analyses or by technical doctrines of statutory construction and constitutional law?

In 1908 the future Justice Brandeis, while still a practicing lawyer, presented a brief to the United States Supreme Court in the case of Muller v. Oregon.[1] The issue was the validity of Oregon's 10-hour law for women in industry. In defense of the act, Mr. Brandeis presented a brief which, after dealing with the relevant legal precedents in a meager two pages, devoted over a hundred pages to statistics and other data from scientific sources showing the detrimental effects of protracted hours of physical labor upon women.[2] Brandeis drew on reports of public investigations, books and articles by medical authorities and social workers, and the practice of legislatures here and abroad. The Court accepted Brandeis' challenge to take judicial notice of this material, and the impressive document convinced the Court, including even so strong an individualist as Mr. Justice Brewer. This type of brief has become fairly common. Lawyers for government particularly have used and are using it. It was a notable invention, widely acclaimed, and has since been called the "Brandeis Brief Approach."[3]

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[1] *208 U. S. 412 (1908).*

[2] *See Mason, Brandeis, A Free Man's Life (1946), p. 248.*

[3] *Those tempted to use the Brandeis approach should be cautioned, however, about taxing the patience and time of many courts. Mere volume or size of a brief is not the successful criterion for rallying essential support for a position which advocates a change in the law. One can be persuasive and still be concise. In a recent case, for example, Construction Ind. Ass'n Sonoma County v. City of Petaluma, 522 F. 2d 897 (CA 9 1975), the court stated in a footnote, at p. 906 that: "Appellees' brief is unnecessarily oversize (125 pages) mainly because it is rife with quotations from writers on regional planning, economic regulations, and sociological policies and themes. These types of considerations are more appropriate for legislative bodies than for courts."*

This chapter underlines the importance of this basic approach to issues of constitutionality and sometimes to issues of statutory construction in the field of land use regulation, and includes some specific suggestions related to the collection, analysis, and filing of empirical and analytical data which may become important in courtroom litigation. It also suggests ways in which these data and analyses may be presented in court and discusses in this connection the use of judicial notice.

As indicated, the typical setting for the use of empirical and analytical data is the case where the reasonableness and hence the constitutionality of a regulation is under attack. It is also sometimes used in statutory construction cases.

The following example illustrates a case in which the Brandeis method is not likely to be applicable. Suppose that the validity of a county's interim zoning ordinance is under attack. The attack may be premised on the ground that the ordinance is "ultra vires"; that is, beyond the power delegated to the county by the State's county zoning enabling act. Here the Brandeis approach will avail the county little or nothing. The court probably will insist on approaching the problem technically and strictly within the language of the enabling act. Did it or did it not grant interim zoning power to counties? The language of the act will be closely read and construed. Probably it will be observed that the city zoning enabling act, Wis. Stats. 62.23(7), expressly grants interim zoning authority; the county act, Wis. Stats. 59.97, does not. In any event, the case will likely be disposed of on the basis of a technical reading and construction of the language of the state statutes. A Brandeis brief filled with material on the reasons for, and savings from, interim zoning will probably be ignored.

If the issue is posed in terms of the unreasonableness and hence the unconstitutionality of the interim zoning ordinance, then empirical and analytical data on interim zoning in general and this interim ordinance in particular might not only be accepted by the court but probably will be controlling for the outcome of the case. If the meaning of a zoning or other land use regulation is at issue, empirical and analytical data tending to show what the local governing body was attempting to accomplish, and why, might be accepted by the court as a part of the legislative history of the questioned enactment. And again this material might be controlling.

In cases where the constitutionality of the ordinance is attacked, the courts generally erect a protective presumption of constitutionality, thus shifting the burden of proof to the landowner to show that the ordinance is so unreasonable as to be unconstitutional. Many a municipal

attorney, however, has found to his embarrassment that it is unsafe to sit on his presumption of constitutionality. Ad hoc assumptions by the court, as well as empirical and analytical data presented by the landowner, may vitiate the presumption. So it behooves the attorney for the local unit which passed the challenged ordinance in preparing his case to turn to, and work with, the professional planners and the plan commission in order to effectively organize the underlying material which gave rise to the ordinance.

In spite of the Brandeis example, which is now almost 70 years old, the lesson still comes hard to some lawyers, planners, and judges. There is still an inclination to assume that, where an ordinance is under constitutional attack, the question for decision is relatively simple, involving merely the determination of the existence of harmony or conflict between two legal texts: the Constitution and the challenged ordinance. In the land use field, such an assumption is especially naive. In the great majority of cases, the complaining landowner is presenting a much narrower question; that is, he is not claiming that the entire ordinance is unreasonable and therefore invalid; rather, he asserts that as applied to him and to his individual tract of land it is. The relatively narrow issue is: Are there valid community reasons for imposing the alleged financial burdens upon him?

There are two technical aspects of the subject that should be mentioned. First, as indicated in the previous chapter, the typical constitutional attack on a land use control ordinance is premised on the due process clause of the Fourteenth Amendment of the Federal Constitution. That language is very general: ". . . nor shall any State deprive any person of . . . property, without due process of law . . . ." In an effort to give more specific content to this sweeping phrase, courts have said a measure which seeks to regulate land use must relate reasonably to the preservation of "public health, safety, morals, or general welfare." They have also said that not only must the goal of the regulation be reasonable in one or more of these senses but the particular regulatory means of mechanism must be reasonably likely to achieve the goal. Some courts do not give to the phrase "general welfare" a meaning of its own; instead they say it partakes of the meaning of the words that come before it in the particular formula—public health, safety, or morals. But in most states, including Wisconsin, proof that a regulatory measure is reasonably likely to protect the general welfare is admissible as an objective distinct and separate from the preservation of the public health, safety, or morals. Protection of the property tax base, of aesthetic values, and of the character of the neighborhood are some other community development objectives which have been held by state courts to be reasonably within the general welfare concept. In such cases, the skill and imagination of attorney and cooperating planner must be directed toward the preparation of materials which demonstrate the general welfare goals of particular plan implementing measures.

Second, there are two principal ways in which empirical material is made available to courts: judicial notice and introduction in evidence during the course of the trial.

In these ways, judges are equipped with more than their ad hoc impressions, precedent, and so-called black letter rules of law which, in this field, are more apt to be enormously general standards that talk of health, safety, morals, and/or of general welfare.

The first vehicle for transmission of empirical data is the one used by Brandeis, the doctrine of judicial notice. The doctrine of judicial notice in its orthodox form says it is unnecessary to introduce evidence formally in court to prove the existence of facts of common knowledge or facts required to be recorded in offices of the government. Thus, it is proper for judges to resort to dictionaries, government records, or authoritative scientific, historical, or sociological works to determine the facts. Individuals may, of course, differ over whether a point is a matter of fact or of opinion. They may also differ over when a fact is so well established that it can be said to be part of the stock of common knowledge. Some courts have held that, when such differences arise, the court is not at liberty to take judicial notice of the facts in question.

A more liberal form of judicial notice has been used by other courts, including the Wisconsin Supreme Court. Former Chief Justice Currie, of the Wisconsin Court, has stated that the Justices should be free to rely on whatever social and economic data they deem dependable.[4] Accordingly, the Wisconsin Court would probably be particularly receptive to solid demographic, economic, land use, traffic, hydrologic, hydraulic, and other planning and engineering data and material submitted in the form of a Brandeis brief.

To wait until a case is fully tried before submitting such material to a court is of doubtful fairness to the other side, which has been deprived of its right to critical cross-examination. For this reason, and because there is always some uncertainty whether a court, particularly a trial court, will accept material submitted through the avenue of judicial notice, the direct introduction of such material in evidence during the course of the trial should, in general, be the means chosen to inform the court. There may be general background or comparative material in standard works or other usually accepted sources for which judicial notice is the preferred vehicle, especially where introduction in open court would involve calling the author of the work or the one who prepared the material for publication from a great distance to testify. But professional local studies, analyses, maps, and data should, whenever possible, be entered into the record by way of formal introduction in evidence. This implies the need to qualify the witness; and it also has important implications for planning agencies in terms of keeping a record of just who did what in planning studies, of the authorship of study documents, of the draftsmanship of maps, and of the identification of photographer and place

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[4] *Currie, "Appellate Courts Use of Facts Outside of the Record by Resort to Judicial Notice and Independent Investigation," 1960 Wis. L. Rev. 39. And see Comment, 61 Harv. L. Rev. 692 (1948).*

photographed. It implies careful documentation of all aspects of data collection analysis and research. The total process by which a planning decision was reached should be an open book, easy to read, and easy to prove in court. Approval by the plan commission should be in the official minutes. In short, the record should be orderly and tight. The additional costs, if any, which these admonitions entail, are well merited when it is recognized that a good plan, based on good work, may be struck down on the basis of unconstitutionality because there is little or no provable record.[5]

It is well for the lawyer and planner to prepare each case, not so much for the effect at the trial, but for the record that will be made for a possible appeal. Adequate photographs and maps may seem surplus at the trial level where the participants and the judge are well acquainted with the land and the area. In the event of an appeal, such materials may be invaluable in acquainting the appellate judges with the planning and engineering issues of the case.[6]

It is important to note that the landowner on his side may also introduce such data in evidence or offer it by way of material in his brief through the avenue of judicial notice. Among the facts that he can offer to prove are sloppy record keeping by the planning agency, insufficient attention to the special problems of his land or neighborhood, or that what he proposed is actually better planning than that accomplished by the official planning agency. One of the country's well known land use lawyers has said:

> From the point of view of the protesting private property owner it is more important to demonstrate a lack of public purpose . . . than it is to demonstrate a hardship to the property owner because of the restriction . . .
>
> It is, in my opinion, a valuable asset for the attorney representing the property owner to be able to demonstrate that the ordinance itself was not prepared with great care. If I know that this is so, then I certainly will subpoena the official records in order to demonstrate the lack of careful planning or the lack of competent professional counsel. (In this connection whenever I am counsel to a city or village that is in the course of preparing an ordinance, I insist that every executive meeting of the zoning or plan commission have detailed minutes showing the basis for its decisions with respect to policies incorporated into the ordinance.)[7]

[5] *See Fasano v. Board of County Commissioners of Washington County, 507 P. 2d 23 (1973).*

[6] *See Babcock, "Preparing a Zoning Case," Planning 1958 (ASPO) 38 at p. 43.*

[7] *Id.*

WHAT KINDS OF DATA AND ANALYSIS ARE IMPORTANT TO SUSTAIN THE VALIDITY OF PLAN IMPLEMENTATION REGULATIONS?

It is often difficult to say what specific item of data, analysis, or line of reasoning will impress a court in a particular case. Certainly, basic population and economic studies and land use inventories, especially when displayed on good base maps, will almost always be usable. Beyond this the planner has a wide range of studies and investigations which may be conducted within the planning area, each contributing valuable data to his store of facts and knowledge.[8] As needed, the findings of these studies can be pulled together in any number of ways to bolster the constitutional validity of the implementing steps taken to achieve long-range community development goals.

The important things for the planner to recognize is that pertinent detail, documentation, and solid empirical and analytical evidence will likely carry the day. Generalizations, assertions, instinct, and intuitive reasoning are not apt to impress a court of law even though the plan, for which they are offered in support, is desirable. The planner must understand and utilize modern statistical techniques and sound engineering practices. Economic analyses should be used when applicable. Comparisons of data also are useful; for example, comparative studies before and after a key event, over a series of years, and particularly between those areas where unplanned or misplaced development was allowed to occur at high cost to the community and those areas where properly placed development effected cost savings.

No body of empirical and analytic data can be accepted as final and unchanging. A continual updating must take place of the statistical relationships and of the analyses, conclusions, and plans they helped produce. A court may invalidate, and justifiably so, an important part of the most elaborate and well considered planning program on the ground that its factual underpinning is uncertain because it is outdated, not wrong, and therefore of questionable evidentiary and supportive value. It is not possible to spell out precisely how frequently planning and engineering data should be updated or how old data may be and not lose its persuasive capability. Courts will generally apply a test of reasonableness. Clearly, in areas undergoing rapid change, data must be updated more

[8] *Mass transit and highway facility inventories; origin and destination studies; utility inventories; soils studies; geologic and topographic studies; public financial resources studies; cost of municipal services studies; school cost and enrollment studies; urban renewal studies; airport studies; park and recreation studies; watershed studies; hydrologic and hydraulic studies; pollution, water quality, and groundwater studies; inventory of existing planning and plan implementation legislation; development of forecast techniques; design and/or refinement of planning standards; and planning methodology studies are all examples of important sources of information.*

frequently. On the other hand, in more stable areas, data many years old may accurately reflect present conditions and thus persuade the court.

The same caution applies to the use of planning standards. Whenever a standard not developed locally as part of the current planning process is sought to be used, three questions must not only be answered but must be capable of being documented:

1) When and for whom was the standard originally designed?

2) What are the assumptions and validity of the standard based upon?

3) Is it applicable today in the community in question?

Statements in recognized planning treatises are usable as are reports in journals with solid reputations of experience. There is a great deal of Brandeis brief material in a good planning library, and articles in periodicals by recognized authorities may prove to be valuable.

One major source of data and information in the Region is the Southeastern Wisconsin Regional Planning Commission. The Commission in partial fulfillment of its legislative mandate under section 66.945 Wis. Stats. has conducted numerous studies on the development of the Region along with the present and projected impacts on the population and natural resource base. The preponderance of this work has found its way into one or more published reports or plans.[9] And this immense reservoir of information and the expertise of the professional staff of the Commission are continually being made available to the local units of government and the citizens of the Region.

In conclusion, there appears to be no upper limit to the number of studies or the amount of factual data that a court would be willing to receive. Though it may base its conclusions on a single or narrow ground, it undoubtedly will be moved by the weight of evidence and by the comprehensiveness of the planning effort. It is unsafe for the planner to attempt to discern the minimum level of investigation that will sustain a comprehensive planning program. Likewise, it is unsafe for the planner to rely on the court's agreement with, and acceptance of, basic community development objectives. It should always be remembered that it is not just the reasonableness of the planning objectives that is important. The court is also concerned with the reasonableness of the means to the objectives. Unless the planner, by use of sound research and data gathering techniques, can adequately justify the means both in principle and as applied to the particular litigant, the data and analysis he has prepared will be found insufficient.

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[9] *To date (March 1977) the SEWRPC has published 26 major planning reports documenting regional plan elements adopted for the Southeastern Wisconsin Region, ranging from regional land use and transportation plans to regional utility and community facility plans. In addition, the Commission has published a total of 18 technical reports setting forth detailed technical information ranging from mathematical simulation models to public opinion surveys. The Commission has also published a series of six local planning guides designed to assist local officials in establishing sound local planning efforts. The Commission has also published a series of 17 community assistance planning reports prepared at the request of local units of government in the Region and setting forth more detailed local planning recommendations. A complete list of SEWRPC publications is set forth in Appendix A.*

Part Two

SPECIFIC PLANNING AND PLAN IMPLEMENTING POWERS IN WISCONSIN

In the second part of this report, more specific background is provided on the planning and plan implementation powers which the Wisconsin Legislature has retained and those which it has parceled out to various agencies and levels of government. The basis for this authority and the ability to exercise it flow in large part from the rudimentary powers discussed in the previous chapters. But, to gain a more complete picture of this dispersed authority, it is necessary to examine state agencies and their programs and the wide range of planning enabling acts for counties, towns, villages, and cities, as well as for regional planning commissions.

The resulting mosaic that the Legislature has created is complicated and diverse. Sometimes pieces do not fit neatly one against the other. It becomes obvious very quickly that this picture of legislative delegation was not produced at one sitting. Instead, it is the product of dozens of separate legislative enactments in many sessions of the Legislature. Clearly there has never been a successful attempt made to draw the many pieces together into a coordinated, integrated pattern, and this report makes no claim to have discovered and identified every legislative delegation of authority or statutory nuance. The principal legislative delegations of authority, however, are examined as necessary to adequately describe Wisconsin's legal tools for planning and plan implementation. It is important to know what statutory authority presently exists in order to more intelligently address the problems which may hinder effective planning and plan implementation. In addition, the overview is essential for an understanding of the functional analyses that follow in later chapters.

Chapter VI

STATE AGENCIES AND LOCAL GOVERNMENTS EMPOWERED TO PLAN FOR COMMUNITY DEVELOPMENT

INTRODUCTION

The outer parameters within which planned community development proceeds in Wisconsin are largely determined by the widely dispersed authority granted to State and local agencies of government by the Legislature. This chapter deals with certain aspects of that authority which permits the executive agencies along with the other levels of government in Wisconsin to engage in planning.

STATE LEVEL AGENCIES, PROGRAMS AND POWERS

The Department of Natural Resources

As part of the reorganization of state government in the 1960's, it was the intention of the Wisconsin Legislature to lodge major responsibility for conserving the land, water, air, wildlife, and other natural resources of the State within one agency.[1] Eventually that agency, the Wisconsin Department of Natural Resources (DNR), was created by the so-called Kellet Bill in 1969.[2] Under that legislative enactment the overall direction and policies of the Department are set by the Natural Resources Board which consists of seven members appointed by the Governor for staggered terms of six years.[3]

Upon its creation the DNR inherited many ongoing programs that had been administered by other state agencies. For example, many of the responsibilities of the old Wisconsin Department of Conservation and the Wisconsin Department of Resource Development were merged and placed under the new DNR. In addition to these duties, the Department has been charged with the responsibility of administering numerous other programs. This authority involves the DNR in various planning as well as plan implementation efforts which dramatically affect the natural resources of the State. The efforts mentioned below are representative of the programs and planning powers of the DNR.

With the reorganization of Wisconsin State agencies in 1969, the extensive regulatory powers over navigable waters which had formerly been lodged with the Wis-

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[1] *Chapter 614, Laws of 1965, sec. 2.*

[2] *Chapter 276, Laws of 1969.*

[3] *Wis. Stats. sec. 15.34.*

consin Public Service Commission and the Wisconsin Department of Resource Development were transferred to the Wisconsin Department of Natural Resources. The Department's exercise of those powers strongly influences state, regional, and local planning and plan implementation. For example, the Department has powers with respect to the establishment of bulkhead and pierhead lines, approving encroachments in navigable waters, establishment of lake levels, removal of materials from lake beds, issuance of irrigation permits, approval of diversion of water from one watershed to another, and approval of the construction and abandonment of dams and bridges to be built across navigable waters.[4] Moreover, land developers must apply to the DNR for stream straightening permits; permission to dredge and construct lagoon developments near to, or to be connected to, navigable water; and permits for shoreland grading involving more than 10,000 square feet.[5]

The Department's regulatory powers were significantly increased when in 1973 the State Legislature of Wisconsin enacted into law an act to eliminate the discharge of all pollutants into the waters of the State by 1985 and to meet all the requirements of the Federal Water Pollution Control Act—Amendments (FWPCA) of 1972.[6] With that enactment the Department was granted all authority to establish, administer, and maintain a state pollutant discharge elimination system which would restore and maintain the integrity of State of Wisconsin waters. As a part of the Department's overall responsibility under the Act, it must establish a continuing water pollution control planning process that will incorporate such elements as: schedules of compliance for effluent limitations for the present and future; implementation procedures for new water quality standards; procedures for intergovernmental cooperation; and area-wide waste management plans, basin plans, and statewide land use plans.[7]

In addition to the above powers, the Water Resources Act of 1965 created the shoreland/floodplain zoning regulatory programs which are administered at the state level by the DNR.[8] The Water Resources Act requires that local units of government adopt ordinances which meet certain standards and criteria established by the Department including restrictions on lot sizes, building setbacks, filling, grading, dredging, and sanitary regulations.[9] Taken together, this state/local sharing of responsibility has a profound effect on planning for the development of lands bordering the navigable waters in the Region and throughout the State.

Resting upon similar authority which supports the preceding legislative objectives, but with a more specific focus, is the enactment of Chapter 68 Laws of 1975, which establishes a process for long-range planning and site approval for electric generating facilities and high-voltage transmission lines that expect to be located adjacent to waterways of the State. The DNR and the Wisconsin Public Service Commission have critical responsibilities for implementing the new Act through a legislatively established permit process.[10] The Department's primary duties are to review the engineering plans which must include a description of the facility, its location, and the potential effect that the facility will have on the quality of the air and water. The issuance of a DNR permit under this Act will be conditioned in part on whether the facility does not unduly affect public rights and interests in navigable waterways; the effective flood flow capacity of a stream; the rights of other riparian

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[4] *Wis. Stats. secs. 30.11(1), 30.12(1), 30.13(3), 31.02(1), 30.20(1) and (2), 30.18, 31.04, 31.02(2), and 31.23.*

[5] *Id., secs. 30.195(1) and 30.19. Under the latter section (30.19), which regulates the enlargement and protection of waterways, the Legislature has provided that the regulatory measures adopted pursuant to the statutes will not apply to the construction and repair of public highways or to any agricultural uses of land, nor to any navigable body of water located wholly or partly in any county having a population of 500,000 or more.*

[6] *Chapter 74, Laws of 1973, sec. 147.01 et seq. Wis. Stats. The Act repealed sec. 144.555 and amended secs. 15.34 and 165.07. The FWPCA of 1972 can be found at 33 U.S.C.A. sec. 1251 et seq. A more extensive discussion of the laws affecting water resources in Wisconsin can be found in SEWRPC Technical Report No. 2, Water Law in Southeastern Wisconsin, second edition, 1976.*

[7] *Wis. Stats. sec. 147.25 closely associated with these delegated functions under Chapter 147 Wis. Stats. is the provision in earlier authority of the Department to develop a long-range comprehensive state water resources plan for each region of the State in order to guide the development, management, and protection of water resources, sec. 144.025(2)(a). As part of that process, the DNR must adopt rules which set standards of water quality for the State with the stipulation that different standards may be set for different waters depending on their unique characteristics. But in any event those standards must be designed to protect the public health and welfare and more specifically to protect the future use of the waters for fish and wildlife, domestic, agricultural, and industrial uses, sec. 144.025(b).*

[8] *Chapter 614, Laws of 1965 Wis. Stats. sec. 144.26, 59.971, and 87.30. Sec. 144.26(1) provides it is in the public interest and in fulfillment of the state's role as trustee of the navigable waters to make studies, establish policies, make plans, and authorize municipal shoreland zoning regulations for the efficient use, conservation, development, and protection of the state's water resources.*

[9] *See Administrative Code NR 115.03 for the shoreland standards and NR 116.03 and 116.05 for the floodplain standards. The Wisconsin Legislature treated the regulations of the shorelands (sec. 59.971) and the floodplains (sec. 87.30) separately.*

owners; or water quality.[11] As a result of the regulatory and review responsibilities of this most recent legislation, as well as the preceding authority, the DNR has and is collecting a considerable body of data about Wisconsin waters and the lands adjacent to them which have great value in resource planning.

Other than the above-listed powers, the DNR has wide-ranging authority to effectuate plans for the conservation of State of Wisconsin natural resources and to stimulate other levels of government to engage in such planning. Under sections 23.09 and 23.11 Wis. Stats. which invoke certain proprietary powers of the State, the Department is charged with administering and supervising the state forests, fish hatcheries, and state parks.[12] Supplementing these legislative enactments, which deal specifically with government-owned lands, are the funds received under the Outdoor Recreation Program which are coordinated by the Natural Resources Board.[13] The objective of that program is to encourage and implement a comprehensive long-range plan to acquire and develop optimal sites for state and local recreation facilities.[14] In furtherance of the program the legislature has authorized that $56,000,000 may be encumbered over the years 1969-1981.[15]

Moreover, the extensive dimensions of Department powers and the efforts to foster the wise use of state resources through planning can be found in other legislatively delegated responsibilities such as the Metallic Mining Reclamation Act which seeks to ensure the greatest protection and reclamation of natural resources affected by prospecting and mining;[16] or in the DNR's preparation and adoption of minimum standards for the location, design, and management of solid waste disposal sites;[17] and in the review responsibilities of proposed subdivisions of land for the assurance that pollution of state waters will not occur as a result of land division.[18]

The Department of Local Affairs and Development

In recognition of the need to strengthen intergovernmental relations and to facilitate the effective development and utilization of state and local resources, the Wisconsin Legislature established the Wisconsin Department of Local Affairs and Development (DLAD).[19] With the creation of DLAD the State Legislature sought to promote comprehensive planning programs by local and regional entities which would initiate development projects and encourage solutions to areawide problems.[20] The primary vehicles for furthering the planning effort were: direct advisory assistance by the personnel of

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[10] *Wis. Stats. sec. 196.491(2) and (2M). Moreover, the Public Service Commission prior to approving an application for a certification of public convenience and necessity must find among other factors that the design and location or route are in the public interest considering alternative sources of supply, alternative locations or routes, individual hardships, engineering, economic, safety, reliability, and environmental factors; the proposed facility will not have undue adverse impact on other environmental values such as, but not limited to, ecological balance, public health and welfare, historic sites, gelogical formations, the aesthetics of land and water and recreational use; and the proposed facility will not unreasonably interfere with the orderly use and development plans for the area involved, sec. 196.49(3)(d) 3, 4, and 6.*

[11] *Wis. Stats. sec. 30.025(3) et seq.*

[12] *More specifically, Chapter 27 of the Wisconsin Statutes states at sec. 27.01 that "the purpose of the state parks is to provide areas for public recreation and for public education in conservation and nature study . . . (the Department) shall be responsible for the selection of a balanced system of state park areas and for the acquisition, development, and administration of the state parks." Under Chapter 28, Wisconsin Statutes, which deals with the management of forest lands, the Legislature requires that a multiple use concept be employed for managing the potential of the forest lands, sec. 28.04.*

[13] *Wis. Stats. sec.23.30 et seq.*

[14] *Wis. Stats. sec. 23.30(1).*

[15] *The Wisconsin Statutes sec. 23.31 require the Board to submit an annual expenditure plan to the Governor which specifies the functional areas on which the Department will place fiscal emphasis in the succeeding fiscal year, as well as delineating specific acquisition and development objectives.*

[16] *Wis. Stats. sec. 144.80. The Act requires that the Department and the Wisconsin Geological and Natural History Survey submit a comprehensive program of mineral resources zoning and financial incentives to the Governor and the Legislature to stimulate the mining of minerals beneath the surface of the land, sec. 144.83. In those instances where the DNR estimates that the mining will be of sufficient magnitude, it may require the submission of a comprehensive long-term plan by an operator for the reclamation of the area to be affected. Section 144.86 requires filing of a bond with the Department to insure faithful performance by the operator.*

[17] *Wis. Stats. sec. 144.43 and see NR 151.01 et seq. Wis. Admin. Code; all sites are required to be in conformance with the standards in order to obtain an annual license to operate.*

[18] *Wis. Stats. sec. 236.13 (2m). This applies to lands within 500 feet of the ordinary high intermark of navigable bodies of water.*

[19] *Chapter 211, Laws of 1967, sec. 22.03 Wis. Stats. et seq.*

[20] *Wis. Stats. sec. 22.14(1) and (2)(b) and (d). The legislation also emphasizes that DLAD is to carry out continuing studies and analyses of urban problems found in Milwaukee and other urban areas, sec. 22.13(2)(a).*

DLAD, the administration of federal and state grant programs to local governments and regional agencies, and the administration of state platting regulations under Chapter 236 of the Wisconsin Statutes.[21] With respect to the latter, the Department has major responsibility for reviewing proposed subdivisions of land in the State.[22] It checks for the accuracy of the survey of the proposed plat, layout requirements such as minimum lot sizes, and the provision of public access to navigable waters.[23]

Coupled with these responsibilities are the departmental review of county plans for solid waste management to ensure uniformity with its standards and the review of petitions for the incorporation and consolidation of villages and cities.[24] The statutory standards to be employed in reviewing petitions for incorporation or consolidation are found in section 66.016 Wis. Stats. They require a finding that the proposed city or village be homogeneous and compact with a reasonably developed community center that shows an interrelationship of socioeconomic features and that an incorporation will not hinder the solution of governmental problems affecting the metropolitan area. If in the determination of the Department the petition meets the standards, it will grant the petition. If, however, the petition fails to meet the standards, the Department may recommend that it be dismissed and be resubmitted to include more or less territory, or it may recommend outright dismissal of the petition by the appropriate circuit court.[25] In any event, the Department's recommendation is subject to judicial review by the circuit court in Dane County.[26]

In addition to the foregoing powers, DLAD has been empowered to consult with the Wisconsin Department of Industry, Labor, and Human Relations in the formulation of local standards for decent safe and sanitary dwelling accommodations which could have wide impact on planning for residential development throughout the State.[27]

The Department of Administration

The Wisconsin Department of Administration was established to coordinate management services and assist the other agencies of state government.[28] As a part of this broad functional responsibility, the Department has the critical task of clearly defining the alternatives and objectives of the numerous state programs so that the Legislature, Governor, and the state agencies may more effectively plan for those services needed by the citizens of Wisconsin. To support this legislative mandate, the Department, under section 16.95 Wis. Stats., has been empowered with significant planning authority, the focus of which is in the State Planning Office. Basically that authority may be categorized under the following duties:

1. Collecting, analyzing, and interpreting data needed for state agency planning;

2. Developing comprehensive long-range plans for the natural and human resources of the State;

3. Stimulating and assisting other state agencies in their development of other state planning developments;

4. Evaluating the plans of all state agencies with respect to gubernatorial and legislative policies, and identifying gaps and duplicative efforts within those plans;

5. Advising and assisting the Governor and Legislature in their evaluation of state agency programs and plans;

6. Ensuring the implementation of agency plans which are in conformity with gubernatorial and legislative policies; and

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[21] *Wis. Stats. sec. 22.14(2)(a)(h) and (g).*

[22] *Approval of plats does not apply to land divisions within the City of Milwaukee. The review of all other platting is to be carried out, according to the Statutes, by the head of the planning function, DLAD. The Wisconsin Statutes define a subdivision in Wis. Stats. sec. 236.02(8) as "a division of a lot, parcel, or tract of land by the owner thereof or his agent for the purpose of sale or of building development where: (a) the act of division creates five or more parcels or building sites of 1-1/2 acres each or less in area; or (b) five or more parcels or building sites of 1-1/2 acres each or less in area are created by successive divisions within a period of five years."*

[23] *Wis. Stats. secs. 236.15 and 236.16(1) and (3). It also checks the final plat maps and engineering information for the boundaries and monuments of the plat, sec. 236.20. Additional discussion of land division will follow in Chapter VII, infra.*

[24] *Wis. Stats. sec. 144.435. County plans for solid waste management are to be developed in accordance with criteria adopted by DLAD. In the review process the Department may consult with the respective regional planning commission in determining whether the proposed site use and operation are in conflict with the commission plans, Wis. Stats. sec. 144.435(a). The criteria for the development of county and multicounty solid waste management plans can be found in Wisconsin Administrative Code, LAD 3.01 et seq. This represents a joint state effort to ensure proper solid waste management between not only DLAD and the counties but the Department of Natural Resources as well. Cf. note 17 supra and accompanying text.*

The authority to review petitions for incorporation and consolidation can be found in Wis. Stats. sec. 66.014 and 66.02.

[25] *Wis. Stats. sec. 66.014(9). If the petition is granted and the appropriate order issued by the court, a referendum must be held on the petition.*

[26] *Wis. Stats. sec. 66.017.*

[27] *Wis. Stats. sec. 32.26.*

[28] *Wis. Stats. sec. 16.001.*

7. Administering those federal planning grants designated by the Governor for state planning.

Indicative of the tasks performed by the State Planning Office pursuant to the statutes is the role the office now plays in coordinating state government activities relating to land use. Among the responsibilities associated with this leadership role are the evaluation of land regulatory programs to prevent unnecessary review procedures, the review of state policies on extension of public services to ascertain their effect on promoting sound patterns of land use, and the development of a land use information system that will satisfy the needs of state agencies and local governments.[29] Another major coordinating effort by the State Planning Office involves the federally sponsored Coastal Zone Management Act.[30] The initiation of this program is part of an overriding concern for the misuse of Wisconsin's coastline bordering on the Great Lakes which stems in large part from the lack of appropriate alternatives that an effective planning process could supply. In an effort to combat this situation, the State Planning Office has been designated as the lead agency to assist state, regional, and local levels of government in developing guidelines for balancing appropriate uses of the coastal zone.

The Department of Transportation and the Division of Highways

As a part of the overall reorganization of state government in the late 1960's, the Wisconsin Department of Transportation was created and placed under the supervision of the Secretary of Transportation.[31] Subsequent legislation authorized the Department to "direct and undertake all planning in the areas of highways, motor vehicles, traffic law enforcement, aeronautics, mass transit systems, and for any other transportation mode."[32] This enactment also permits the Department when requested by a state, regional, or municipal agency, or a harbor commission to undertake planning for the harbors and waterways of the State.

Of particular importance to the Southeastern Wisconsin Region is the legislative authority of the Department to engage in mass transit planning and demonstration projects which will reduce the dependence on automotive travel and thereby the high costs associated with the construction of urban highways and parking facilities.[33] As a part of this authority to encourage mass transit planning, there is a provision for direct grants of up to 100 percent of the cost of the planning or demonstration project to municipalities or counties if the Secretary of Transportation deems the project suitable. Proposals for such funding may include:

1. Improvement in accessibility of public transportation;

2. Improvement in the quality of mass transit service to passengers;

3. Improvement in the economic performance of mass transit systems; and

4. Reduction of adverse impacts of vehicular transportation on the urban environment.[34]

An important unit attached to the Department is the Division of Highways which is under the immediate supervision and direction of the Wisconsin State Highway Commission.[35] This full-time Commission consists of three members appointed by the Governor for staggered terms of six years. There is to be one member each from the north, west, and east sections of the State. The ultimate broad power delegated to the Commission by the Legislature is to "have charge of all matters pertaining to the expenditure of state and federal aid for the improvement of highways . . . [and to] do all things necessary and expedient in the exercise of such supervision."

Under this grant of authority the Commission may prepare plans, specifications, and engineering work for any highway improvement within its jurisdiction.[36] This responsibility includes the planning, laying out, construction, and reconstruction of the interstate highway systems.[37]

To carry out its highway plans, the State Highway Commission has an impressive kit of implementing tools. It has so-called "quick taking" powers of eminent domain under which title passes to the Commission when it makes an award of compensation to the landowner. Thus, highway construction is not delayed while the issue of possible additional compensation is being litigated.[38]

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[29] *The specific charge for carrying out these activities comes in a directive issued from the office of the Governor on April 18, 1975.*

[30] *86 Stat. 1280, 16 U.S.C.A. ss. 1451-1464 (1972).*

[31] *Chapter 327, Laws of 1967, sec. 13, sec. 15.46 Wis. Stats.*

[32] *Wis. Stats. sec. 85.02. In addition to these responsibilities, the Secretary is specifically required to develop an airport development plan and conduct studies on what would be the most effective development and operation of airports, sec. 144.31(2). And, in a recent Attorney-General's opinion, it was deduced from the broad legislative mandate that the Department could enter into contracts with the Federal Government to secure funds to enable the DOT to undertake airport system planning, 60 OAG 68 (1971).*

[33] *Wis. Stats. sec. 85.06(1).*

[34] *Id.*

[35] *Wis. Stats. sec. 15.463.*

[36] *Wis. Stats. secs. 84.01(6) and 84.06.*

[37] *Wis. Stats. sec. 84.01(15).*

[38] *Wis. Stats. sec. 32.05(7).*

The Commission has power to construct the planned highways, regulate billboards where an interstate highway system is involved,[39] establish roadside park areas, protect roadside amenities with roadside beautification activities,[40] purchase scenic easements,[41] and participate in a historic markers and sites program.[42] Furthermore, the Highway Commission under section 236.12(2)(a) Wis. Stats. has been given review authority of all proposed subdivision plats if it abuts or adjoins a state trunk highway or connecting street. The Commission has adopted detailed regulations to ensure the safety of the public when entering and departing from the state trunk highways.[43]

The powers encompassed within the Wisconsin Department of Transportation and the Highway Commission to plan for the future highways and the expansion and maintenance of existing ones have important ramifications for the development of the State and the Region. The past influence of highways in shaping the state's economic markets, making accessible vast recreational resources and affecting residential patterns is strong evidence of that fact.

The Department of Health and Social Services

With its numerous program responsibilities to protect the health and safety of the public, the Wisconsin Department of Health and Social Services (DHSS) exercises important regulatory powers over water supply systems, storm sewerage systems, private domestic sewage treatment and disposal systems, and mobile home parks.[44] In addition to these regulatory functions the DHSS reviews subdivision plats pursuant to the enabling authority spelled out in Wisconsin's subdivision control chapter.[45] That authority is only exercised, however, where the plat is not to be served by a public sewer. Where such is the case, the plat is reviewed in light of Chapter H 65 Wisconsin Administrative Code; the key requirements imposed concern the ability of the soil to absorb sewage effluent, minimum lot sizes, and elevation in relation to nearby watercourses. The intention is to assure space for adequate drainage beds for private disposal systems and to keep septic tanks above the saturated groundwater zone. The enactment of the Water Resource Act of 1965 added a further condition before approval of a subdivision plat would be granted for those lands within 500 feet of a navigable body of water. For lands so situated, the law now requires the assurance of adequate drainage areas for private sewage disposal systems and building setback restrictions in order to protect the public health and safety.[46]

State Public Service Commission

The Wisconsin Public Service Commission consists of three full-time members appointed by the Governor for six-year terms. Its important functions include the regulation of motor carriers and public utility rates and service.[47] In the past the Commission had extensive regulatory powers over navigable waters but with the reorganization of state government the preponderance of that authority has been shifted to the Wisconsin Department of Natural Resources. However, as indicated in the foregoing discussion on the DNR, the Commission has important review powers over all future siting of electric generating facilities and high-voltage transmission lines that are expected to be located adjacent to waterways of the State.[48] That Act, Chapter 68, Laws of 1975, necessitates long-range planning for such facilities and requires, also, identification of the impact that development of such facilities will have on important environmental values and existing land use plans. These new requirements for power plant sitings will have important ramifications in bolstering state, regional, and local planning and plan implementation efforts.

The Department of Industry, Labor and Human Relations

The Wisconsin Department of Industry, Labor and Human Relations (DILHR), which is principally concerned with industrial accidents and unemployment compensation, has important building and safety code promulgation and enforcement powers. The exercise of these powers can be an important implementing tool for certain state, regional, and local planning efforts by their influence over structural rehabilitation, as well as new construction.

The Department, which is directed by a three-member Commission appointed by the Governor, derives its powers from various sections of the Statutes.[49] One is the so-called "safe place" statute requiring that places be made safe for employees and frequenters.[50] A second

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[39] *Wis. Stats. sec. 84.30.*

[40] *Wis. Stats. sec. 84.04.*

[41] *Wis. Stats. sec. 84.105(6).*

[42] *Wis. Stats. sec. 44.15.*

[43] *See Wis. Stats. sec. 236.13(1)(e) and Wisconsin Administrative Code Hy. 33.01 et seq.*

[44] *Wis. Stats. secs. 15.19, 144.03, and 101.93 and see Wisconsin Administrative Code H 62.01 et seq.*

[45] *Wis. Stats. secs 236.13(1)(d) and (2m). The regulatory provisions are set out in Wisconsin Administrative Code H 65.01 et seq.*

[46] *Chapter 614, Laws of 1965. And Wis. Stats. sec. 236.13(2m).*

[47] *Wis. Stats. secs. 194.02, 196.02, and 196.03.*

[48] *Chapter 68, Laws of 1975.*

[49] *Wis. Stats. sec. 15.221.*

[50] *Wis. Stats. sec. 101.11.*

is the authority granted to the Department over places of employment and public buildings as may be necessary for the adequate enforcement and administration of laws and orders requiring them to be safe.[51] "Public" includes not only publicly owned buildings but a great many that are privately owned but used by tenants, employees, frequenters, or other members of the public. The only exceptions appear to be: "any place where persons are employed in a) private domestic service which does not involve the use of mechanical power or b) farming."[52] Another law empowers the Department to fix reasonable standards, rules, or regulations for the construction, repair, and maintenance of places of employment and public buildings.[53] Plans for structures that fall within these statutory bounds must be submitted to DILHR to assure compliance with state level building codes. In addition, employees of the Department inspect existing public buildings to check for compliance with Department safety codes.

Geological and Natural History Survey

An invaluable source of basic physical data and information about the State and its regions is the Wisconsin Geological and Natural History Survey. Pursuant to Wis. Stats. 36.25(6), the Board of Regents of the University of Wisconsin has charge of the Wisconsin Geological and Natural History Survey and hires the State Geologist. The State Geologist is the Chairman and Director of the Survey's activities and is constantly being called upon for vital information by state, regional, and local planners. Two programs of this agency are of special significance, and both are aided by the U. S. Geological Survey on a matching fund basis: 1) the topographic mapping program of the State and 2) the groundwater investigation program.

The State Geologist also participates with the Soils Department of the University of Wisconsin and the U. S. Soil Conservation Service in the execution of detailed soil surveys and the preparation of soils maps showing the character and fertility of the developed and undeveloped soils of the State. Another function of this agency is the classification of lands, especially lands in northern Wisconsin, by mineral content. In general, it plays its role as a source of basic physical data for planning and development.

Miscellaneous State Agencies

A number of additional state agencies have relatively minor roles in planning and plan implementation.

Among them is the State Scientific Areas Preservation Council.[54] This agency determines which areas are of special scientific interest for purposes of acceptance or rejection of private gifts and makes recommendations to federal agencies, national scientific organizations, and to other state agencies.

The Board of Commissioners of Public Lands is a valuable repository of original U. S. Public Land Survey field notes and records.[55]

The University of Wisconsin Extension Service can be an important conduit communicating planning goals to Wisconsin people preparatory to plan implementation.

The Natural Resources Council of State Agencies is primarily a coordinating instrumentality through which representatives of state agencies mesh programs involving natural resources.[56] Through its subcommittees it produces reports which are of value to planners; and much of its committee work culminates in recommendations for legislation, some of which has plan implementation significance.

The State Historical Society of Wisconsin, even though an endowed membership corporation, is nevertheless an official state agency.[57] Its outstanding program of renovation and maintenance of historic sites has contributed significantly to the education of children and their parents. It helps local county historical societies perform similar functions and plays an important role in the historic marker program. In addition, the Society library in Madison is a federal repository and thus a valuable source of records and information.

MULTIUNIT REGIONAL AGENCIES

The Wisconsin Statutes authorize the creation of several types of intrastate regional agencies which can be conceived as occupying a position between the State and the local units of government. The major ones are:

1. Agencies created by contract between two or more local units of government for the joint exercise of any power or duty required or authorized by statute;[58]

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[51] *Wis. Stats. sec. 101.02(15)(a).*

[52] *Wis. Stats. sec. 101.01(2)(a). The term "public building" refers to any structure—including exterior parts of that building such as a porch, exterior platform, or steps providing means of ingress or egress—used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by three or more tenants, sec. 101.01(2)(h).*

[53] *Wis. Stats. sec. 101.02(15)(j). The Department also regulates mines and quarries to ensure compliance with its safety codes, sec. 101.15.*

[54] *Wis. Stats. sec. 23.27.*

[55] *Wis. Stats. sec. 23.01.*

[56] *Wis. Stats. sec. 23.26(1).*

[57] *Wis. Stats. sec. 44.01.*

[58] *Wis. Stats. sec. 66.30.*

2. Metropolitan sewerage districts or commissions which include lands in more than one municipality;[59]

3. Regional planning commissions created under section 66.945 Wis. Stats.[60]

Regional Action by Contract

Some implementation of regional land and water use plans may be accomplished through the creation of commissions by contract between local units under Wis. Stats. 66.30.[61] Contracts under Wis. Stats. 66.30 allow for the joint exercise of powers presently held by Wisconsin municipalities, and municipalities could act in concert to formulate and implement plans. Legislation granting bonding power to Commissions created pursuant to a contract under Wis. Stats. 66.30 for purposes of "acquisition, development, remodeling, construction, and equipment of land, buildings, and facilities for regional projects" makes this approach more feasible.[62] Thus, it appears that in southeastern Wisconsin all or some of the local units within the jurisdiction of the already existing Regional Planning Commission could band together by contract and set up implementing commissions and authorize joint bonding to finance the projects deemed most necessary and desirable.

Metropolitan Sewerage Commissions

Two types of metropolitan sewerage commissions are authorized by Wisconsin Statutes: 1) the Metropolitan Sewerage Commission of the County of Milwaukee and other metropolitan sewerage commissions. The Metropolitan Sewerage Commission of the County of Milwaukee has a long history of successful operation extending over many local units within Milwaukee County and outside Milwaukee County as well.[63] Its powers over sewage collection and over surface water drainage and pollution are outlined in SEWRPC Technical Report No. 2, Water Law in Southeastern Wisconsin, second edition (1976).

This regional special-purpose district, although limited in its legislatively delegated powers, has a great potential for regional plan implementation in two important respects. First, it constitutes a precedent for regional action which may be helpful in inducing regional organization for community services other than sewage collection and treatment. Secondly, close cooperation between planning agencies and metropolitan sewerage commissions can help guide the placement of regional development in both time and space through the location and construction of sewerage and drainage facilities.

Two other metropolitan sewerage districts exist in the Southeastern Wisconsin Region—the Western Racine County Sewerage District and the Walworth County Metropolitan Sewerage District. These districts have powers and duties similar in nature to the Milwaukee Metropolitan Sewerage District and have important water quality plan implementation responsibilities.

Regional Planning Commissions

The 1955 Legislature authorized the creation of areawide regional planning commissions and since that time nine regional planning commissions have been formed, serving 67 of the 72 counties of the State.[64] Like metropolitan sewerage districts, regional planning commissions are special-purpose agencies of strictly limited powers. They are directed to prepare and adopt master plans for the physical development of the Region on the basis of studies and analyses. They may publicize the purpose of these plans, issue reports, and provide planning advisory services to local units of government. In addition, they may enter into a contract under Wis. Stats. 66.30 with any local unit of government in the Region to make studies and offer advice on land use, thoroughfares, community facilities, public improvements, economic, and other development matters.[65] They also are authorized to perform an advisory review function for proposed land acquisitions which are included in an adopted master plan. They have power to set their own budgets and, within strict limits, to charge member units their allocated shares of the budget thus fixed. Also under Wis. Stats. 66.945(11) commissions, with the consent of a local unit

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[59] *Chapter 276 Laws of 1971 repealed the earlier sections dealing with the formation and powers of sewerage districts and put in place thereof Wis. Stats. secs. 66.20-66.26.*

[60] *Other types of regional agencies are flood control boards which are organized pursuant to Chaper 87 of the Wisconsin Statutes. That Chapter provides for property owners living in a single drainage area, which may well involve more than just a single municipal governmental unit, forming a flood control board for the sole purpose of effecting flood control measures, Wis. Stats. sec. 87.03. Little use has been made of this device largely because the entire cost of any such projects, which are generally very expensive, are to be borne primarily by the local units of government concerned.*

The Legislature has also authorized the formation of a metropolitan transit authority in any one county having a population of 125,000 or more. With the approval of its electors, this authority may acquire lands by purchase or condemnation and may finance, construct, maintain, and operate transportation facilities, Wis. Stats. 66.94.

[61] *It is not the intention to suggest that regional plans may not also be implemented by the coordinated action of local units of government, each exercising its individual plan implementation powers.*

[62] *Wis. Stats. sec. 66.30(3m).*

[63] *Wis. Stats. sec. 59.96(6)(a).*

[64] *Chapter 466, Laws of 1955, sec. 66.945 Wis. Stats. For a report on the regional planning commissions, see Department of Local Affairs and Development, Wisconsin Regional Planning Report—1974.*

[65] *Wis. Stats. sec. 66.945(12)(b).*

or a state agency, may act for the unit or agency in approving or disapproving subdivision plats under Chapter 236 of the Wisconsin Statutes. Except for the latter two functions, "the functions of the regional planning commission shall be solely advisory to the local governments and local government officials comprising the region."

State implementation and local adoption and implementation of plans of the regional commission are all that is provided for. State and county adoption and implementation of some parts of such plans offer much hope. In addition, as has been indicated, local units within the Region have broad authority to contract under Wis. Stats. 66.30 for the joint implementation of regional plans.

It is also true that a regional planning commission may be able to assert indirect leverage for the implementation of its plans by being designated a reviewing agency for federal or state grants-in-aid and by influence on federal and state agencies and on private real estate lenders and insurers.

Examples of such indirect plan implementing are in their A-95 review designations;[66] the review of applications for state funds for ORAP monies; in requirements that local highway planning be coordinated with regional and state highway planning programs before federal highway construction funds are made available; and in the wide use by state reviewing agencies of regional data, standards, and planning goals whenever applications for incorporation consolidation, plat approval, or other state permits are received. Private real estate developers, contractors, and insurers in the Region could be influenced in the direction of regional planning objectives in much the same way that the federal government influences housing projects which receive federal financial support via Federal Housing Administration subdivision guide manuals or the Flood Disaster Protection Act of 1973. Wide dissemination within the Region of completed regional plans and planning standards, coupled with regionally conceived zoning and official map ordinances and the underlying basic data relating to soils, land use, population, and economics, could have a shaping effect on private decisionmaking.

Examples of regional plans being endorsed and followed are the regional land use and surface transportation plans documented in SEWRPC Planning Report No. 7, Regional Land Use-Transportation Study, which was formally adopted by the Commission in December 1966. The regional land use and transportation plans produced by the Commission have found considerable support and acceptance at all levels of government and among the various state and federal agencies concerned with the physical development of the Region.[67] This study as part of the ongoing planning process has been updated to reflect the many changes in the Region.[68]

The idea that it is good business (economically sensible) to follow the regional plan should continue to be encouraged within both the public and private sectors. Any number of devices, other than the few suggested here, can be imagined which combine the decisionmaking power of state, federal, or private agencies with the advisory planning functions of the regional agency and thus promote implementation of the regionally developed plan.

A notable illustration of combining all three levels of government and the private sector in an effort to implement regionally developed plans is the Section 208 areawide water quality management planning program for Southeastern Wisconsin which was recently begun by SEWRPC. That program, which expects to be completed in late 1977, is completely funded by federal monies appropriated under the Federal Water Pollution Control Act Amendments of 1972.[69] The effort will involve extensive data collection, identification of all point sources of water pollution, special monitoring studies to ascertain the impact on water quality from nonpoint sources, preparation of alternative plans to eliminate water pollution, and selection of a recommended comprehensive water quality management plan. Throughout this process strong public input and evaluation of the various steps and work elements will be encouraged. And to assist this input further the Commission has formed three advisory committees. One is the Technical Advisory Committee whose members will supply their expertise in helping SEWRPC develop techincal policies. Another is the Intergovernmental Coordinating Committee whose members represent all levels of government. This committee has the major responsibility to review key intergovern-

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[66] *Through their A-95 review designations, the regional planning commissions have reviewed within a one-year period grant applications totaling approximately $335,000,000, Wisconsin Regional Planning Report—1974. Supra, note 66.*

[67] *All seven county boards of the Region adopted the recommended transportation plan in 1967; all but the Ozaukee County Board adopted the recommended regional land use plan in 1967. Since then, the plans have been adopted by the governing bodies of 11 of the 28 cities, 12 of the 54 villages, and 14 of the 65 towns within the Region. These plans have also been adopted by such agencies as the Wisconsin Department of Transportation, Department of Natural Resources, the Milwaukee County Expressway and Transportation Commission, U. S. Department of Transportation, U. S. Environmental Protection Agency, and U. S. Department of Housing and Urban Development (Figures are as of July 1974).*

[68] *The first volume of a two-volume publication is available to the public. It is entitled Planning Report No. 25, A Regional Land Use and A Regional Transportation Plan for Southeastern Wisconsin—2000.*

[69] *P.L. 92-500, 33 U.S.C.A. secs. 1251 et seq., 86 Stat. 816. Section 208 is one section of the Act, and as a result the title of the planning program was so named.*

mental and interagency policy implications. A third committee is the Citizen Advisory Panel for Public Participation whose members include representatives of various citizen groups. This committee provides an opportunity for citizen groups to become familiar with and influence the planning program, the resulting plan, and the implementation measures proposed. In addition, the Commission is provided with an opportunity to discuss with citizen interest groups both the subject and content of the areawide water quality planning program as well as the means of presentation of relevant aspects of the planning program to the general public.

The management plan that is ultimately selected after public hearing will be used by the Governor in determining the respective management agencies to carry out the plan.[70] The distinguishing feature of this plan will be that no federal waste treatment works construction grants, nor any waste treatment permit, may be granted or approved unless they are in compliance with the Section 208 plan, thus providing great impetus to the eventual implementation of the plan.

DISPERSION OF PLANNING AND PLAN IMPLEMENTING POWERS AMONG LOCAL UNITS OF GOVERNMENT

Towns, Villages, and Cities

By a majority vote of electors at a town meeting, any Wisconsin town may take on all the powers of a village, except those in conflict with express town statutes.[71] As a practical and legal matter, this latter limitation does not seriously qualify a town's ability to adopt all of the planning powers of a village. These village planning powers, by express provisions of the Statutes, are the same as those granted to cities under Wis. Stats. 62.23.[72] So by means of a single and a double reference, all three units of government—cities, villages, and towns with village powers—can have the identical planning powers provided in Wis. Stats. 62.23.[73]

Before these powers are discussed as a unity, it is well first to summarize the limited powers for planning that are delegated to towns which do not assume village powers. These towns have only such powers as are expressly granted them by the Legislature in Chapter 60 of the Wisconsin Statutes. Under these Statutes they have only two alternatives for undertaking a planning program. The town has limited planning powers which may be exercised through either a town park commission or a town zoning committee.[74] Town park commissions have only limited planning powers. They are authorized to make a thorough planning study of the town for the purpose of identifying lands that should be reserved for public open space and park use and for highways and boulevards.[75] The town park commission may also be empowered to recommend boundaries for zoning districts and to recommend the regulations and restrictions for each district. There are, however, no general powers conferred upon the park commission for the planning of all land uses or the preparation of a comprehensive master plan.

In lieu of a park commission, the town may create a zoning committee of five members.[76] Apparently, the town may not have both a zoning committee and a park commission. The zoning committee is not granted general land use planning powers. The statutory assumption, an assumption contrary to good planning practice, seems to be that a zoning ordinance will be prepared without benefit of a prior master plan.

Four additional town planning authority enactments remain to be mentioned. The 1957 Legislature authorized town boards to cooperate with county rural planning

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[70] *The comprehensive plan will be composed of four elements or subplans: 1) a plan for abating pollution from point sources. This element will update, refine, and extend the existing SEWRPC Planning Report No. 16, A Regional Sanitary Sewerage System Plan for Southeastern Wisconsin; 2) a plan element for abating pollution from nonpoint sources, primarily rainfall runoff from urban and rural lands; 3) a plan element for the handling, recycling, and disposal of sewage sludge; and 4) a plan element for water quality management, including the designation of land use and wastewater treatment management agencies. For a more complete description of the program see SEWRPC, a Study Design for the Areawide Water Quality Planning and Management Program for Southeastern Wisconsin, 1975-1977.*

[71] *Wis. Stats. sec. 60.18(12).*

[72] *Wis. Stats. sec. 61.35.*

[73] *Questions can be raised of whether planning powers of towns which adopt village powers will be truly identical to those of cities under Wis. Stats. sec. 62.23. Because of the different official positions involved, the composition of a town plan commission would, necessarily be different from that of a city or village plan commission although "parallel" official positions to the mayor, alderman, and city engineer clearly exist at the town level. Again, it is doubtful that a court would hold that a town has extraterritorial planning powers, even though both cities and villages have such powers under Wis. Stats. sec. 62.23. But for towns with village powers, agencies specified in town statutes probably do have the nonextraterritorial planning powers delegated by Wis. Stats. sec. 62.23.*

[74] *Wis. Stats. secs. 60.181 and 60.74(2).*

[75] *Wis. Stats. sec. 60.183.*

[76] *Wis. Stats. sec. 60.74(2).*

committees.[77] These county committees also have limited planning powers. They may plan for transportation facilities, community centers, the setting aside of county parks, recreation fields, community woodlots, places of local and historic interest, and for the reservation and preservation of land for public use along river fronts and lakeshores.[78] Where a county has a park board or commission, the county may not have a rural planning committee.[79] Instead, the park agency has all of the planning powers of the rural committee. Presumably, in such counties town boards may cooperate with the park agency in the planning functions just listed. A second statute authorizes town boards to cooperate with counties in the preparation and adoption of a county zoning ordinance. The third statute is the regional plan commission statute authorizing towns to become members of regional planning commissions created by the Governor under Wis. Stats. 66.945. The final statute is one authorizing town boards to act jointly with other municipalities, presumably under an arrangement pursuant to Wis. Stats. 66.30, to establish a regional planning program to protect the health, safety, and general welfare of the town as a part of the Region.[80]

As towns that have adopted village powers and villages and cities are considered, the focus shifts to Wis. Stats. 62.23—the city planning enabling act. Here the familar and generally eminently sound apparatus for comprehensive planning is authorized and described. This act includes not only the authority to prepare and adopt a local master plan, but also the authority to prepare and adopt an official map and a zoning ordinance, two of the most important plan implementation devices. This act also requires that zoning regulations be made in accordance with a comprehensive plan, a sound requirement. An argument also can be made that the comprehensive plan should be the local master plan, also referenced in the act.

Wisconsin cities have been authorized to have plan commissions since 1909,[81] and Wis. Stats. 62.23 still wisely contemplates the creation of a plan commission comprised largely of a mixed blend of city officials and citizen members. The professional staff, although this is not made clear by the Statutes, will presumably either be employed by the commission and be answerable to it or will be set up as a separate department of city government under the mayor to assist the commission in its work.[82]

Where a city chooses not to create a plan commission, it may turn under Wis. Stats. 27.08 to a park board for the preparation of a master plan and for the accomplishment of other planning and plan implementing functions. The procedures and the extraterritorial scope of a master plan differ, however, from those applicable to plan commissions under Wis. Stats. 62.23. A master plan adopted by a plan commission, although certified to the governing body, need not be approved by it;[83] one adopted by a park board must be approved by the governing body.[84]

A park board's master plan may have extraterritorial reach only for streets, parks, parkways, boulevards, and pleasure drives.[85] But a plan commission's master plan may have extraterritorial reach on these matters, other public facilities and services, and land uses generally. The park board's extraterritorial authority is coextensive only with the city or village's extraterritorial plat approval jurisdiction; the plan commission's plan can take in as much territory outside the municipality as it deems necessary for the development of the municipality.

It is doubtful that this choice to use either a park board or a plan commission for master planning exists for villages or for towns with village powers.[86] Therefore, villages and such towns are spared not only the choice but also the differences in planning powers just outlined. Each presumably will be required to establish a village or town plan commission if it desires a master plan of the type contemplated by Wis. Stats. 62.23.

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[77] *Wis. Stats. sec. 60.29(43).*

[78] *Wis. Stats. sec. 27.015.*

[79] *Wis. Stats. sec. 27.015(13).*

[80] *Wis. Stats. sec. 60.29(38).*

[81] *Chapter 162, Laws of 1909.*

[82] *Wis. Stats. sec. 62.09(1) specifies the officers of a city and then provides "and such other officers or boards as are created by law or by the council." For example, common councils have the power to create the office of city engineer. Schneider v. Darby, 179 Wis. 747, 190 N.W. 994 (1922). The power of the council should be viewed in the light of the general charter, home rule status of Wisconsin cities. True, Wis. Stats. 62.23(1)(e) authorizes the plan commission to employ "experts and a staff" but nowhere is this made the exclusive province of the plan commission. It would seem, therefore, that the council could create the office of "city planner" or "city plan director" and authorize the organization of a department under him. However, any master plans proposed by the department must, to be official under Wis. Stats. sec. 62.23(3), be approved by the city plan commission.*

[83] *Wis. Stats. sec. 62.23(3).*

[84] *Wis. Stats. sec. 27.08(4).*

[85] *Id.*

[86] *Wis. Stats. sec. 61.35 does not grant to villages any of the powers of city park boards as specified in Wis. Stats. 27.08. Accordingly, towns that adopt village powers are not granted such powers either.*

The master plan contemplated by Wis. Stats. 62.23 is a physical plan. Consider the familiar words as they have come down through Wis. Stats. 62.23(2) from the U. S. Standard Planning Act of 1928:

> (2) It shall be the function and duty of the commission to make and adopt a master plan for the physical development of the municipality, including any areas outside of its boundaries which, in the commission's judgment bear relation to the development of the municipality provided, however, that in any county where a regional planning department has been established, areas outside the boundaries of a municipality may not be included in the master plan without the consent of the county board of supervisors. The master plan, with the accompanying maps, plats, charts, and descriptive and explanatory matter, shall show the commission's recommendations for such physical development, and may include among other things without limitation because of enumeration, the general location, character and extent of streets, highways, freeways, street grades, roadways, walks, bridges, viaducts, parking areas, tunnels, public places and areas, parks, parkways, playgrounds, sites for public buildings and structures, airports, pierhead and bulkhead lines, waterways, routes for railroads, street railways and busses, and the general location and extent of sewers, water conduits and other public utilities whether privately or publicly owned...the general location, character and extent of community centers and neighborhood units, the general character, extent and layout of the replanning of blighted districts and slum areas, and a comprehensive zoning plan.

The question may be asked, "Is a master plan a mere guide to the local planning agency and governing body, or is it in some respects in and of itself a legally binding document?"

Wis. Stats. 62.23, reflecting the philosophy of the Standard Planning Act of 1928, seems on its face to contain the answer when it provides in subsection (3) that: "The purpose and effect of the adoption and certifying of the master plan or part thereof shall be solely to aid the city plan commission and the council in the performance of their duties." The fact that no public hearing on the proposed master plan is required and that it need be approved only by the plan commission and not by the local legislative body seems to be further evidence that the plan is intended only for guidance, not for regulatory control.

Nevertheless, from the outset, adoption of a master plan has had one regulatory effect. Once the plan is adopted by the plan commission, the local governing body may not act finally on a variety of specified public improvement projects until each matter has first been referred to the plan commission and until the commission, after consideration, has reported.[87]

In rewriting Chapter 236, Wis. Stats. the land subdivision code, in 1955, the Legislature provided:

> Approval of the preliminary or final (subdivision) plat shall be conditioned upon compliance with: . . . (c) any local master plan or official map . . . .[88]

The extent or validity of the requirement that a subdivision plat comply with a local master plan has not been tested before the Wisconsin Supreme Court. Involved is the technical issue of whether the Legislature intended to delegate to the plan commission a legislative and a regulatory function for master plans. If the Legislature had this intention, was the delegation valid under the Fourteenth Amendment to the Federal Constitution, which imposes an obligation on states that property not be taken "without due process of law?"

In general, it would seem that the Legislature can authorize an administrative agency to indulge in limited legislation and that it has done so in the case of plan commissions and master plans. Undoubtedly, it would, as a practical matter, strengthen the case if the local governing body indicated its approval of the master plan even though this is not technically required by the statute. Undoubtedly, also as a practical matter, it would help to show that, though not required by the statute, a public hearing on the proposed master plan was, as a matter of fact, held after due notice before either the plan commission or the governing body or both.

On the other hand, it must be conceded that literal application of the requirement that the subdivider comply with the approved master plan would violate the Fourteenth Amendment in some instances, not because legislative and regulatory authority cannot be delegated to plan commissions but because the regulatory impact on the particular landowner was so great as to constitute an invalid taking of property in his case.

For example, suppose that a master plan adopted by a local plan commission marks a 20-acre area for future park acquisition. Some time later the private landowner of this 20-acre parcel submits a plat for the subdivision of the tract. If the plan commission refuses to approve the plat and the council does not buy or condemn the land, the owner may be left in the position of not

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[87] *Wis. Stats. sec. 62.23(5). If the commission fails to report within 30 days or such longer period as may be set by the local governing body, then the body may take final action without the report.*

[88] *Wis. Stats. sec. 236.13(1)(c).*

being able to earn a fair return on his land; and a court would probably declare the application of the master plan unconstitutional.

On the other hand, if the master plan shows a proposed highway near a lakeshore, or at some other location, and the plat as proposed does not show the highway at the planned location, here the master plan might well be upheld as a valid police power control and denial of plat approval affirmed. Consequently, because of the 1955 platting law, an approved master plan may be given at least indirect regulatory and legal effect of exercising some controls on the subdivision plat.

It appears that the framers of the New York Planning Act, from which Wisconsin took its official map statute in 1941, contemplated that the creation of a plan commission and the preparation and adoption of a master plan would precede the enactment of an official map ordinance. But in the absence of an express requirement that a master plan is a necessary prerequisite, it is highly unlikely that the Wisconsin Court would say that it is.[89] Sound planning practice to the contrary, there is no express legislation indicating an intention that approved master plans precede the valid enactment of official map, zoning, or subdivision control ordinances. A judicial conclusion that a master plan is such a precondition would invalidate many local official map, zoning, and subdivision control ordinances in Wisconsin because, admittedly, many such ordinances have been passed without the guidance of a previously adopted master plan.[90]

Legal Basis for County Planning

In 1967 the Wisconsin Legislature, in an effort "to encourage uses of land and other natural resources which are in accordance with their character and adaptability," amended the enabling authority of counties to zone lands.[91] With the amendment, counties may now specifically plan for the physical development of the county as well as zone the uses of lands.[92] The vehicle for developing a plan is a planning and zoning committee created by the county board of supervisors. If a committee pursuant to the Statutes is formed, then a plan for the physical development of the unincorporated territory within the county must be prepared.[93] The territory of the respective cities and villages may also be included in the development if the cities and villages approve of such inclusion by resolution.[94]

The process of developing and adapting the county plan as envisioned by the Legislature is to take the following course. First, comprehensive surveys, studies, and analyses of the past and present characteristics of the county will be conducted, considering such factors as land use, population density, the economy, soil characteristics, wetlands, and forests, and other human and natural features of the county. Then, using the information gathered from these studies, the plan would identify the future physical development goals of the county and frame specific recommendations for public and private uses of the land and other natural resources.[95] Once the plan is formulated and a public hearing is held on its merits, then the planning and zoning committee may approve it and submit it for adoption by the county board. The plan may be adopted by resolution in whole or part, or amended by the county board.[96] Upon adoption, in the words of the Legislature, the plan will serve as a guide for public and private actions. The lack of strong legislative mandate to implement the plan becomes readily apparent upon analyzing the subsequent statutory section which grants zoning enabling powers to counties.[97] In that section there is no provision that the actual zoning and

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[89] *Beuscher and Kucirek, "Wisconsin's Official Map Law," 1957 Wis. L. Rev., at pp. 176, 187.*

[90] *See Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A 2d 1 (1957).*

[91] *Chapter 77, Laws of 1967 amended Wis. Stats. sec. 59.97.*

[92] *Wis. Stats. sec. 59.97(1).*

[93] *The Statutes add that, unless provided by ordinance to the contrary, county zoning agencies in existence on July 22, 1967, shall be designated the planning and zoning committee of the county with all the powers and duties, Wis. Stats. sec. 59.97(2). Provision is also made for the retention of professional staff or contracting for such services to discharge those duties, sec. 59.97(2)(d).*

[94] *Wis. Stats. sec. 59.97(3)(a).*

[95] *Wis. Stats. sec. 59.97(3)(b) 2. Enumerated categories include highways, parks, public facilities, sanitary and storm sewers, reduction of water pollution, flood control, public and private utilities, and industrial/commercial sites.*

[96] *Wis. Stats. sec. 59.97(3)(a). Cities and villages included in the plan may also endorse it. Furthermore the Statutes provide that a master plan adopted under Wis. Stats. sec. 62.23(2) and (3) and an official map established under sec. 62.23(6) shall control in unincorporated territory in a county affected thereby, whether or not such action occurs prior to the adoption of a development plan, Wis. Stats. sec. 59.97(3)(e).*

[97] *Wis. Stats. sec. 59.97(4).*

regulation of land use need implement or follow the county development plan. Logic would dictate that the formulation of a zoning ordinance, which is one of the most important tools available to counties in shaping their future development, should rest upon a well thought out plan which has been developed in a rational manner using sound evidence and open to public participation as that proposed above. But the legal requirement of clearly tying the county development plan and zoning together is presently lacking. That is not to say that a zoning ordinance can stand by itself without a reasonable basis for its enactment—it cannot.[98] As the discussion in the previous chapters indicates, the law does require that zoning ordinances be reasonably based. The point here is that, if the effort has been made to formulate a county development plan, it should be followed, especially when a county board is exercising its important authority to enact zoning ordinances for the purpose of achieving rational land use development.

Besides the authority above, the Wisconsin Legislature has delegated other powers which permit planning activity to occur at the county level. For example, under Chapter 92 Wis. Stats. a county board of supervisors may by resolution declare the county to be a soil and water conservation district.[99] In that instance the county board's agricultural and extension committee will serve as supervisors of the district, having the legislative authority to plan comprehensively for the conservation of the soil, water, and related resources of the district.[100] As part of this process, it is required that the appropriate procedures for implementing the plans be developed.

Supervisors of a district may develop land use regulations and eventually draft an ordinance that would conserve soil and water resources and control runoff and sedimentation.[101] If a referendum is held on the proposed ordinance resulting in a favorable vote by a majority of the electors residing in the area to be affected, then the county board may officially adopt the ordinance which implements the land use regulations. Such regulations may be enforced by injunctive order or forfeiture. And where a defendant landowner still fails to take corrective measures, the supervisors may authorize entrance upon the land and performance of the necessary operations to bring the lands into conformity with the regulations and may afterwards recover the costs from the recalcitrant landowner.[102]

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[98] *In the recent case of Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W. 2d 471 (1973), this was again reinforced at pp. 651-652.*

[99] *Wis. Stats. sec. 92.05. And see the authority granted to rural planning committees, Wis. Stats. sec. 27.105 and county park commissions Wis. Stats. secs. 27.02 and 27.05.*

[100] *Wis. Stats. sec. 92.06. Two additional members may be appointed who are not members of the county board. If the county is included in a regional planning commission, then a comprehensive plan for the district may not be at variance with the plans of the commission, sec. 92.08(4).*

[101] *Wis. Stats. sec. 92.09.*

[102] *Wis. Stats. secs. 92.10 and 92.11.*

Chapter VII

IMPORTANT REGULATORY MEASURES TO EFFECTUATE THE GOALS OF PLANNING

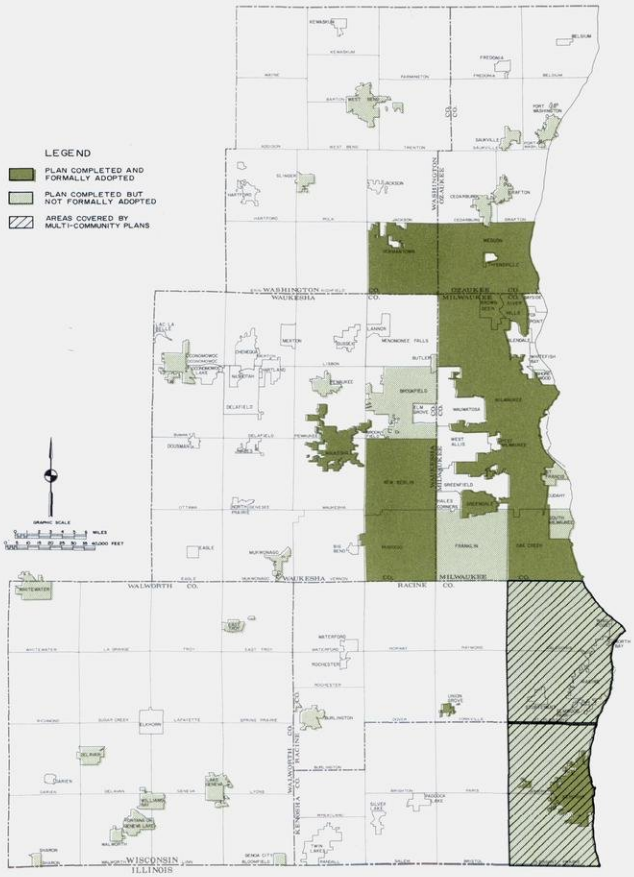
INTRODUCTION

Local general purpose units of government (towns, villages, cities, and counties) have many legal powers that enable them to implement physical plans. Discussed here will be the important police power regulatory measures of zoning, subdivision control, and official map powers as they exist in Wisconsin.[1] Actually, local units can act to effectuate physical planning goals in numerous other ways: public improvement programs for street, sewer, and water facilities; purchase of park and recreation sites and operation of such facilities; the shaping of tax assessment policies so as to induce or retard development of land; an active industrial development program; the use of a capital improvement budget; strict enforcement of building, safety, and housing codes; and an urban renewal program. These and other measures may be utilized along with zoning, subdivision control, and official mapping to implement planning goals.

In the State of Wisconsin there are two sources of authority that enable the local units of government to plan and regulate the use of land; they are the State Constitution, through its home rule provisions, and the specific statutory authority enacted by the State Legislature. Because this discussion focuses on zoning, subdivision control, and official map enabling acts of general statewide application, it will not involve the reader in the somewhat beclouded meaning of the constitutional home rule provisions.[2] Nor will this discussion include any speculation that cities or villages may, under the home rule clause of the Constitution, have zoning, subdivision control, or official mapping powers beyond those specifically delegated by the Legislature in the respective enabling statutes.[3] It will be assumed instead that these statutes contain the full reservoir of power available to cities and villages in these fields of regula-

Map 3

COMPLETED AND ADOPTED LOCAL COMPREHENSIVE PLANS INCLUDING LAND USE ELEMENT IN THE REGION: 1972



Source: SEWRPC.

[1] *The Wisconsin Court has held that "the police power is an inherent attribute of government and encompasses regulations for the protection of good order and good morals," State ex rel. Baier v. Milwaukee, 33 Wis. 2d 624, 629, 148 N.W. 2d 21 (1967) and quoting from Chicago, M. & St. P.R. Co. v. Milwaukee, 97 Wis. 2d 422, 72 N.W. 2d 1118 (1897).*

[2] *The Wisconsin State Constitution, Art. II, sec. 3, as amended (1924) provides in part: ". . . cities and villages organized pursuant to state law are hereby empowered, to determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as shall with uniformity affect every city or every village."*

[3] *It should be noted that while the home rule provisions seem very broad on their face, there are some important qualifiers. For example, the general grant of power to the cities and villages permits them only to act on matters of "local affairs and government." In State ex rel. Ekern v. Milwaukee, 190 Wis. 633, 209 N.W. 860 (1926) the court interpreted this phrase to mean those matters which directly and intimately affect the individual municipalities and not those that are remote or indirect, at p. 640. And, furthermore, in the landmark case of Van Gilder v. Madison 222 Wis. 58 84 267 N.W. 25 268 N.W. 108 (1936), the court found that on matters of "statewide concern" the Legislature may deal with them free from any restrictions contained in the home rule amendment.*

tion. Accordingly, it will not be necessary to attempt to determine whether towns which take on village powers become "home rule" units. Nor will it be necessary to emphasize that the counties do not have home rule powers.[4] All four units of local government—cities, villages, towns, and counties have no more power in these regulatory fields, it will be assumed, than the Legislature has specifically delegated in the respective enabling acts.

ZONING POWERS

There are three separate and distinct general zoning enabling acts in Wisconsin:[5] One for towns without village powers,[6] one for counties,[7] and one for cities and villages and for towns with village powers.[8] For well over a half-century the courts have upheld the local government's exercise of this delegated authority to zone lands according to use districts. They may do so as long as it is in furtherance of the public health, safety, morals, and general welfare and even though exercising that authority may infringe upon certain individual rights.[9]

Town Zoning Authority

The zoning situation of the towns is by far the most complicated. There are literally five different procedures by which town lands may be zoned:

1. If there is no county zoning ordinance, then the town having first asked the county to zone may, if the county fails to act, enact its own zoning under Wis. Stats. 60.74.[10]

2. If there is a county ordinance, the town may elect to have the county ordinance apply in the town.[11]

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[4] *An interesting twist on the fact that counties do not have home rule powers is found in the case of West Allis v. Milwaukee County, 39 Wis. 2d 356, 159 N.W. 2d 36 (1968). In that case the State Legislature authorized Milwaukee County to construct a waste disposal facility which would be financed from local property taxes. The local municipalities objected to the authority granted to the County on the grounds that it infringed on their own home rule authority, since such service was strictly a "local affair." But, as the court pointed out, at p. 368, ". . . the law they (the municipalities) object to delegated powers to Milwaukee County, an administrative branch of the State government itself. We see no evidence that the home rule amendment was in any way intended to limit the power of the State to deal with its own agencies."*

[5] *There are two additional specific grants of zoning enabling authority in the Wisconsin Statutes. Wis. Stats. sec. 114.136 provides for airport zoning and Wis. Stats. sec. 92.09 enables soil and water conservation districts to propose land use regulations to the county board.*

[6] *Wis. Stats. sec. 60.74.*

[7] *Wis. Stats. sec. 59.97.*

[8] *Wis. Stats. sec. 62.23(7). Generally there are two exemptions from zoning ordinance regulations, pertaining to nonconforming uses, i.e., uses of land which were in existence and lawful at the time of the adoption of the zoning ordinance, and to the use of lands by state, county, and federal government so long as such uses are governmental and not proprietary in nature. A proprietary function has been defined as that which might be provided by a private corporation. For further discussion and citations on this point, as well as a more extensive exploration of the authority to zone in Wisconsin, see Cutler, Zoning Law and Practice in Wisconsin (1957), at p. 8, and Cutler and Baxter, Zoning Law and Practice in Wisconsin (Supp. 1974), at p. 6.*

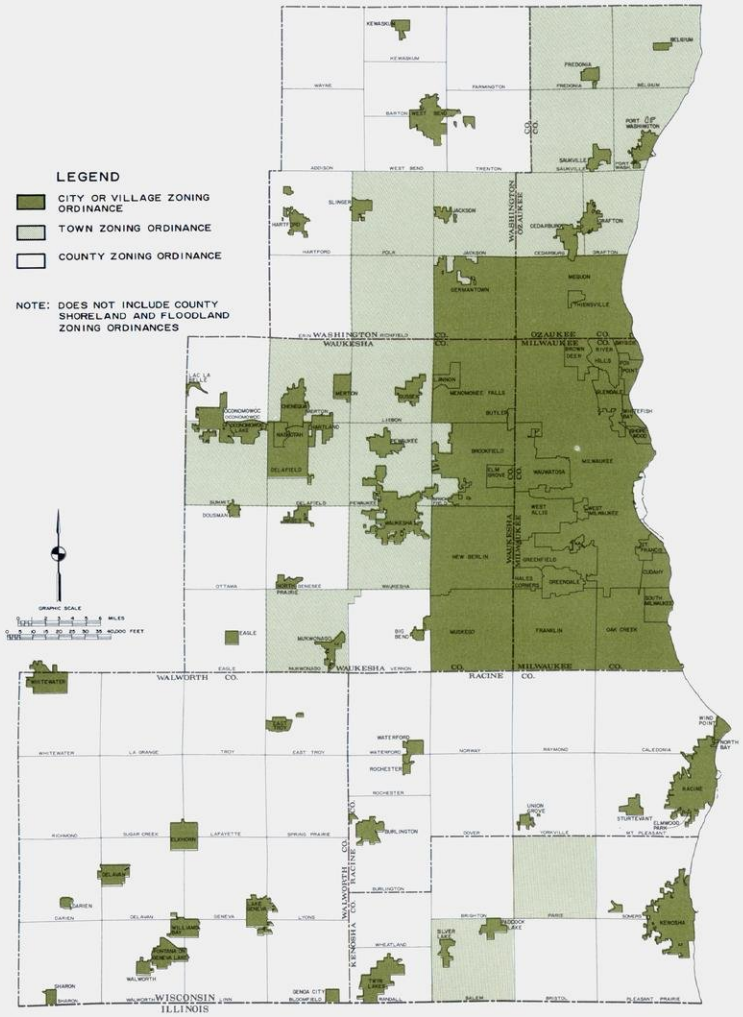
[9] *With respect to the individual's right to develop his property, the Wisconsin Court in State ex. rel. Carter v. Harper, 182 Wis. 148, 153, 196 N.W. 451, 33 A.L.R. 269 (1923), has stated: "It was not intended . . . to so far protect the individual in the use of his property as to enable him to use it to the detriment of society. By thus protecting individual rights, society did not part with the power to protect itself or to promote its general well being. Where the interest of the individual conflicts with the interest of society, such individual interest is subordinated to the general welfare." Similarly, a few years later in the landmark decision by the United States Supreme Court, Euclid v. Ambler Co., 272 U.S. 365, 475. S. Ct. 114, 54 A.L.R. 1016 (1926) a zoning ordinance was found as not being in violation of the Fourteenth Amendment. And see Browndale International v. Bd. of Adjustment, 60 Wis. 2d 182, 203, 208 N.W. 2d 121 (1973) cert. den. 94 S. Ct. 1933 where the constitutionality of zoning was upheld in the public interest. Also see Just v. Marinette, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972). But an unlawful confiscation will be found in violation of the Due Process Clause of the Federal Constitution's Fourteenth Amendment if the economic usefulness of the property is reduced to miniscule proportions or the regulation lacks any logical basis; cf. Cutler, supra, note 8, at p. 82.*

[10] *The statute provides that if the county board at its regular meeting has been petitioned by the town board and it fails to direct its zoning body to proceed towards development of an ordinance; or, if such directions to proceed are given but the report of the zoning agency and the tentative ordinances pursuant thereto are not presented to the county board within one year; or if so presented and the county board at its next meeting thereafter fails to adopt the ordinance, the town board may proceed under this section, Wis. Stats. sec. 60.74(5) (am). In Edelbeck v. Town of Theresa, 57 Wis. 2d 172, 203 N.W. 2d 694 (1973), a town ordinance was found invalid since the county had already adopted an ordinance, at p. 182a. A similar finding was made in Racine County v. Alby, 65 Wis. 2d 574, 233 N.W. 2d 438 (1974).*

[11] *Wis. Stats. sec. 59.97(5)(c).*

Map 4

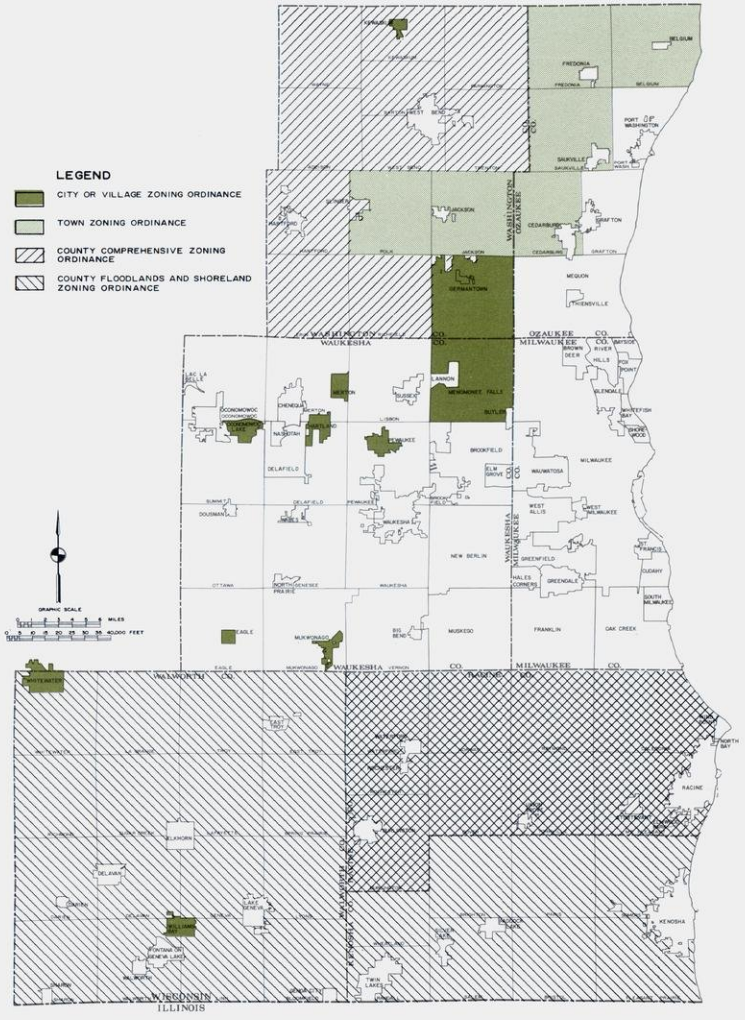
ZONING ORDINANCES IN THE REGION: 1972



Source: SEWRPC.

Map 5

ZONING ORDINANCES IN THE REGION BASED UPON THE SEWRPC MODEL ZONING ORDINANCE: 1972



Source: SEWRPC.

3. The town may take on village powers and, by a double reference process, exercise city zoning powers granted by Wis. Stats. 62.23(7).[12] But it may not do the latter if there is a county zoning ordinance in existence, unless approved by referendum and the county board.

4. A town may act jointly with other municipalities to establish and maintain a regional planning program.[13] Thereupon the town acquires city zoning powers and may zone in spite of the existence of a county zoning ordinance, but only if the zoning implements the regional plan, is approved by the county board, and is not disapproved by the electors at an annual town meeting.

5. Finally, a part of a town may be zoned extra-territorially by a city or village under Wis. Stats. 62.23(7a).

The Authority to Zone at the County Level

Enough has already been said to make it clear that so-called county zoning under Wis. Stats. 59.97 is actually joint county-town zoning. A county-enacted zoning ordinance is not in force anywhere until affirmatively approved by a town board. Approval by one or even a majority of the towns in a county does not make a zoning ordinance binding upon lands in towns which do not approve the ordinance.

Town approval requirements present special complications for amendments to county zoning ordinances.[14] First of all, approval of amendments by nonaction of a town board is contemplated, something that is not possible for initial zoning ordinances. If a town board fails to act within 40 days from the time a county adopts a zoning amendment, approval is conclusively presumed. Secondly, although individual town approval for amendments changing district lines is specified, amendments changing zoning regulations go into force throughout the entire zoned area of the county, including nonapproving towns, once a majority of towns have approved. This scheme had caused difficulty when an existing county zoning ordinance was being supplanted by a completely new and reconstituted ordinance because repealing the old ordinance and then reenacting the new under initial ordinance procedures would have legalized, as non-conforming, illegal uses established in violation of the old ordinance. This was confusing, and the Wisconsin Legislature sought to simplify matters by providing that a comprehensive revision of an existing zoning ordinance may be adopted in one ordinance subject to individual approval town-by-town.[15]

One major innovation in the allocation of zoning authority granted to counties came under the Navigable Waters Protection Act of 1965.[16] That Act provides for the regulation by counties of all shorelands in unincorporated areas bordering on navigable waters in an effort to protect and preserve the State's navigable waters for navigation, fishing, recreation, and scenic beauty. The regulations apply to lands within 1,000 feet of a lake, pond, or flowage, or 300 feet from a river or stream, or to the landward side of a floodplain. The restrictions placed on the property must meet certain standards set out by the Wisconsin Department of Natural Resources.[17]

This granting of authority to restrict the use of lands bordering navigable waterways has a feature which distinguishes this authority from the basic zoning enabling powers of counties under section 59.97 Wis. Stats.[18] Under this statute, town approval of the county ordinance is not required for the ordinance to take effect.[19]

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[12] *Villages are permitted under Wis. Stats. sec. 61.35 to take on those powers of the city enumerated under sec. 62.23 and town boards may do likewise by assuming village powers under sec. 60.18(12) and thereby through a double reference under sec. 61.35 take on the powers of the city. If the town board wishes to adopt a zoning ordinance under sec. 60.74(7) in a county which has already adopted a county zoning ordinance, then the town ordinance is subject to county board approval, 62 OAG 139 (1973).*

[13] *Wis. Stats. secs. 60.29(41) and 60.74(8).*

[14] *Wis. Stats. sec. 59.97(5).*

[15] *Id., as amended by Chapter 343, Laws of 1965.*

[16] *Chapter 614, Laws of 1965, Wis. Stats. secs. 144.26 and 59.971.*

[17] *NR 115.03 Administrative Code. The regulations adopted under this section will supercede any provisions of a previously adopted zoning ordinance affecting those lands unless the existing restrictions are more stringent. If a county fails to adopt an ordinance meeting the standards, the DNR is authorized to adopt an appropriate ordinance for the county. In 1972 a constitutional challenge was raised to a county's ordinance adopted pursuant to the enabling legislation. In the landmark decision of Just v. Marinette, 56 Wis. 2d 7, 18, 201 N.W. 2d 761 (1972) the court found that, in furtherance of the public trust duty of the State, the Legislature may delegate authority to local units of government, which the State did by requiring counties to pass shoreland zoning ordinances.*

[18] *A county shoreland/floodplain zoning ordinance supercedes all ordinances enacted under sec. 59.97 which relates to shorelands, see Town of Salem v. Kenosha County, 57 Wis. 2d 432, 204 N.W. 2d (1973), at p. 434.*

[19] *In addition to the foregoing, the Navigable Waters Protection Act also required the adoption and enforcement of floodplain zoning ordinances throughout the State; see Wis. Stats. sec. 87.30 and N.R. 116.01 et seq. Wisconsin Administrative Code. A distinguishing feature from the shoreland provisions, however, is that floodplain ordinances must be in force for the incorporated land areas of the State as well. Thus, the respective cities and villages, as well as counties, are involved with implementing this measure.*

The Authority to Zone Among Cities, Villages, and Towns With Village Powers

It is noteworthy that neither the county nor town zoning enabling statutes require that the zoning be in accordance with a comprehensive plan. The requirement is present, however, in Wis. Stats. 62.23(7)(c), the city-village zoning act, and is almost universally present in zoning enabling statutes throughout the country. In fact, the requirement is so familiar to courts that they tend to treat it as necessary to the constitutionality of zoning.[20] There has been some confusion about what the phrase "comprehensive plan" means in this connection. It seems generally to be conceded that it does not mean that a complete master plan must precede zoning in order for the ordinance to be valid. For the courts to have required such a master plan as a precondition to zoning would, as a practical matter, have invalidated thousands of zoning ordinances throughout the country. The New Jersey Court has stated it in this way:

> Thus the historical development did not square with the orderly treatment of the problem which present wisdom would recommend. And doubtless the need for immediate measures led the Legislature to conclude that zoning shall not await the development of a master plan . . . .
>
> Without venturing an exact definition of "comprehensive plan," it may be said for present purposes that "plan" connotes an integrated product of a rational process and "comprehensive" requires something beyond a piece-meal approach . . . .[21]

Suppose a county planning agency studies land use problems of the county as a whole and recommends an ordinance based on such studies. This step presumably satisfies the constitutional requirement (if there be one) for a comprehensive plan. But suppose that only a patchwork of towns approves the ordinance, leaving large areas of the county unzoned. Is there a possibility that the resulting zoning is vulnerable on constitutional grounds? Is it possible that the zoning will fail because of lack of comprehensiveness, because the zoning is piecemeal? The Wisconsin Court has never been asked to answer these questions. Yet they do point to possible constitutional dangers in the present joint system of county-town zoning.[22]

Interim Zoning: In order to accommodate the situation in which a community lacks a comprehensive zoning plan and wishes to develop one, the Wisconsin Legislature amended the Statutes to permit the use of interim zoning by cities and villages.[23] Specifically, the amendment reads:

> . . . the common council of any city which has not adopted a zoning ordinance may, without referring the matter to the plan commission, enact an interim zoning ordinance to preserve existing uses while the comprehensive zoning plan is being prepared. Such ordinance may be enacted as an ordinary ordinance but shall be effective for no longer than two years after its enactment.[24]

In a recent case, New Berlin v. Stein, this amendment was interpreted as a legislative device which froze existing uses by maintaining the status quo until the preparation and adoption of a comprehensive zoning plan could be effectuated.[25]

Extraterritorial Zoning: Recognizing many problems arising from objectionable uses and haphazard development adjacent to incorporated lands, the Legislature has empowered cities and villages to regulate lands outside their incorporated territories.[26] The jurisdiction extends to lands within three miles of the corporate limits of cities of the first, second, and third class, and one and one-half

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[20] *McQuillan, Municipal Corporations, sec. 25.07 (1957).*

[21] *Kozesnik v. Township of Montgomery, 24 N.S. 154, 131 A. 2d 1 (1957). A leading expert in this field notes further that "for the most part . . . zoning has preceded planning in the communities which now provide for the latter activity, and indeed, nearly one-half of the cities with comprehensive zoning ordinances have not adopted master plans at all. As a result, there appears to have been a judicial tendency to interpret the statutory directive that zoning ordinances shall be 'in accordance with a comprehensive plan' as meaning nothing more than that zoning ordinances shall be comprehensive—that is to say, uniform and broad in scope of coverage. The lack of a master plan is deemed irrelevant to the validity of zoning measures," Harr, In Accordance With a Comprehensive Plan, 68 Harv. L Rev. 1154, 1157 (1955). And see Cutler, supra, note 8, at pp. 11-14, for a general discussion on this matter and also the more recent case Fasano v. Bd. of County Commissioners of Washington County, 264 Or. 574, 507 P. 2d 23 (1973).*

[22] *A related issue is the question of spot zoning. This has been defined by the Wisconsin Court as a practice whereby a single lot or area is granted privileges which are not granted or extended to other lands in the vicinity (and) in the same use district, Cushman v. Racine, 39 Wis. 2d 303, 159 N.W. 2d 67 (1968), at pp. 306, 307. However, the Court in past cases reviewing this issue has held that spot zoning, even where it occurs, is not illegal so long as it is done in the public interest and not solely for the benefit of the property owners, cf. Rodgers v. Menomonee Falls, 55 Wis. 2d 563, 573, 201 N.W. 2d 29 (1972); Bichler v. Racine County, 33 Wis. 2d 137, 146 N.W. 20 403 (1966) and Cushman v. Racine, Id.*

[23] *Chapter 65, Laws of 1957.*

[24] *Wis. Stats. sec. 62.23(7)(d).*

[25] *58 Wis. 2d 417, 206 N.W. 2d 207 (1973).*

[26] *Wis. Stats. sec. 62.23(7a). Towns lack these powers.*

miles for villages and cities of the fourth class.[27] Those municipalities which elect to enact a comprehensive zoning plan for the lands outside their corporate limits may adopt an interim zoning ordinance which will freeze existing uses in the territory during the interval in which the zoning ordinance is being prepared.[28]

The Creation of Special Planned Development Districts and a Recognition of Floating Zones: An underlying purpose of the legislation which authorizes zoning is to avoid the mixing of incompatible land uses. Consequently, the specific districts or zones which are established generally permit only a narrow range of uniform uses within each district. However, even this requirement of uniformity within districts need not be followed where special planned development districts are created. This exception was provided in 1969 when the Legislature amended the statutes to permit the establishment of special districts that are designed to "promote the maximum benefit from coordinated area site planning, diversified location of structures, and mixed compatible uses."[29]

The obvious intent of the Legislature was to provide some increased flexibility to the zoning process. This provision now allows communities to structure with proper planning an environment that would encompass all phases of living.[30] A further attempt at achieving greater flexibility in zoning was recognized by the Wisconsin Supreme Court in State ex. rel. Zupancic v. Shimenz.[31] There the Court in dictum indicated its approval of the concept of floating zones.[32] The concept works in the following manner. A municipality develops certain standards that must be adhered to for the new zone. Those standards will usually contain certain restrictions on the size of the development, the type of land needed, the total area of land involved, and the amount of open space and services to be provided. Then, upon petition or request of a developer, the municipality may permit the zone to be located within an already established and larger district, which heretofore would have precluded the existence of the new uses. However, with the requirements having already been established and assurance that the predefined standards will be met, it can more safely be assumed that the new zone will not further the interests of a few individual owners or developers.[33] But it should be reemphasized that while the Court was expressing receptivity to the concept of floating zones, its expression, since it was dictum, is not binding upon the lower courts, nor does it carry any weight for future deliberations of the Wisconsin Supreme Court.

THE REGULATION OF SUBDIVISION

This particular regulatory device is of extreme importance to plan implementation since decisions made concerning the subdivision of land are one of the first official actions involving public policy as it applies to future development. If done properly, the subdivision of land will serve

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[27] *In those instances where there may be an overlap in jurisdiction, the extraterritorial powers will be divided by a line drawn along a line of points equidistant from the respective municipal limits.*

[28] *The interim ordinance as indicated, supra, note 23, and accompanying text will only be effective for two years. The law provides for a one year extension if the joint extraterritorial zoning committee (formed according to the provisions of this section, Wis. Stats. sec. 62.23(7a)) recommends the extension.*

The constitutionality of using interim extraterritorial zoning powers without first obtaining the consent of the county was raised in Walworth County v. Elkhorn, 27 Wis. 2d 30, 133 N.W. 2d 257 (1965). There the County was arguing that under Wis. Stats. sec. 62.23(2) lands may not be included in a municipality's master plan without the consent of the County Board of Supervisors, but this argument failed on two grounds. First, the section which provides for extraterritorial zoning, sec. 62.23(7a) specifically enumerated with other sections where controlling in exercising this power, and the section the County was relying on was specifically excluded. And second, the section that the County was relying on applied only where master plans were involved and extraterritorial zoning was intended by the Legislature to be a different process, at p. 35. The exercise of extraterritorial powers, however, will not in the opinion of the Attorney General supercede the counties' zoning of shorelands and floodplains under the Navigable Water Protection Act, sec. 59.971, 63 OAG 69 (1974) and see supra, notes 16-18 and accompanying text.

[29] *Wis. Stats. sec. 62.23(b), as amended by Chapter 481, sec. 3, Law of 1969. The amendment provides that such districts may be created by the council with the consent of the owners and it recognizes that, within such district, there may be one or more principal structures and related accessory uses. The amendment is silent, however, on the number of owners whose consent is needed to invoke these provisions.*

[30] *In addition to the considerations that must be accounted for in the development of the "normal" districts, special planned development districts are to provide for an environment which accentuates efficient pedestrian and vehicular traffic, open space, and suitable commingling of public and private utilities and community facilities.*

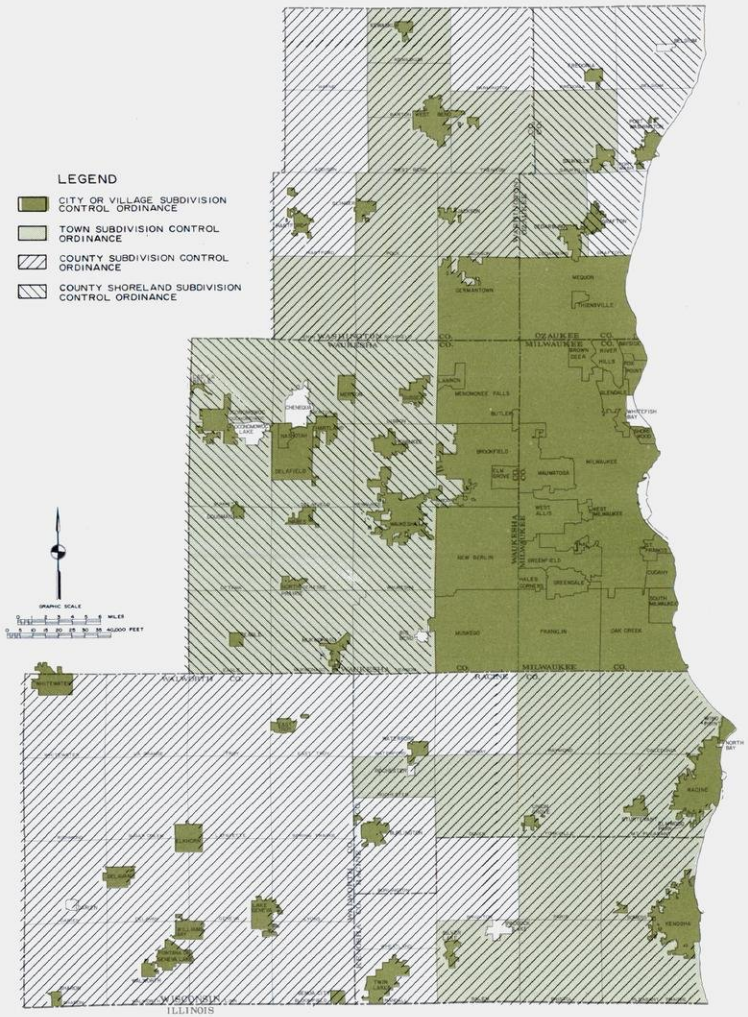
[31] *46 Wis. 2d 22, 33, 174 N.W. 2d 533 (1970).*

[32] *Since the question of floating zones was not legally at issue in the case before the Court, the discussion of this matter is not controlling upon the lower courts of the State nor does it carry any legal weight for the Supreme Court in future decisions, thus it is dicta.*

[33] *Cf. Anderson, American Law of Zoning (1968), sec. 516, pp. 281-287.*

Map 6

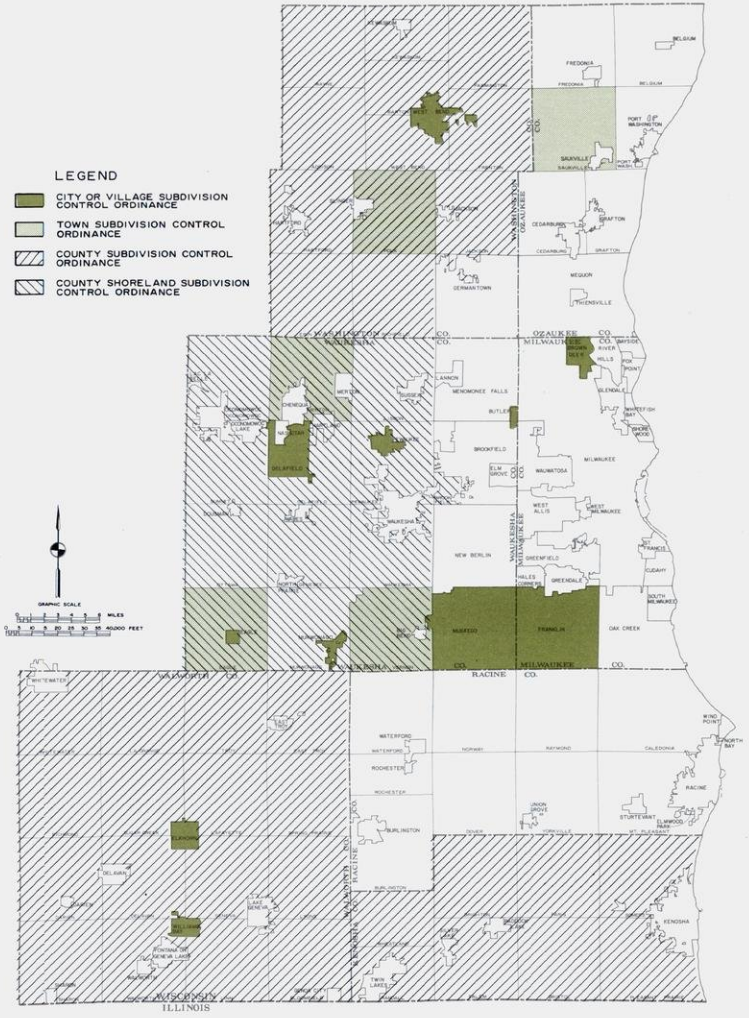
SUBDIVISION CONTROL ORDINANCES IN THE REGION: 1972



Source: SEWRPC.

Map 7

SUBDIVISION CONTROL ORDINANCES IN THE REGION BASED UPON THE SEWRPC MODEL LAND DIVISION ORDINANCE: 1972



Source: SEWRPC.

as an instrumental guide to sound community growth?[34] In sharp contrast to zoning authorizations, the powers delegated to Wisconsin counties, towns, villages, and cities to enact subdivision control ordinances are almost identical. Each unit of government must have a local planning agency before such an ordinance can be adopted.[35] Similarities can also be found in the criteria which these local units can use in reviewing plats for approval where no local ordinance has been passed. State level standards imposed by Chapter 236 Wis. Stats. for lot size, street width, street and other improvements, and access to lakes can be applied to each type of local unit.[36]

Some differences do exist, however. Villages and cities can extend the applicability of their ordinances into extraterritorial areas in outlying towns. The subdivision ordinance-making power of towns and counties is confined to their own unincorporated lands. For land lying inside an incorporated village or city, that unit and certain state agencies have approval authority.[37] But for land located in an unincorporated town, the situation is more complicated. If the land is outside the territorial plat approval jurisdiction of a city or village, then the plat is subject to local review and approval by the town board, to review by the county planning agency, and then by state agencies. If the land is within an extraterritorial ring, then local approval may involve the town board; the governing body of the neighboring city or village which has adopted a subdivision ordinance or official map; the county planning agency if the county employs a fulltime person charged with the duty of administering zoning or other planning legislation; and, again, appropriate state agencies. If the various conditions specified in this latter situation are present, a developer whose land lies within the extraterritorial ring might face three separate subdivision ordinances with which he is supposed to comply. When conflict occurs under this latter situation, Wis. Stats. 236.13(4) provides that the most restrictive requirements should control. For a more detailed statement of the procedures by which plats in Wisconsin must be submitted to some units of government for review and approval and to other units to give them an opportunity to object, see Wis. Stats. 236.10, 236.11, and 236.12; SEWRPC Planning Guide No. 1 Land Development Guide; and SEWRPC, Model Land Development Ordinance.

A county which has a planning agency can enact a binding subdivision control ordinance under Wis. Stats. 236.45 without town board approval. In addition, through lot size, street layout and width requirements, service road requirements, highway access restrictions and other controls, the county can substantially control alternative uses of land even though the town in which the land is located has refused to approve the county zoning ordinance.[38]

Official Map Enabling Powers:[39] The relative uniformity which exists among local units of government on subdivision plat approvals disappears when one examines Wisconsin legislation for the official mapping of widening lines along existing streets and the mapping of future streets. Villages and cities have clearly expressed official mapping powers under Wis. Stats. 62.23(6).[40] Towns with

[34] *Wis. Stats. sec. 236.01 et seq. Another important reason offered for the requirement of subdivision plats and their recordation is to insure accurate real estate description. The statutes provide that where a parcel of land is divided into five or more sites of one and one-half acres each or less in area, or where five or more such sites are created by successive division of land within five years, then a subdivison has occurred, secs. 236.02(8) (a) and (b), and 630 AG 122 (1974) and 63 OAG 194 (1974).*

[35] *For a further discussion of subdivision control as a plan implementation device, see SEWRPC Planning Guide No.1, Land Development Guide, November 1963.*

[36] *Under the Statutes, the Department of Local Affairs and Development is given lead authority to review all platting of lands. DLAD is given this authority under Wis. Stats. sec. 236.12(2)(a); however, the City and County of Milwaukee are specifically exempted, sec. 236.12(1). The minimum lot width and area requirements are found in sec. 236.16. In residential areas of counties over 40,000 persons, lots are required to be 50 feet wide and contain a minimum area of 6,000 square feet. In residential areas of counties with less than 40,000 persons, they are required to be 60 feet wide with a minimum area of 7,200 square feet. The requirements for identifying lots are found in sec. 236.20. In addition, the Statutes provide that the rules of the Department of Health and Social Services relating to proper sanitary conditions without public services will apply, as well as rules developed by the State Highway Commission pertaining to entrance and departure from highways, secs. 236.13(1)(d) and (e). Moreover, if the lands within a plat lie within 500 feet of the ordinanry high water mark of any navigable body of water, the Department of Natural Resources and Department of Health and Social Services may require adequate drainage for private sewage disposal systems, sec. 236.13(2m).*

[37] *For this state level review authority, see footnotes, Id. Some counties under the provisions of sec. 236.12(b) have limited objecting authority; and see secs. 236.45(3) and 236.10(4).*

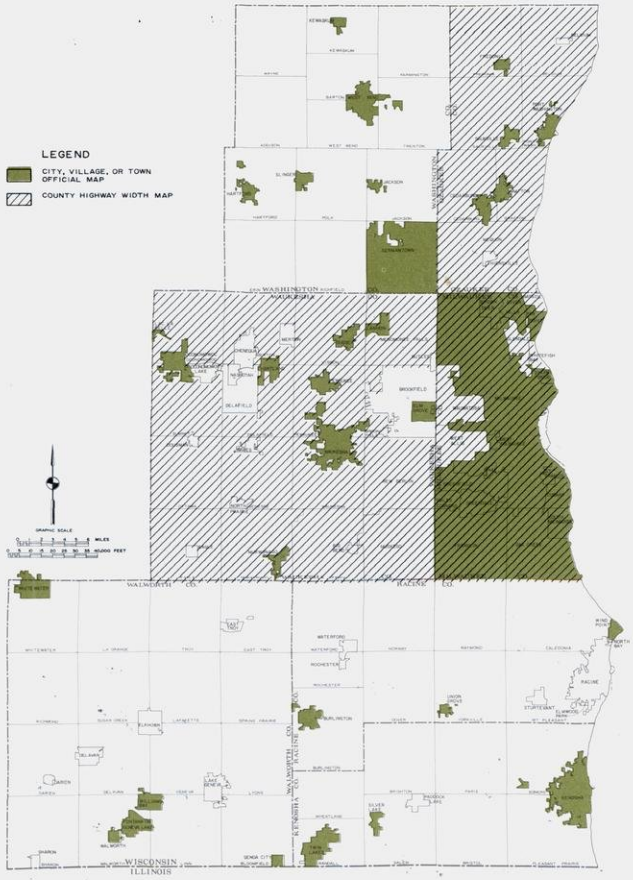
[38] *Furthermore, it should be noted that local adoption of a more restrictive definition of the term "subdivision" than set forth in the Statutes is allowed under sec. 236.45(2). Under this authority, cities, villages, towns, and counties may regulate divisions of land into parcels larger than one and one-half acres or divisions of land in less than five parcels and apply to these divisions the same requirements authorized in the foregoing discussion.*

[39] *For a further discussion of official mapping as a plan implementation device, see SEWRPC Planning Guide No. 2, Official Mapping Guide, February 1964.*

[40] *In addition, Wis. Stats. sec. 62.23(10)(11) authorizes cities, and therefore villages under Wis. Stats. sec. 61.35, to establish setback lines as a preliminary to street widening. This relatively narrow setback statute is not discussed further because most of its objectives can be better accomplished through official mapping and the inclusion of setback controls in zoning ordinances.*

Map 8

OFFICIAL MAPS IN THE REGION: 1972



Source: SEWRPC.

village powers probably have the same powers as villages and cities. Towns without village powers have no official mapping powers. Counties have limited official mapping powers under two statutes which are not only different from the city-village enabling act but are beclouded by ambiguities (see Wis. Stats. 80.64 and 236.46). It has already been noted that, at the state level, the State Highway Commission has been granted limited official mapping powers on lands needed for freeways and expressways under the provisions of Wis. Stats. 84.295.

The city-village act has an interesting history. The official map is one of the oldest land use control tools used in this country. Early statutes simply denied compensation for buildings erected in the beds of mapped streets. There were no special provisions to take care of hardship cases. The courts in some states declared such statutes unconstitutional. Two schools of thought about the official map arose. One group urged the use of the power of eminent domain for advance acquisition of rights-of-way needed for future streets. The other proposed the use of regulatory enactments which included express protections for hardship cases. Messrs. Bassett and Williams were the leaders of the latter police power group. They prepared an enabling act, and in 1926 New York adopted it. Wisconsin in 1941 chose to follow the New York lead and, relying heavily on the New York act, enacted Wis. Stats. 62.23(6). In 1957 the Wisconsin Court upheld this act, although it did not rule out the possibility of declaring invalid specific applications of it to particular landowners.[41]

Wis. Stats. 62.23(6) permits not only the mapping of streets and highways but also of parkways, parks, and playgrounds. The objective is to map lands for any of these purposes; adopt an ordinance making the map official, and thus assure that the land ordinarily will be available at bare land prices without buildings on it when needed for its public purpose.[42] Little use of the device seems to have been made in Wisconsin for the purpose of mapping parks and playgrounds. However, a good deal of interest has been shown by cities and villages in mapping widening lines along existing streets and in mapping future streets. The power to map future streets extends beyond the corporate limits out to the edge of the municipality's extraterritorial plat approval jurisdiction—one and one-half miles for villages and fourth class cities, three miles for larger cities.[43]

To assure that structures will not be built in the mapped street bed, issuance of a building permit under the provisions of Wis. Stats. 62.23(6)(d) must be sought. Presumably, a structure built illegally in a bed without a permit will not be paid for when the land is ultimately taken for street purposes. Where a landowner demonstrates, when applying for a building permit, that he is unable to earn a fair return from the mapped land and that he will be substantially damaged, he is then entitled to a permit, but not necessarily for the kind of building that he wants to build. Instead of a permit for a permanent, expensive structure, he may get a permit for a relatively short-lived inexpensive structure, but one from which he can earn a fair return.

County street and highway mapping powers, Wis. Stats. 80.64 and 236.46, on the other hand, do not set up any administrative machinery or sanctions to protect the integrity of the map. Wis. Stats. 80.64 authorizes the county board to establish widening strips for existing highways and also to adopt plans showing the location of future streets or highways. The lands involved must be

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[41] *Miller v. Manders, 2 Wis. 2d 365, 86 N.W. 2d 469 (1957).*

[42] *In addition, official mapping powers have as their objective the assurance that future development will be properly serviced by appropriate thoroughfares and open space.*

[43] *This extraterritorial power applies only to unincorporated town lands. Where there is a nearby village or city, the extraterritorial area is divided by a line drawn along a line of points equidistant from the respective municipal limits, Wis. Stats. sec. 66.32.*

located within a municipality, and the governing body of the municipality must consent. The map showing the highway lines and also property lines and owners[44] must be filed in the office of the register of deeds, and a notice must be published and posted. As already indicated, no express sanction is provided; nor is any building permit procedure stipulated.

A major ambiguity in Wis. Stats. 80.64 centers on the meaning of the word "municipality." Does this include towns as well as villages and cities? Clearly, if the county board's authority is limited to the mapping of widening strips and future streets within villages and cities, then Wis. Stats. 80.64 is not of great consequence. The village or city has a clearer and more adequate mapping statute (Wis. Stats. 62.23(6)) under which it can do its own official mapping. But if the statute encompasses unincorporated towns, then the powers delegated by Wis. Stats. 80.64 are significant.

The chapter on the construction of statutes offers some help. It says: "Municipality includes cities and villages; it may be construed to include towns."[45] It is relatively easy to find an intent in Wis. Stats. 80.64 to include towns. As already pointed out, the statute does not make much sense if it applies only to the mapping of streets in cities and villages which have full power to do their own mapping. Besides, in the last sentence of Wis. Stats. 80.64, the word "municipality" is used as clearly including towns. That sentence says that, with respect to counties having a population of at least 500,000, if after the county board has by map established a highway width in a municipality the area is annexed to a city or village, the county established width should continue to govern. Clearly, only areas in towns can be annexed to cities or villages, and hence the word "municipality" is here meant to include towns.

In addition to all of this is the actual construction which counties have placed upon the statute for many years. For example, Milwaukee, Ozaukee, and Waukesha Counties within the Region have adopted maps under Wis. Stats. 80.64, and these maps have all included lands in towns. The counties face the same problems in the preparation of a map ordinance that they face in the preparation of a zoning ordinance in that each town must approve the ordinance before it can become operative in that town. This can lead to a patchwork application of the map ordinance when some towns accept and others reject the proposed county ordinance.

The failure of Wis. Stats. 80.64 to require building permits or to say what will happen if a landowner builds in the bed of a mapped street leaves the legislative intent unclear. One possible construction is to say that the Legislature meant merely to authorize the preparation of the maps and to require that they be made known to the public so that landowners in the exercise of voluntary restraint and good sense would refrain from building in the mapped beds. The other construction is that adopted with respect to a similar mapping statute by an early New York case: namely, that the Legislature must have intended that a landowner who ignored the map and built his building in the mapped street should suffer the consequences and not be paid for this building when the street is ultimately opened or widened.[46] If this is the legislative intent, then the absence in the statute of a provision to take care of hardship cases might throw the validity of the statute into serious constitutional doubt. Wis. Stats. 236.13(1)(c) permits local units in reviewing plats to compel compliance with an official map. In those cases where the county has such reviewing authority, this could be an important sanction. Presumably, this plat review sanction could be bolstered by a county subdivision control ordinance adopted under the provisions of Wis. Stats. 236.45.

In spite of ambiguities and doubts, Wis. Stats. 80.64 has, as a practical matter, saved counties that have used it many millions of dollars in connection with highway widenings. Because it is such a valuable tool, it would be well to clarify its meaning and provide a means of enforcement and dealing with hardship cases by including a provision requiring the issuance of building permits.

The second county official mapping law provision is found in the platting statutes. Prior to 1955, Wis. Stats. 236.46 applied only to Milwaukee County. In 1955 its authorizations were extended to all counties. Wis. Stats. 236.46 contemplates that, in addition to maps for future highways and the widening of existing highways, the county boards may prepare and by ordinance make official plans for the future platting of lands within the county. Here the area of authority is clearly limited to unincorporated lands in the towns only, and town board approval is again prerequisite. Again no procedures for administration are provided. One sanction is, however, spelled out: namely, that the ordinance "shall govern the platting of all lands within the area to which it applies." Specific implementation of this sanction could be provided for in a county subdivision control ordinance adopted under Wis. Stats. 236.45.

On the whole, a clarification and merger of the provisions of Wis. Stats. 80.64 and 236.46 are called for. In addition, it would be well to spell out procedures for the administration of county official map laws. Specific sanctions should be stated, and the relation between county official maps and county subdivision control authority should be clarified.

In more general terms, it would, in fact, be well for Wisconsin to acknowledge that with respect to its packets of zoning, subdivision control, and official map delegation there is serious need for a rational consolidation and modernization of all three, eliminating unnecessary differentiations in power as between cities and villages, towns, and counties.

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[44] *The stipulation with respect to property lines and owners do not apply to Milwaukee County.*

[45] *Wis. Stats. sec. 990.01(22).*

[46] *In re Furman Street, 17 Wend. 649 (N.Y. 1836).*

Part Three

GROWTH MANAGEMENT ACCORDING TO LOCATION AND TIMED INTERVALS

While the initial section of this report dealt explicitly with the wide ranging legal authority to carry on and implement planning efforts, this segment of the report turns to two important concepts which draw upon the previous discussion for their effect. The first of these, Chapter VIII, addresses the fundamental problem of how to place development in the "best" locations. It begins with an explanation of what information is needed to sustain this aspect of the planning process which attempts to make these difficult locational choices. From there, it proceeds to enumerate the various legal techniques for accomplishing the placement of development in space.

In the second chapter of this part, Chapter IX, the focus shifts to the problem of how to place development in time so as not to exceed a community's capacity to provide vital services. The emphasis is on what information is necessary to legally ensure the proper pace of development, as well as the legal tools to accomplish that objective.

Chapter VIII

PLACEMENT OF DEVELOPMENT IN SPACE

INTRODUCTION

The placement (spatial location) of various types of development within a large urban region is of the utmost importance if a wide range of essential public services is to be provided at minimum cost, if land is to be used in its most beneficial capacity, if aesthetic and amenity features are to be preserved, and if the underlying and sustaining resource base is to be protected.

How can widely scattered spots of urban development over the rural landscape be presented? How can ribbon development be controlled? How can areas between existing urbanized spots or ribbons be filled in? How can urban development be guided so that it will move out more solidly and sprawl less? How can the isolation of lower income groups be halted? These are the kinds of questions to which this chapter is addressed.

Perhaps it is easiest to understand the scope of this problem if we think in terms of the economist's concept of scarcity. What is scarce here? Natural resources and tax dollars are obviously the two most important items in limited supply. The demand within almost every community for more and better quality services, such as fire and police protection, recreational facilities, water supply, sewerage and sewage disposal, streets and street maintenance, schools, gas, electric power, and telephone service, is increasing rapidly; and if these demands are to be satisfied, a heavier capital investment in utility and community facilities and larger expenditures for their operation and maintenance are necessary. At the local level, this usually means a further increase in the already overburdened property tax.

In other words, if all the demands are to be met, the wise use of scarce tax dollars is always necessary. The problem is compounded and costs multiplied when development takes place in a random manner over an entire urbanizing region and when widely divergent land uses are intermixed one with another or when development is not properly adjusted to the natural resource base. Thus, economic considerations alone justify placing regional development in such a manner that the cost of providing the desired level of services will be minimized.

As to the scarcity of resources, land is a good example. It is apparent that there is a finite land area in any given regional setting. But more important, within this total land area there are categories of land much smaller in size, each possessing a different set of unique characteristics desired by, or found to be of value to, various segments of our society, such as the following: land with rich productive soil for the farmer; marshland for the conservationist; land near transportation links for the industrialist; wooded areas for picnickers and campers; stream, lake, and shoreland for fishermen, boaters, and bathers; land in proximity to population masses for commercial interests; land capable of supporting the stress of high-rise apartments or providing an appropriate setting for single-family residences; land especially needed as a recharge area for groundwater supply; and land needed by a river in flood stage. The point being made is that, because each of these land categories is in limited supply within any one area, the placing of development becomes very necessary in order to optimize the satisfaction that any one land user derives from his particular piece of land and, at the same time, to preserve for future use as many of the different categories of land as is

possible. All too often ad hoc developments have failed to satisfy the present land user very fully and at the same time have permanently destroyed an irreplaceable type of land resource.[1]

In addition to these reasons involving scarce tax dollars and scarce land resources, there are important considerations growing out of America's increased concern over the quality of the environment in which we live—reasons that are identified under general labels like "amenities" or "aesthetics." Finally, planners, educators, sociologists, criminologists, and traffic engineers have experimented more and more in recent years with the problem of standards. They have done so for good reason. Poorly located and improperly developed land uses breed slums and crime. Streets and highways become congested and prematurely obsolete. Parking problems multiply. Commercial and industrial activities can be stifled by the very congestion they generate. Air and water pollution is generated. If these and other similar conditions are to be avoided, the standards being developed, which attempt to take into account the relationships which should exist between people, spatial needs, and minimal environmental quality requirements, must be implemented. This can only be accomplished by appropriately placing development within an entire region.[2]

Thus, it may be concluded that for economic, resource conservation, and social reasons all development must be properly placed (spatially located) within a region. Each parcel of land has a range of uses for which it is well suited. These, then, are the uses to which that parcel of land should be put. There is an order in which development can most efficiently and safely proceed. This, then, is the order which should be followed. The private market, uncontrolled, has demonstrated that it will not typically produce this order. The era in which ad hoc development can be tolerated is past. A planning program which regulates the placing of development is, therefore, necessary.

WHAT KINDS OF DATA AND ANALYSES SUSTAIN LEGAL MEASURES FOR THE PLACEMENT OF DEVELOPMENT?

Much has already been said in this report about the processes of data collection and documentation which will enable underlying study materials to be introduced in evidence to support the planning program. Beyond these general comments, it is often difficult to say what specific piece of data, what analysis, or line of reasoning will impress a court. Certainly, the comprehensiveness of the planning effort will be given weight. But when specific parts of a planning program are under attack, the comprehensive general data at hand must be capable of being pulled together in a manner which strikingly and clearly justifies the imposition of the particular regulation under attack.

To justify regulations that place development in space, there are a number of especially persuasive pieces of data which should be available and if necessary offered in evidence, as for example: comparisons between those areas where unplanned or misplaced development was allowed to occur at high cost to the community and those areas where properly placed development effected cost savings; current and historical inventories of each of the major categories of land showing the scarcity of certain desired land types or the total exhaustion of some land categories caused by the heretofore uncontrolled placement of development; thorough soils surveys and analyses, coupled with engineering and public health data, showing the limitations of certain soils for certain kinds of development; hydrologic and hydraulic studies showing the extent of areas subject to flooding and the adverse effects of developing such areas not only on the development itself but on the stream flow regimen; proximity to existing or foreseeable sewer extensions, and relative ability to drain surface and waste waters; and traffic flow and transportation surveys which demonstrate that effective utilization of existing and planned street, highway, and transportation facilities can only be

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[1] *While many of the communities in the Southeastern Wisconsin Region have moved to encourage the "best" use of lands within their boundaries, there is clear evidence of improper placement of development which has caused the loss of invaluable resources. For example, a recent study conducted by SEWRPC, Planning Report No. 25, A Regional Land Use Plan and A Regional Transportation Plan for Southeastern Wisconsin: 2000, Volume One (1975), indicates that from the base year of 1963 to 1970, some 3,000 acres of high value wildlife habitat were lost primarily because of the increased low density residential sprawl common to the Region, at p. 388. Similar types of losses were experienced in: woodlands, at p. 387; environmental corridors, which include such natural elements as undeveloped shorelands and floodlands, poorly drained soils, significant topography and geologic formations, and historical sites, at p. 388; and prime agricultural lands, at p. 40. And the report also showed that due to the diffusion of low density residential development, the extension of public utilities to such development was costly and often impractical, and as a result only 40 percent of all land actually developed in the Region between 1963 and 1970 was served by public sanitary sewerage facilities. This occurred even though the great proportion of this development was located in proximity to major urban centers, at p. 42.*

[2] *As an example of where such standards have been formulated and then utilized, see SEWRPC Planning Report No. 20, A Regional Housing Plan for Southeastern Wisconsin (1975), at pp. 295-307. The report documents the significant housing problems that presently exist in the Region and those which loom on the horizon. It then develops a series of alternative plans for providing decent, safe, and sanitary housing for all residents of the Region and measures each plan against the formulated standards to ascertain its ability in meeting specific objectives and principles.*

achieved by controlled placement of development.[3] Where land is to be held undeveloped until other lands are filled in, data supporting a forecast of the time when the filling in will be completed should, if possible, be available. Lastly, it may be possible to introduce a series of current, realistic, and locally applicable standards which are regarded as minimal expressions of people to space relationships for such various land uses as single and multifamily residential, light and heavy industrial, commercial, and recreational.

As each of these data presentations is prepared, the ultimate possible evidentiary purpose should continually be borne in mind. These are the facts which justify the regulations which may one day be under attack. Because some of the regulations are still on the frontier of experimentation, data collection, organization, and retention are of special importance.

GOVERNMENTAL ABILITY TO AFFECT THE PLACEMENT OF DEVELOPMENT

Federal

Almost immediately it can be seen that the placement of development within an urbanizing region can be federally influenced in a number of ways, most directly by actual federal expenditures within an area or by the conditions which attach to federal grant-in-aid or federal mortgage insurance programs. Less directly it can be influenced by the sheer size of overall federal expenditures and as a consequence of the persuasive force and impetus which is generated by federal legislative and administrative activities.

Direct federal expenditures may take many forms and thus have various effects on the placing of development within an area. Land may be purchased for a new post office or federal building. A military establishment may be created or expanded in the interest of national defense. A large wilderness area may be purchased as a wildlife preserve or national park. Federal purchasing agents may buy part of the agricultural or industrial output of the area. The placement of a particular type of development in a particular land area, which occurs in each of these examples, is very real; yet because it usually affects only a small percentage of the total land area within any region and local officials retain the still formidable job of placing development in the remaining land area, it is often overlooked as a placement factor. The fact is, however, that the federal spending decision, limited as it may be in any particular region, withdraws a portion of the region's total land area from alternative use possibilities and fixes, in both a geographic and functional sense, the development use to which that land is to be put. The necessity of coordinating federal expenditure programs, which almost always have development placing effects, with comprehensive state, regional, and local planning and development programs becomes very apparent. If not coordinated, federal, state, regional, and local actions which affect the placement of development may work at cross purposes. It is unlikely that they will by chance achieve the end commonly desired; that is, placement of development in accordance with a comprehensive areawide development plan.

Federal grant-in-aid programs have increased in number and in the amount of dollars expended, but so have the conditions attached to those grants. This is largely in response to an expanded view of the role of Federal Government and federally declared policy and because local revenue sources have been unable in recent years to generate the needed level of support. Federal aid outlays have development placing effects. The fact that federal aid monies are available at all involves a determination that some activities, some types of development are socially more desirable and thus deserve an immediate allocation of space within the region. In addition, many of the conditions on which the grant is made or on which the grant is continued or increased have the effect of placing the activity (development) in a more suitable location within the region. Consider, for example, the urban redevelopment, conservation, and open-space programs. Grants are made only if requisite local, regional, or state planning is done; and the open-space areas purchased are restricted by federal prohibitions against development. A similar policy is followed for highway transportation funding in urban areas. Federal monies will only be granted for projects in accord with a comprehensive and ongoing transportation planning process.[4]

As the number and type of aid programs and the volume of federal dollars made available to local governments increase, the ability to control in a purposeful way the pacing of development through the cooperative efforts of federal, state, regional, and local officials will increase.

For example, federal influence on the placement of housing development can be felt through the Flood Disaster Protection Act of 1973. That Act conditions state and local participation in the federally backed insurance mortgage program upon adoption and enforcement of floodplain ordinances which preclude certain development in areas subject to future flood losses.[5] A clear directive such as this can have a profound effect on sanctioning a total regional development placement program.

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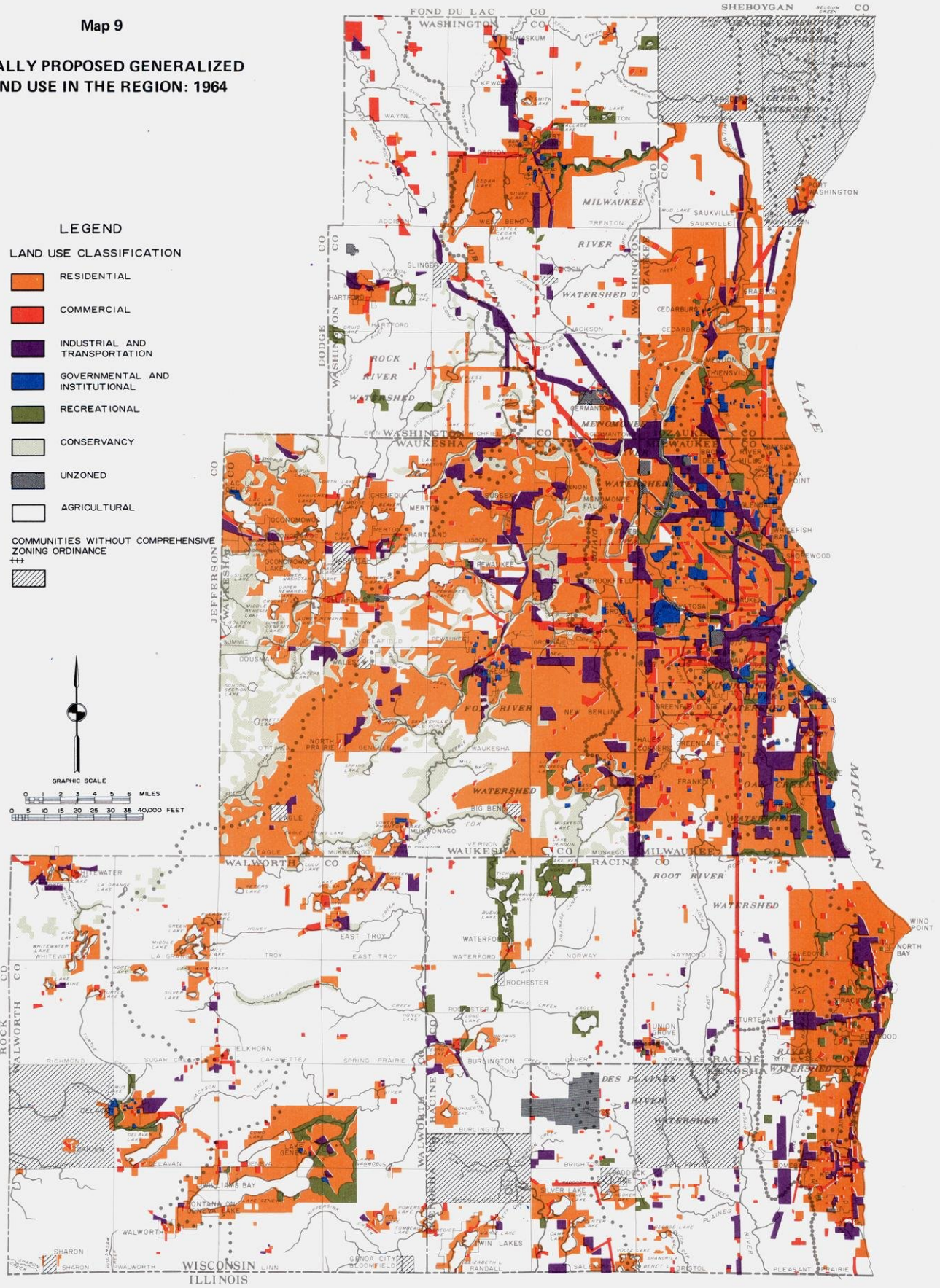
[3] *SEWRPC over the past decade and a half has collected a considerable body of information on land use characteristics of the Region, such as those described in the text. A complete list of SEWRPC publications is set forth in Appendix A.*

[4] *The strong direction and requirements imposed by the Federal Government in return for federal assistance and monies have been discussed previously. Cf. the discussion on "701" planning grants, highway funding, the Flood Disaster Protection Act of 1973, sewerage facility construction grants under Section 208 of the Federal Water Pollution Control Act Amendments of 1972, supra Chapter V, note 31, and accompanying text.*

[5] *42 U.S.C.A. Secs. 4002(b)(2) and 3, and see supra Chapter II, notes 9-11, and accompanying text.*

Map 9

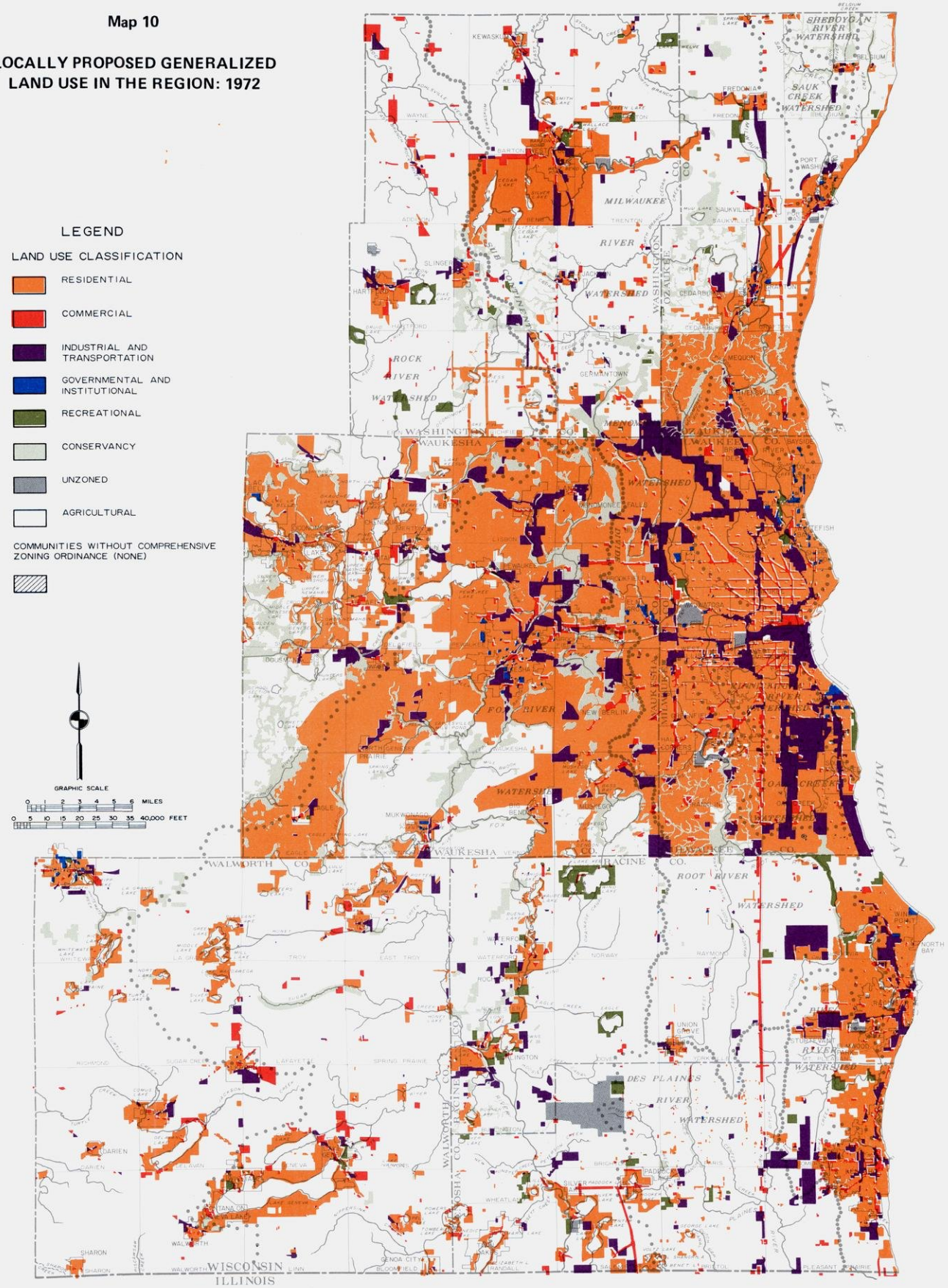
LOCALLY PROPOSED GENERALIZED LAND USE IN THE REGION: 1964



Source: SEWRPC.

Map 10

LOCALLY PROPOSED GENERALIZED LAND USE IN THE REGION: 1972



Source: SEWRPC.

Aside from the development placing effects of federal expenditures, federal insurance or aids, a tremendous influence is exerted by the mere formation of federal policy. The announced policies and goals of federal administrative agencies, Congress, and the Office of the President, especially in the areas of transportation, agriculture, conservation, and urban affairs, undoubtedly influence and help shape many state, local, and private decisions which bear directly on the placing of development. The more forcefully and persuasively these statements are advanced and then, in turn, implemented, in working federal programs, the more widespread will be their development placing effects.[6]

A recent federal enactment which already has had a significant influence on federal policies with respect to development and its impact on surrounding resources is the National Environmental Policy Act.[7] This Act requires that all federal agencies proposing major federal actions file an environmental impact statement which considers the ramifications of the development prior to its being commenced. The impact statement must not only discuss and analyze the potential benefits of a project but also the adverse effects that it may impose on the quality of the human environment.[8]

State

The State of Wisconsin can influence the placing of development within an urbanizing region in a variety of ways. Like the Federal Government, it can do so as a proprietor and as a locator and builder of structures and facilities. Grants-in-aid from the State to local units could contain conditions comparable to those already included in federal grants. But with respect to the state's role both as a proprietor and a purveyor of grants-in-aid, attention must be called to an important constitutional limitation in the Wisconsin Constitution. Article VIII, Section 10, bars the State from being a contractual party to the carrying on of "works of internal improvement." The Wisconsin Supreme Court has held that this limitation does not prevent the State from building structures and facilities needed to carry out state services.[9] So the construction of a capitol, of a state office building, or of university buildings is clearly authorized. It has, however, been repeatedly necessary to amend the State Constitution to put the State in a position legally to provide money for highways, airports, veterans' housing, development of forests and state parks, respectively. On the other hand, the internal improvements limitation does not apply to expenditure of local funds by local units; it is a limitation upon the State only.[10]

Within the scope of the internal activities now permitted by court interpretation and by the amendments listed, the State can influence placement of development by construction of facilities, by grants-in-aid to local units and, in a modest way, through its veterans' housing mortgage lending program. Of major importance is the state's power to plan, place, and construct highways. The conditioned grants-in-aid contemplated under the Outdoor Recreation Act, which provides funding for cities, villages, towns, and counties for recreation sites, are indicative of what may be a trend of increasing importance as more and more state-local aid programs are conditioned.[11] Certainly, the State also can play an important role through policy and goal formulation, persuasion, and executive leadership.

Aside from the construction of highways and other state spending or aid programs, the principal avenue of impact upon the placement of development will be through exercise by the State of its police (regulatory) powers. A wide range of such regulation is evident: state level building and safety codes; channel encroachment, lake level, and dam construction regulations; pollution controls; subdivision review regulations; annexation, incorporation, and consolidation controls; highway right-of-way reservation and acquisition regulations; highway frontage and access controls; public utility regulations; public transportation regulations; water supply and waste disposal regulations; water use regulations; and the more recent act which regulates the siting of electric generating facilities.[12]

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[6] *Implementation may require, but is not limited to, federal financial commitment. In fact, having already spoken of the development placing effects of federal financial outlays, it will be noticed that the emphasis in this paragraph is on the development placing impact of nonfinancial federal activities; that is, the statement of policy alone, the mere proposal of enlarged federal activity, the persuasiveness of federal argument, and federal administrative rule making.*

[7] *Pub. L. 91-190, Title I, sec. 101, January 1, 1970, 83 Stat. 852, 42 U.S.C.A. sec. 4331.*

[8] *The impact statement also must contain "alternatives to the proposed action; the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented."*

[9] *See State ex rel. Owen v. Donald, 160 Wis. 21, 151 N.W. 331 (1903); State ex rel. Thompson v. Gissel, 267 Wis. 331, 65 N.W. 2d 529 (1954).*

[10] *Bushnell v. Town of Beloit, 10 Wis. 155 (1860).*

[11] *See Wis. Stats. sec. 66.36.*

[12] *Chapter 68, Laws of 1975. For a more complete description of many of these regulatory activities as carried out by state agencies see Chapter V, supra.*

These regulatory devices used on a statewide basis have obvious development placing effects.[13] Ideally, their use should be coordinated with federal, regional, and local development placing activities to achieve the most desirable combination of comprehensively designed placement of development and of least cost.[14]

Regional and Local

Major reponsibility for the placement of development has traditionally been left to units of government below the state level. Local school districts select school sites and build schools. County and local park boards do likewise. Metropolitan sewerage districts lay out and construct sewage treatment and trench sewer lines and improve major storm water drainage channels. Cities, towns, and villages lay out streets, approve plats, provide water and sewerage facilities and a number of other facilities and services, and perform a wide range of regulatory functions, all of which directly affect the placement of development.[15]

So much responsibility and real power to place development have been delegated to local units of government that federal and state influence on this important function is often lost sight of, resulting in improper coordination between federal, state, and local development placing activities. All too often, in fact, there is incomplete planning and development placing coordination among competing and overlapping local units of government. These coordination lapses have proven costly.

Regional and local units of government obviously make direct expenditures of tax revenues as do the federal and state governments, and these expenditures result in placing a given type of development on a given piece of land. A city hall here and a fire station there; a sewage treatment plant here, a storm water retention pond there; a parking ramp here, a transit station there; a park here and a library there—all must be placed somewhere. In addition, subject to whatever conditions attach, regional and local units of government are large recipients of both federal and state aid monies and, in expending these funds, they place the development activity involved.

SPECIFIC TECHNIQUES FOR ACCOMPLISHING THE PLACEMENT OF DEVELOPMENT

Inasmuch as the largest number of development placing devices are actually put into effect by local units of government, a more thorough description of each device will be provided in this section of the chapter.

Eminent Domain Powers

A power which ensures either federal, state, regional, or local governmental units of being able to secure particular tracts of land necessary for carrying out a public purpose is that of eminent domain. Put quite simply, this power enables private property to be taken upon payment of reasonable compensation without regard to its present use or the wishes or desires of the present private owner. Proceedings in eminent domain are usually well defined by statute. See Wis. Stats. Chapter 32.

Generally, eminent domain proceedings, or for that matter any public purchase of lands, contemplate the acquisition of what is called "fee simple" title, a complete title, without restrictions on transfer of ownership. However, it is possible to acquire a group of rights less than the "fee" by purchase. This is called the purchase of an easement.

Easements

An easement is "a liberty, privilege, or advantage in lands, without profit, and existing distinct from the ownership of the soil."[16] This device has been adapted to preserve open space in the form of scenic easements, conservation easements, and the purchase of development rights. The important thing is not the easement label but the substantive provisions in any particular easement; that is, the exact definition of what rights, powers, or privileges have been purchased and for how long.

The scenic easement is designed to keep a specified area open in order to preserve a scenic view. This involves purchasing the landowner's right to build new structures, to dump trash or other unsightly debris, to erect billboards, or to cut timber or brush. Since these are all restrictions on the landowner's privileges and do not involve a right to enter upon the burdened land, the easement is called "negative." A scenic easement may, however, be "positive" if it provides, as the ones of the State Highway Commission of Wisconsin do, for the State to enter onto the land to clear brush or timber to improve the view or to plant screening vegetation. If such an easement is employed in conjunction with a highway or other facility, the easement is said to be "appurtenant" to the highway or other facility. The owner of the highway or other facility which presumably arranged for the

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[13] *The fact that in many states some or all of the above listed regulatory functions or devices are exercised primarily or only at local governmental levels should not lead to confusion. The power to act is in the state and emanates from the state. Local units of government derive whatever police power authority they may have solely from the state.*

[14] *Local Highway Planning in Wisconsin by Kurt W. Bauer, April 1962, is a well-documented case study which clearly reveals the numerous problems encountered in efforts to plan for and place highway development in the absence of state-local planning coordination.*

[15] *Authority for all of these activities is found in the appropriate state enabling legislation. In Wisconsin a large part of this delegated authority is found in Wis. Stats. Chapters 27, 40, 59, 60, 61, 62, and 66. See Chapters V and VI of this report.*

[16] *Colson v. Salsman, 272 Wis. 397, 75 N.W. 2d 421 (1956).*

easement is said to have a "dominant tenement" and thus is legally able to enforce the provisions of the appurtenant easement against the present and future owners of the land burdened with the easement.[17]

Conservation easements are almost always positive. Typically, they provide for public access to private land to hunt and fish or to reach the waters of a lake or stream. In addition, there may be restrictions negative in character on the owner's right to cut brush or hedgerows or to fill if the area is a natural wetland. A conservation easement may not always be appurtenant to other publicly owned lands. If it is not, it is called an easement "in gross." Traditionally, though less so today, this type of easement has been difficult to enforce and thus is used less frequently. However, its suitability to many of today's open space reservation needs would dictate that it be used, with proper care, wherever feasible.[18]

The purchase of a so-called "development rights" easement from a landowner seeks to prevent subsequent urban development. Present uses may be continued. The easement is negative and, unlike easements which are purchased to run in perpetuity, this type of easement might well be purchased for a specific term of years and thus serve to place future development in time as well as in space.[19]

The primary advantage held out for the purchase of an easement instead of the purchase of the full fee simple is reduced cost. The cost of purchasing fee simple title is the present market value of the land. The cost of an easement is the difference between the market value before the restrictions attach and the market value after they attach. In addition, the easement leaves the land in private ownership and on the tax rolls. Besides, the public may be saved maintenance costs.[20]

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[17] *Land burdened with an easement is called the "servient tenement." In Kamrowski v. State, 31 Wis. 2d 256, 142 N.W. 2d 793 (1966) the Wisconsin Court upheld as constitutional the Highway Commission's condemnation of lands for scenic easements involving the Great River Road (i.e., obtaining scenic easements along the Mississippi River).*

[18] *Easements in gross in some jurisdictions are not assignable. Some jurisdictions say that this type of easement cannot be negative. And some few jurisdictions do not recognize this type of easement at all. In Wisconsin this type of easement is clearly recognized, has been held capable of supporting either positive or negative controls, and, in dictum of the court in Reese v. Enos, 76 Wis. 634, 45 N.W. 414 (1890), has been held assignable. Each of these factors favors its wider use in Wisconsin.*

[19] *Much discussion has recently occurred over the concept of transferring these development rights to other parcels of land and having the recipient pay the owner of the nondeveloped lands for the rights; see Chapter I, note 4, supra.*

Purchase and Lease Back, and
Purchase and Resale Upon Condition

If fee simple public ownership of a given tract of land is not necessary to a continuing open space or development placing program and the easement device for one reason or another is thought inadvisable, there are two other techniques involving an initial purchase of the land which may be used: purchase and lease-back, and purchase and resale upon condition.

The first of these, purchase and lease-back, may involve the governmental unit conducting the program in a much larger proprietary role than it might otherwise choose. Furthermore, although the leasehold interests granted back to private users may be subject to taxation, the fee simple retained in public ownership is not. Maintenance costs may be high. However, it may be possible to pass these costs on to the lessee; and this technique has the advantage of being able to fix quite definitely the subsequent uses to which the land may be put. Moreover, this fixing will be done within the well-established legal framework of lessor and lessee rights. Enforcement by the public body will not be difficult, especially if the terms of the lease spell out the remedies for breach on the part of the lessee.

Purchase and resale upon condition is a technique widely used today in urban renewal projects.[21] This device also seems suitable as a means of carrying out a program of open space reservation. The public body could seek damages or an injunction by way of remedy for subsequent breaches of the conditions of sale.[22] This approach would return lands to the tax rolls, and there would be no public maintenance costs. However, the unwillingness of courts to enforce conditions if the passage of time changes the character and appearance of the surrounding area and the possibility of clouding titles if the conditions imposed provide for reversion have caused some to avoid this technique as a means of land use control.[23]

Some Caveats About the Use of Less-Than-Fee Devices:

The easement purchase device and the purchase and lease- or sale-back devices present three important difficulties. First, there is the problem of financing an extensive

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[20] *For a more exhaustive discussion of easements in conjunction with open space reservation, see W. H. Whyte, Securing Open-Space for Urban America, Urban Land Institute Technical Bulletin 36, December 1959.*

[21] *Berman v. Parker, 348 U.S. 26 (1954). And see Wisconsin's Blighted Area Law Wis. Stats. secs. 66.43 and 66.431 et seq.*

[22] *Forfeitures may also be provided for, but this is a harsh remedy and should seldom, if ever, be used. See W. F. White Land Co. v. Christenson, 14 S.W. 2d 369 371 (TEX. CIV. app. 1928).*

[23] *See M. Melli, Subdivision Control in Wisconsin, 1953 Wis. L. Rev. 389.*

enough program to make it meaningful in a regional development placement program. Local governments are typically burdened by high costs of ongoing governmental services and needed capital improvements—streets, sewers, water mains, and parks. It is unrealistic to expect very many local units of government to raise the substantial sums a less-than-fee program would require for a sustained period. Grants-in-aid from a higher level of government or acquisition of the less-than-fee interest by the state itself seem to offer the only realistic financing hopes.

A second difficulty relates to the relative unfamiliarity of landowners, appraisers, and government officials with the less-than-fee devices. Educational efforts are required to make clear to landowners just what they are selling and what they are retaining. Income and real estate tax consequences must be explained, and the explanation is not easy, particularly so far as concerns federal and state income taxes. In fact, clarification of tax consequences by the Federal Government would help such programs materially. Appraisers find it difficult to set values until they become familiar with just what rights are being retained and what rights are being disposed of.

Finally, there is instinctive preference for out-and-out fee simple purchase and retention by government officials. The experience with conservation easements in the initial years of the Wisconsin Outdoor Recreation Program is instructive in this respect. The original program contemplated the expenditure of $7,500,000 over 10 years for conservation easements. After the expiration of three and one-half years of the program, only $230,663 for such easements had been spent.[24]

Regulatory Devices

It is almost immediately apparent that a large-scale program of open space reservation or development placing cannot be carried on exclusively by general government spending or land purchase arrangements. Various forms of regulation, extensions of the previously mentioned police power of the state, are important, perhaps even the primary tools. Principal among these is the technique of zoning.

Zoning: The traditional role of zoning, that of simply dividing the urban area into districts most suitable for residential, commercial, and industrial activities and restricting all future development to an appropriate district, has been greatly expanded in recent years. Zoning has become a device for excluding nuisances;[25] for arranging land uses that are not nuisances; and for establishing height, lot size, floor space, and bulk standards.[26] It has been applied in rural areas to protect floodlands, woodlands, and steep slopes and to preserve historic sites, marshes, and wetlands.[27] It is being used to protect prime agricultural lands, greenbelts, and scenic open spaces from being absorbed by the outward movement of urbanization. It has, in fact, become the most widely used public policy implementing tool in the face of what has become a continual process of converting land from rural to suburban and urban uses.[28]

The zoning principle, as used today and as sustained by the courts, does not appear to rely on the oft heard distinction that it is a regulation of use only and not a "taking." When a tract of land with commercial potential valued at $10,000 per acre is reduced in value to $2,500 per acre because a zoning ordinance is enacted that places this tract in a single family residence district, who can deny that $7,500 per acre in value has been "taken"?[29] The courts, as has been emphasized, insist on a creditable community reason for the zoning. It may be important that the use prohibited by zoning is of a type which casts costs upon others. Assuming that legitimate reasons are present in a particular case, the real distinction the courts seem to be making is between a valid "partial taking" and an invalid "complete" or almost complete "taking." A large plurality of alterna-

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[24] *The current outdoor recreation program under Wis. Stats. sec. 23.30, which is administered by the Wisconsin Natural Resources Board, is geared toward acquisition of fee simple title. It should be noted that there is authorization for cities and villages under Wis. Stats. secs. 61.34 (3m) and 62.22(1m) to condemn less-than-fee interests, with towns having no such easement purchase power unless having taken on village powers. Even under this legislation, if the sole purpose is to control the placement of development, the question of whether or not there is a sufficient public purpose might arise. For example, in New Lisbon v. Harrbo, 224 Wis. 66.271 N.W. 659 (1937), the court stated: "It is elementary that a municipal corporation may only exercise the power of eminent domain for some public purposes authorized by statute or constitution," at p. 74. The language of Wis. Stats. secs. 61.34(3m) and 62.22(1m) seems broad enough to include the purchase of easements to control the placing of development, but a final determination of this point cannot be had before the statute is tested in court. The purchase of scenic easements is specifically authorized.*

[25] *Hadachek v. Los Angeles, 239 U. S. 394 (1915).*

[26] *Simon v. Needham, 311 Mass. 560, 42 N.E. 2d 515 (1943). Lionshead Lake Inc. v. Township of Wayne, 10 N.J. 165, 89 A. 2d 693 (1953).*

[27] *Vartelas v. Water Resources Commision, 146 Conn. 650, 15 3A. 2d 822 (1959); Mang v. County of Santa Barbara, 182 Cal. App. 2d 93 5 Cal. Reptr. 724 (1960). In Wisconsin, floodplain zoning is required by law. See Wis. Stats. sec. 87.30 and this includes unincorporated areas as well. For shoreland regulation of unincorporated areas, see Wis. Stats. sec. 59.971.*

[28] *Cutler, "Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe," 1961. Wis. L. Rev. 370. Rodger v. Tarrytown, 302 N.Y. 115, 96 N.E. 2d 731 (1951).*

[29] *Euclid v. Ambler Realty Co., 272 U.S. 366 (1926).*

tive use possibilities may be eliminated (taken away) by a zoning ordinance. Thus, the market value of the land reflecting only those remaining permitted uses may be sharply reduced. However, as long as a meaningful range of economically feasible and reasonably profitable alternatives remains, in other words, as long as the taking is not complete, the ordinance will usually be sustained.[30]

The main concern of the court in reviewing zoning ordinances today, aside from procedural matters, appears to be the degree of comprehensiveness and the completeness of underlying empirical data justifying the restrictions imposed. Zoning ordinances based on thorough soils study; slope analysis; clear delineation of flood hazard areas; accurate measurement of existing and reasonable forecasts of the space requirements of major categories of alternative land uses, for example, commercial, residential, industrial; reasonable standards of density and lot size; and thorough economic and population studies are almost certain to be sustained. If solidly founded, courts seem willing to sustain what at first glance might appear to be highly restrictive ordinances. Some examples are: exclusive agricultural zoning, Mang v. County of Santa Barbara, supra, where agricultural activity was, in fact, a meaningful alternative; large lot zoning[31] where, in fact, large lots are justified by the unique characteristics of the land and are not simply exclusionary devices; floating zones, where the provisions and conditions for fixing the zone are clear and reasonable;[32] and forest and recreation zones where it can be shown that these uses are uniquely most suitable and that a reasonable return can be expected.

More recently, in the important New York decision of Golden v. Planning Board of the Town of Ramapo, the town's comprehensive zoning ordinance which severely regulated the location and sequence of capital improvements over an 18-year period was upheld.[33] A critical factor in the court's approval of the local zoning ordinance was the fact that exhaustive studies had been conducted on existing land uses, public facilities, popu-

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[30] *The courts retreat from the distinction generally made between a partial and a complete taking when they sense that the zoning ordinance was enacted for the express purpose of depressing land values prior to an impending public purchase of land. Righteous indignation seems to arise in the court, and the landowner is usually accorded the full speculative value of the land. Opgal Inc. v. Burns, 189 N.Y.S. 2d 606 (1959). However, if other valid reasons exist justifying the zoning ordinance, the public is not precluded from benefiting from reduction in land values if and when it subsequently purchases a parcel of land in the zoned area.*

Quaere: Is there any basis for the court's indignation? Seemingly not. Clearly the public welfare is benefited; thus, the zoning ordinance is justified when lands needed to be purchased for a public purpose are obtained at a reduced price, at a price which is reasonable to both the landowner and the public and which excludes only the upper ranges of speculative profit that might or might not have been obtained. Having found a valid public purpose justifying the zoning ordinance, the only valid question before the court is whether the taking was partial or complete. If not complete, the ordinance should be sustained as is the normal practice. One might go a step further and suggest that, inasmuch as our system has firmly established that partial takings of value (property) under the regulative process is valid, why shouldn't the purchase price of any land bought by the public be reduced by some amount roughly equal to the value that could have been taken by regulation. The general rule has been that if land with a speculative value of 10 is sought to be purchased by the public, it must pay 10. The suggested rule says that, if land with a speculative value of 10 could be reduced in value to 7 by valid regulation, the public should be able to purchase the land for 7 regardless of whether the regulation is or is not in fact enacted. The latter rule is perfectly consistent with the real state of the law today, but its frank adoption is blocked by a number of legal shibboleths.

See the examples in note 3, Chapter II, supra for attempting to deal with the speculative value and Hagman's skepticism on recovering such profits. But also see Just v. Marinette, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972) in which the Wisconsin court did address the issue of speculative value directly and its decision promises to have far ranging impact, at least for lands that have unique characteristics, such as shorelands and floodplains. In that case, the landowners argued that the zoning restrictions on their shoreland property so depreciated the value of their property as to constitute a constructive taking. However, as the court noted, ". . . this depreciation of value is not based on the use of land in its natural state but on what the land could be worth if it will be filled and used for the location of a dwelling. While loss of value is to be considered in determining whether a restriction is a constructive taking, value based upon changing the character of the land at the expense of harm to public rights is not an essential factor or controlling," at p. 23 ("Public rights" referred to Wisconsin residents having the right to unpolluted waters, and the control of adjacent lands was necessary to ensure that the waters be free from pollution). And see Large, "This Land is Whose Land? A Changing Concept of Land as Property," 1972 Wis. L. Rev. 1039, which provides an analysis of the Just decision and some caveats, at pp. 1074-1083.

[31] *Fischer v. Bedminister Township, 11 N.J. 194, 93 A. 2d 378 (1952); Senior v. Zoning Commission, 147 Conn. 531, 153 A. 2d 415 (1959).*

[32] *Rodger v. Tarrytown, 302 N.Y. 115, 96 N.E. 2d 731 (1951). Extensive discussion on the major developments in the law concerning exclusionary zoning can be found in Chapter XII, infra.*

[33] *30 N.Y. 2d 359, N.Y.S. 2d 138, 285 N.E. 2d 291. Appeal dismissed, 409 U.S. 1003 (1972).*

lation trends, transportation, housing needs, and similar subjects.[34] From these studies emerged a master plan which was, in turn, implemented by the comprehensive zoning ordinance and, in the eyes of the New York court, the ordinance, being rationally based, was not violative of the state or Federal Constitutions.[35]

Some courts will go a long way to sustain a soundly conceived zoning ordinance, and this seems particularly true of the Wisconsin Court. The requirement that a regulation promote the public health, safety, morals, or general welfare is not, after all, a hollow phrase. It is an invitation to prove in a particular case that the needs of the public transcend the rights of the individual, thus justifying the imposition of the regulation.

However, even in this favorable climate, the misuse of zoning powers will lead to the invalidation of the offending ordinance. As previously mentioned, the elimination of all or almost all of the alternative use possibilities so that no reasonable return can be had by the owner of the land will not be countenanced.

Furthermore, when all or many alternative use possibilities are made conditional, the absence or inadequacy of standards or procedures which will bind the municipality, and let the landowner know within reasonable limits what is expected of him before the conditional use permit will be granted, will often invalidate the ordinance.[36] This is also true of conditions for fixing a zone in which a technique of floating or overlay zoning is being used. Where the conditions to be met are too vague or the procedures for obtaining a permit are too cumbersome, courts often see the whole scheme as a sham and jump quickly to the aid of the private landowner. Where the tool of zoning is used as a stalling tactic or as an exclusionary device, courts have little trouble striking down the ordinance. For example, zoning all open lands for exclusive agricultural use with vague provisions for special uses, thus forcing each developer to present his application for a special use permit to the governing body of the municipality for its approval or rejection, largely on terms of its own choosing, will not generally stand up. See the Cutler article, supra. A last abuse worthy of mention is simply the lack of a comprehensive plan or any plan at all in the preparation of a zoning ordinance or amendment. Arbitrary or capricious lines drawn on a map do not create an enforceable zoning ordinance even though legislatively adopted.

Subdivision Control: A subdivision control ordinance is another important device which can be used to regulate and order the placing of development. The rationale for such regulation is simply that the subdividing of raw land has a vital and lasting effect upon the community as a whole. The private developer seeks the benefit of recording his lots for ease of sale; he contemplates that the public will assume the long-term maintenance of streets, sewers, and water lines; he will undoubtedly affect the community tax base and alter existing governmental service functions and their costs; and the initial decisions of location, lot size, street width, and type of housing will undoubtedly establish an indelible pattern of land use that will affect the community for generations to come. In addition, the state is interested in secure real estate descriptions to prevent fraud and conflict, and mortgage lenders are interested in the long-term stability of the new neighborhood which is being established. For any or all of these reasons, the body public is justified in regulating the process of subdividing and in establishing those reasonable conditions upon which plat approval will be granted.

The foregoing seems to be generally recognized. Difficulties arise in determining what are reasonable conditions. How much may a developer be compelled to do as the price for plat approval? The answer here is much the same as in the zoning situations just discussed. Courts will be moved to accept those conditions which sound planning and empirical and analytical evidence justify. They will reject those conditions which appear to overreach, rely on erroneous or incomplete data, or which are simply stalling tactics designed to slow down or prevent development.

The developer, the community, and the courts all realize that the subdividing of land entails an increasing cost burden to the community over and above the increase in taxable property values created by the development. There is general agreement that these initial costs should at least in part be borne by the developer. Theoretically, one could argue that all costs associated with the develop-

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[34] *Id., at p. 366.*

[35] *However, this effort by a local unit of government is not without its critics. Cf. Brooks, "Commentary—The Equity Concept in Land Use Decisions," in Future Land Use (1975) at p. 112, where the author criticizes a lack of responsiveness by the Ramapo plan to regional needs and its exclusionary effects, particularly with respect to low income housing; see also Reilly; "Commentary—Managed Growth in Concept and Reality," within the same publication at p. 115. And also see Bosselman, "Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World," 1 Fla. State Univ. L. Rev. 234 (1973).*

[36] *Homrich v. Storrs, 372 Mich. 532, 127 N.W. 2d 329 (1964) and Osius v. City of St. Clair Shores, 344 Mich. 695, 75 N.W. 2d 28 (1956). See also Mandelker, "Delegation of Power and Function in Zoning Administration, 1963 Washington University Law Quarterly 60 and 58. A.L.R. 2d 1079 (1956) for two lengthy articles on this subject. A wide range of cases and court comments are cited in both pieces. Quoting briefly from A.L.R. ". . . zoning provisions requiring a property owner to obtain a special permit before using his property for a particular use or structure have been regarded as invalid because of the failure to furnish sufficient standards for the guidance of administrative officials charged with the duty of passing upon applications for permits." p. 1111.*

ment should be borne by the private developer and passed on to his buyers, who after all are seeking to profit from his decision to subdivide. There should be no hidden subsidy to the developer or to his buyers in the form of community absorption of development costs. Practically, it may not be possible to push the conditions for plat approval this far. First of all, it is often very difficult to determine the true costs of development. After the major cost items of street, water, and sewer have been settled, cost determination can become a very speculative process.[37] Furthermore, at some point the development creates tangible benefits to the community, other than an increased tax base, which also are very difficult to measure but which, if the logic is carried to its conclusion, should accrue to the developer. And lastly, at some point the community has a responsibility to provide necessary services regardless of the costs involved. Therefore, the conditions imposed for plat approval must be reasonable; but the definition of reasonableness may be expanded by comprehensive planning and the presentation of data that justify the particular challenged set of conditions or condition.[38]

The placing of structures within the subdivision will, of course, be carried out in conformity with the community's desires by provisions dealing with street, block, and lot layout; lot size; dedication (or reservation or first right of purchase) of land for park, playground, school, police or fire station sites; and dedication of drainageways and widening strips along existing boundary streets.[39]

A lower court holding in Kentucky sanctioned the limitation of subdivision development to an urban services district.[40] The court noted that municipal expenses rose tremendously when municipal services were extended to less desirable terrain or over excessive distances to accommodate the tendency of subdividers to leapfrog over the countryside. As development in the urban services district approaches the level that the district was designed to accommodate, additional lands can be embraced in the district or a new district created. There does not seem to be anything to prevent two or three such districts from being created in those areas most favorable to particular types of development around the edge of an urbanizing area.

It seems clear that stringent regulations may be placed on a subdivision when unique factors exist or that the subdivision can be denied entirely. For example, a subdivision located on especially steep or rocky slopes or on marshy or low-lying ground may have unique sets of requirements or design standards validly applied to it;[41] a subdivision which will create parking, traffic, or transportation problems of large magnitude should similarly be subject to conditions which will ameliorate these problems in whole or in part. More examples could be cited. The point being made, however, is that unique situations demand a certain flexibility in subdivision control ordinances, a certain ability to deal in the community's best interest. Where the circumstances are in fact unique, justifying the imposition of additional or more stringent plat approval conditions, it would seem that the arrangements concluded between the developer and the community would be a valid exercise of the police power.[42] There should be a master plan establishing the criteria for approval or disapproval of subdivision plats as placement proceeds.[43]

Other Regulatory Devices: There are other police power regulatory tools besides zoning and subdivision control. Almost all can and do have an effect upon the placing of development. Official mapping is certainly aimed at preventing development in the beds of mapped streets. As applied to county or state highway programs, this device is intended to enable the purchase of rights-of-way at a price more nearly approximating raw land values. Setback ordinances are designed to prevent construction on that portion of a tract of land abutting existing streets and highways both for purposes of safety and to enable

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[37] *The development cost items, which are almost always borne by the developer within the Region, include surveying, monumenting, and grading. In addition, many communities in the Region (see SEWRPC Planning Guide No. 1, Land Development Guide, Table 1, p. 33, and SEWRPC Technical Record, Vol. 2-No. 5) have varying requirements that impose directly on the developer the cost of some or all of the following improvements: street surfacing, curb and gutter, sidewalks, sanitary sewerage systems, storm water drainage systems, water supply systems, street lighting, street signs, and street trees. For the general authorization enabling a community in Wisconsin to impose on the developer the cost of any reasonably necessary public improvement incident to subdivision, see Wis. Stats. sec. 236.13(2)(a).*

[38] *Cf. Zastrow v. Brown Deer, 9 Wis. 2d 100, 114, 100 N.W. 2d 359 (1960) and Mequon v. Lake Estates Co. 52 Wis. 2d 765, 774, 775, 190 N.W. 2d 912 (1971).*

[39] *A Wisconsin case, Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965), upheld the principle that a fee in lieu of dedication for school and park sites is a valid police power subdivision regulation, and see Mequon v. Lake Estates Co., Id.*

[40] *Provencial Dev. Co. v. Webb, Circuit Court No. 7973, Fayette County, Ky. (1960).*

[41] *In the circumstance of wet or marshy ground, development may be made to await the extension of sewer service, septic tanks in this case being a wholly inadequate substitute, and see note 25, supra, on floodplain shoreland regulatory statutes.*

[42] *See Sylvania Electric Products, Inc. v. City of Newton. 344 Mass 428, 183 N.E. 2d 118 (1962).*

[43] *Compliance with such a master plan becomes then a condition to plat approval under Wis. Stats. sec. 236.13(1).*

the more reasonable acquisition of these lands when widening of the road becomes necessary. In addition, ordinances forbidding construction of homes on land not served by an open public street[44] and ordinances specifically forbidding building development where the terrain is too rocky for sewer and water installation, too low to be healthful, too steep, or too prone to flooding to be safe are all possible tools to aid in the accomplishment of a total placement plan.

Other Development Placing Devices

An important factor in the placement of development is the taxing and assessment policy of a municipality. One of the key pressures the owners of raw land feel as the urban fringe moves outward is the increasing tax burden caused by increased assessments which reflect the potential market value of the land if subdivided.[45] An almost total lack of coordination between taxing policy and land use planning policy is common in most states and municipalities. Higher and higher assessment variations tend to force raw land to be subdivided—land which both the owner and community might have preferred to keep open.[46] It seems entirely consistent with reason that the market value of comprehensively zoned land and thus its assessment value should reflect only those alternative uses permitted under an ordinance and not the entire speculative range of land uses, which may or may not come into existence and which of necessity presuppose a zoning change.

Recognizing this reasoning at least in part, the Wisconsin electorate in a referendum vote in 1974 approved a constitutional amendment to Art. 8, Sec. 1 of the Wisconsin Constitution, that allows for the taxation of agricultural and undeveloped lands on their present use and classification and not on their potential or speculative values.[47] However, the enabling legislation needed to effectuate the objectives of the constitutional amendment has yet to be enacted.

SUMMARY

It seems clear that the placing of development in space is desirable from a social and economic standpoint to ensure the wisest use of resources and to protect the health, safety, and general welfare of the community. Federal, state, and local governments in the course of carrying out their affairs affect the placement of development in any number of ways, although often a lack of coordination among these levels of government causes their efforts to be piecemeal, less effective than they might be, and on occasion at cross purposes with their respective development goals. A wide range of governmental powers exists to effectuate development placing goals. There are nuances and modern applications of each which the lawyer and planner should understand to use. Perhaps most important, though, and certainly most effective is the ability to use these implementing powers in combination with one another to achieve the planning goal desired.

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[44] *See Brous v. Smith, 304 N.Y. 164, 106 N.E. 2d 503 (1952).*

[45] *See Wis. Stats. sec. 70.32.*

[46] *The disappearance of many rich agricultural and scenic as well as ecologically important woodland and wetland areas adjacent to growing urban and suburban areas has been and is noticeable in the Southeastern Wisconsin Region; see SEWRPC, A Regional Land Use Plan and Regional Transportation Plan for Southeastern Wisconsin--2000, Volume One.*

[47] *The critical language reads: "Taxation of agricultural land and undeveloped land, both as defined by law, need not be uniform with the taxation of each other nor with the taxation of other real property." This language, therefore, specifically exempts these lands from the general uniformity requirements of taxing imposed by this Section of the Constitution.*

Chapter IX

PLACING OF DEVELOPMENT IN TIME

INTRODUCTION

The placement of development in time, like the placement in space, is a matter of economics. Community growth entails public expenditures, and too rapid growth may outstrip a community's ability to generate the revenues necessary to meet necessary expenditures. Even if development is placed most ideally in space, the question of how fast it should proceed is an important one. In some communities timing of development may present no serious problem. Growth is slow and, if properly placed, orderly. The community is able to provide the necessary public utilities and facilities for new development, along with a full range of governmental services, with little or no difficulty. In other communities, however, the pace of growth may be so fast that the capacity of local governmental units to accommodate this growth in an efficient, orderly, and economic manner is reached or exceeded. This is especially true where the heaviest growth occurs in small local units with severely limited tax bases.

In these situations, continued growth pressures reflect themselves in one of two general courses of community conduct. The first of these includes the continuous raising of tax levels; a decline in the quality of community services; administrative mistakes and waste brought on by the need to make important decisions quickly, often without the benefit of thorough consideration, planning, and engineering; inadequate basic public utility and community facilities, such as streets and highways, schools, water and sewer mains, and mass transit facilities; and a certain community formlessness occasioned by the loss of identity, design, personality, and aesthetic wholeness. The second course of community conduct in the face of intensive growth pressures, and by far the more desirable course, is to begin to pace, to spread out over time, the process of development. This enables expenditures to be more nearly kept within revenue limitations. It enables taxes to be kept within reason. It allows time for the shaping of programs and policies. It enables the quality of governmental services to remain unimpaired. It allows for the timely extension of community facilities. In short, the pacing of development in time may be as important to maintaining a high level of health, safety, and general welfare—while simultaneously preserving the identity of the community—as is the placing of the development in space. This chapter will examine some of the legal tools by which the pacing of development can be accomplished.[1]

WHAT KINDS OF DATA AND ANALYSES ARE NECESSARY TO LEGALLY SUSTAIN THE PACING OF DEVELOPMENT?

The validity of those features of a planning program aimed at pacing (timing) the rate of development will hinge almost entirely on a showing of need. This is especially true because courts may at first suspect that, like many other communities before it, a particular local unit is trying to limit growth strictly for the selfish interests of present residents who want to "preserve the character of the community" and keep out newcomers. There are also, of course, cases where intuitively the public, the court, and the planning agency might all feel that the community is growing too fast for its own good. But without solid facts which demonstrate this condition, the court is unlikely to allow a community to use its subdivision control, zoning, or other regulatory powers to frustrate the intentions of would-be developers. As was true in the placement of development, the courts seem ready to sustain an exercise of police power aimed at pacing development if the technique employed is valid on its face and if the rationale underlying its use can be factually demonstrated.

What is likely to impress the court? Here, again, it is difficult to tell what particular piece of data will finally sustain the questioned use of power. Even if the court seemingly relies upon one piece or another of empirical or analytical evidence—as, for example, a shortage of sewage treatment plant capacity, the unavailability of additional bonding power, or the present impossibility

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[1] *For a short commentary recently published on the rationale for placing development according to time, see Fagain, "Regulating the Timing of Urban Development," Management and Control of Growth, Volume 1, Urban Land Institute (1975). The author emphasizes that timing of development is concerned with two aspects of coordination: tempo, or the rate of urban development, and the sequence in which that development takes place. The motivation for regulating the timing of development, Fagain believes, rests on five planning bases: 1) economizing on the costs of municipal facilities and services; 2) retaining municipal control over development; 3) ensuring that a degree of balance among various land uses exists; 4) achieving greater specificity in regulating development; and 5) maintaining a high quality of community services and facilities, at pp. 296-301.*

of extending water and sewer lines—it will undoubtedly have been impressed with the total weight of evidence brought to bear in support of the particular development pacing device under question.

Particularly useful data might include revenue and expenditure patterns of the community; the tax burden presently being borne; the present outlook for obtaining additional capital outlay funds by bonding and rates of growth of population, employment, school-age children, and the tax base. It would be most helpful to have such information formulated in a conscientiously worked out capital budget, to which the pacing controls could be tied.

Another body of data likely to be important deals with the capacity of existing public utilities and facilities, such as highways, schools, water and sewage treatment plants. Again, valid standards expressing the minimal relationships between people and various governmental service and facility requirements may be introduced to show how the failure to pace growth causes these standards to be exceeded, often quite substantially, to the detriment of the health, safety, and general welfare of the community.

An example of the success of a community in gathering sufficient evidence to support its regulation of the developmental pace was the Town of Ramapo,[2] New York. As cited supra Chapter VIII, there was a constitutional challenge to the town's efforts to control the timing and location of development in the case of Golden v. Planning Board of Town of Ramapo. But in that case the New York Court sustained the community's planning efforts. The Town of Ramapo's approach relied heavily on extensive studies of existing land uses and probable changes. Using this data base, it formulated a master plan and enacted a comprehensive zoning ordinance and a capital improvements program. The capital improvements program, a critical feature in the entire process, was designed to shape community development over an 18-year period. And the timing of development was to proceed under a special permit system which conditioned the issuance of permits to develop upon five essential facilities or services, specifically: 1) public sanitary sewers or approved substitutes; 2) drainage facilities; 3) improved public parks or recreation facilities, including public schools; 4) state, county, or town roads—major, secondary, or collector; and 5) firehouses.[3]

Two of the major challenges by opponents to the Town of Ramapo's phased development program were directed at whether a municipality could be prevented from conditioning permission to develop upon the provision by the municipality of specified services and facilities, and whether such restrictions, if allowed to remain for the full 18-year period, constitute a "taking" of property without compensation. To both of these questions the New York Court answered in the negative.[4] It reasoned that phased growth was in accord with the existing state enabling legislation which is calculated to promote the welfare of the township.[5] Furthermore, it emphasized that the ordinance would not permanently restrict the development of lands but would only regulate development for a temporary but definite period of time—18 years. Moreover, as the New York Court pointed out, any property owner could accelerate its timetable for development by providing the requisite facilities.[6]

While the Wisconsin Court has yet to address a situation similar to that posed in the Ramapo case, it seems likely that it would be impressed by a data base such as that gathered and relied on by the New York community. However, one caveat should be noted which is reiterated throughout this chapter and succeeding ones. An attempt by a local unit of government to control the pace of development within its boundaries which has the effect of excluding certain groups from a particular community will be closely scrutinized by the courts in judging its constitutional merits. Moreover, where there is a growing body of information at the regional level about the relationship of many intercommunity problems, such as in the Southeastern Wisconsin Region, local objectives and techniques for shaping development should be cognizant of these strong intercommunity ties and

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[2] *30 N.Y. 2d 359, 285 N.E. 2d 291, 334 N.Y.S. 2d 138; appeal dismissed 409 U.S. 1003 (1972).*

[3] *Id., at p. 368. Under the permit system a proposed residential development must accumulate 15 development points, to be computed on a sliding scale of values assigned to the specified improvements under the statute.*

[4] *The critics of this planning effort also pointed out that Ramapo had failed to adequately address the regional problems. Most of the out-of-court commentary, it should be mentioned, is not that the effort and the process itself were bad but rather that it should have encompassed this broader forum, i.e., been regional in scope. The Court noted this argument and dwelt at length on it; however, it believed that even if a regional problem were evident, it would more properly be handled by the legislature and not the courts.*

In a somewhat similar situation, the City of Petaluma, California, experiencing growth pressures from the San Francisco Bay area, developed a five year plan to permit development in a reasonable and orderly manner. However, that plan also limited the total number of housing structures that could be built to 500 per year. In Construction Industry Association Sonoma City v. City of Petaluma, 375 F. Supp. 574, 522 F. 2d 897 (9th Cir.), cert. den.—U.S.—(1976) the plan was upheld.

[5] *McKinney's Consolidated Laws of New York (Ann), Town Law secs. 261 and 263.*

[6] *Under this program, the Town also permits a landowner to apply for a reduction in tax assessments when the owner's use of the land was frozen.*

appropriately address them. The concepts embodied in pacing development are to accommodate growth in an efficient and orderly manner to the benefit of both the community and those newly arriving. It should not be the intention of the community to frustrate growth, to prevent it altogether, or to remain a peaceful city of some predetermined size.[7]

TECHNIQUES FOR ACCOMPLISHING THE PACING OF DEVELOPMENT

Federal

Unlike the placement of development which, as noted, can be accomplished by any one of a wide range of federal activities, the pacing of development by the Federal Government, because it lacks direct controls, is usually limited to the timing of events, largely the timing of release of funds. Once a placing decision is made, whether it involves a post office, interstate highway, a mortgage insurance, or grant-in-aid program, the only real pacing device open to the Federal Government is how fast the program is implemented. If the project has the highest priority, funds may be quickly allocated, personnel and technical assistance made readily available, and in the case of aid monies the federal share may be larger and extend over a longer period of time. To whatever degree below the highest priority a particular project may fall, the reverse will be true; that is, funds may be released slowly, technical assistance may be hard to obtain, and the federal share of the costs may be small.

A nonmonetary example of federal pacing of development is the frequency and the degree to which the persuasive forces of federal policymaking, whether by Congress, the Office of the President, or by administrative agencies, are brought to bear on a particular project. Repeated high level attention gives impetus to any program. A prolonged lack of such attention causes things to slow down as the focus shifts elsewhere.

Once again, as in the placement of development, coordination between federal, state, regional, and local officials in the pacing of development seems essential. Priorities should be synchronized. The effects of federal efforts to speed up or slow down given projects need to be understood and taken into account by state and local planning efforts. The same is true of the effects of state and local pacing activities on federal projects.

A word of caution seems appropriate in concluding this point. The ability of the Federal Government to pace development should not be underestimated. If the power to tax is the power to destroy,[8] then the power to spend, which is tremendous at the federal level, might be analogized to the power to sustain, preserve, or create. An increasing number of very necessary facility developmental activities not only owe their existence largely to federal expenditures but also have proceeded in almost exact step with the release of federal funds or the infusion of federal policymaking pressures.[9]

State

The techniques just described for pacing development at the federal level are clearly open to the state. The state spends, has grant-in-aid or shared tax programs, and is able to muster a measure of persuasive force to further or retard the rate at which particular development projects proceed.[10] It, for example, decides whether to build highways and where and when to build them. In addition, the state has directed legislative and police power controls which can be exercised in an effort to pace development. These include the preparation and enforcement of minimum health, education, and safety standards; incorporation, annexation, and consolidation statutes; state level zoning and subdivision regulation and review powers; state level official mapping powers; and public utility regulation.

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[7] *Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W. 2d 816 (1962). In this case the City adopted a sewer plan to serve an estimated population of 21,300 people and no more. The City then zoned to limit its size to this number. The control was declared invalid. In the absence of clear and uncontrovertible evidence that the growth of a particular community beyond a certain predetermined size would pose a danger to health, safety, or welfare, it seems unlikely that the courts would sustain a planning decision to limit community growth totally. And see So. Burlington County NAACP v. Township of Mount Laurel, 67 N.S. 151, 336 A. 2d 713 (1975) as another recent example of where exclusionary zoning is struck down. However, as the cases just discussed supra, notes 2-6 and accompanying text indicate, there is a growing acceptance by the courts to well planned community growth objectives which often do severely limit growth. The major issue currently causing significant controversy in legal and planning circles is the scope of that planning effort, i.e., the community level to which it should be directed. Chapter 12 infra will deal explicitly with this issue.*

[8] *McCulloch v. Maryland, 4 Wheaton 316 (1819).*

[9] *One might consider the great controversy over the impoundment of federal monies appropriated for the construction of sewage treatment facilities in the 1970's. Only after considerable litigation were these monies eventually released and local units of government able to proceed in their construction of these facilities. Cf. Train v. Campaign Clean Water, Inc., 420 U.S. 136 (1972) 95 S. Ct. 847 and City of New York v. Train, 494 F. 2d 1033, 161 U.S. App. D.C. 114, affirmed 420 U.S. 35 (1974).*

[10] *Since development pacing is often justified on economic grounds; that is, the financial inability of a given community to provide necessary services and facilities, the greater tax gathering ability of the state, coupled with a willingness to redistribute these taxes on the basis of growth needs, may become an increasingly important factor in development pacing programs.*

Moreover, the state is uniquely situated between the federal and the regional and local levels of government. It often serves as a conduit for federal expenditures, a vehicle for the developmental program being furthered. Thus, the state may influence the timing and effect of these expenditures. If in accord with the federal action, the state may lend its weight to an even more rapid development of the particular project. If the state is not in accord with the federal development activity, it may cause the project to be delayed or postponed altogether. Once again, and for reasons previously stated, the coordination of pacing activities undertaken by the state with those of the Federal Government and regional and local governmental units seems essential.

Local

The need to pace development has clearly been recognized by many local units of government. However, attempts to accomplish this end have sometimes been characterized by the absence of a sound plan to accomplish the desired end and a consequent misuse of plan implementing tools. For example, large lot size and floor space requirements are sometimes imposed simply to deter construction; needlessly stringent building, inspection, and safety codes have been adopted for similar reasons; and quantitative restrictions on building permits and in some cases a complete moratorium on the issuance of building permits have been attempted as means of pacing development. Restrictive, single-purpose zoning, which bears no relation to real land use needs or underlying matters of fact, has sometimes been used as a means of retarding development.[11] The latter approach usually contemplates other land uses in the uniformly zoned area. This is accomplished by inviting would-be developers to apply for spot zoning amendments, which all too often are granted without regard to a comprehensive plan and on conditions designed only to meet the apparent needs of the moment.

Where pacing of development has been attempted by any of these forms of misuse of governmental power, the courts have usually come to the rescue of the private litigant.[12] But this takes time and money. Often this is all that the community is bargaining for—a little time to order its process of growth. However, the misuse of planning tools seems unwise where, with little additional effort, these same or similar devices could be used in a way which the courts would sustain as valid exercises of the legislative power of the municipality. Misuse of plan implementing tools often breeds a judicial mistrust which makes their valid use more difficult to sustain.

Among the valid development pacing techniques of local government are the preparation of comprehensive or master plans that establish long-range development objectives and capital budgets which focus on a shorter time span and attempt to establish a priority for plan implementation through capital improvements within the constraint of potential revenues. The pacing required in a master plan to achieve long-range goals may be implemented by zoning, capital improvement programs, and subdivision controls which are devised in good faith to deal with the particular needs of the community, as described in the Ramapo case supra, or where density zoning is based on sound standards expressing minimal or acceptable norms of people to space relationships.[13] The creation of an urban services district, as outlined in the previous chapter, has been judicially sanctioned as a means of both placing and pacing development. More broadly, subdivision plat approval may be conditioned on the ability of the community to provide needed public facilities. New York enabling legislation expressly provides that local units of government before granting approval to subdivide may look to:

> . . . lessen congestion in the streets, to secure safety from fire, flood, panic and other dangers; . . . to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements.[14]

Wisconsin has a similar provision in Wis. Stats. 236.45(1).[15] The New York statute was upheld in Josephs v. Town of Clarkstown, in which the court said:

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[11] *SEWRPC estimates that in the Region about 400 square miles of land are zoned for residential use above and beyond that already in such use. If this land were developed according to medium-density standards—about 6,500 persons per square mile—it could house about 2.5 million persons. There remains, then, a need to further reduce the gross amount of land actually zoned for residential use to bring such amounts of land more nearly into balance with anticipated growth, to encourage a more desirable urban settlement pattern, and to protect the underlying and sustaining natural resource base. See SEWRPC, A Regional Land Use Plan and Regional Transportation Plan for Southeastern Wisconsin—2000, Volume One, at p. 233.*

[12] *Albrecht Realty Co. v. Town of New Castle, 167 N.Y.S. 2d 843, 8 Misc. 2d 255 (1957); Corthouts v. Town of Newington, 140 Conn. 284, 99 A. 2d 112 (1953); Medinger v. Zoning Board, Springfield Township, 377 Pa. 217, 104 A. 2d 118 (1954); City of Moline Acres v. Heidbreder, 367 S.W. 2d 568 (Mo. Ct. Aqp. 1963); also, the dissent of Justice Hall in Vickers v. Township of Gloucester, 118 A. 2d 129 (1962).*

[13] *This feature has been given serious consideration by the courts Cf. Young v. Town Planning and Zoning Commission, Town of Wallingford, 151 Conn. 235, 196 A. 2d 427 (1963); Lapkus Builders, Inc. v. City of Chicago, 30 Ill. 2d 304, 196 N.E. 2d 682 (1964).*

[14] *McKinney's Consolidated Laws of New York (Ann) Town Law, Sec. 263.*

[15] *And sec. 236.13(2)(a) Wis. Stats. also allows a town or municipality to condition approval of a subdivision upon the subdivider making and installing public improvements.*

(T)he town board, in order to grant petitioner's application, was required to find that the existing community facilities or plans or reasonable possibilities for the expansion of such facilities are adequate to provide for the needs of future residents of the proposed development; also that the health, safety, welfare, and morals of the town will not be adversely affected. Clearly these provisions are reasonable and valid and it is concluded that they not only did authorize but required the board in rendering its determinations, to take into consideration the threatened serious inadequacy of school facilities. In fact it appears that everything reasonably possible is being done by the local authorities to meet the urgency in the school situation. Certainly the situation would become more urgent in the event zoning requirements were eased to increase the population density in the school district; and the action of the town board here is nothing more than an attempt to help stabilize the problems created by the influx of new homeowners to a point where the school district can cope with them. [16]

It seems likely that the Wisconsin Court would reach a similar conclusion where the need to pace development was demonstrated and the means chosen were validly employed. [17]

A number of conditions for subdivision plat approval, though not thought of expressly as pacing devices, actually have their basis in the continuing need of a rapidly growing community to expand its services and facilities. This expansion must take into account the immediate needs of subdivision developments and the more distant needs of subsequent developments. In effect, then, these conditions are a type of development pacing device. Some examples of these conditions are:

1) Provisions calling for the dedication or at least the reservation (usually coupled with a first right of purchase) of lands for park, school, drainageway, open-space, and recreation needs. Where the collection of small bits and pieces of land for these purposes is not desirable, recent plat approval conditions have called for monetary fees in lieu of land dedications for these purposes. A Wisconsin case upheld the application of such a fee as a valid exercise of the police power contemplated in the provisions of Wis. Stats. 236.45. [18]

2) Provisions allowing the temporary use of septic tanks on the condition that capped sewer mains and sewer extensions be installed and be connected to the municipal system when it is extended to the particular subdivision.

3) Provisions calling for the subdivider to install sewer and water mains of a size and capacity which, though not required at present (or solely to serve the current subdivision), will be necessary in the future to serve areas beyond the existing development. In the latter case, the community usually pays the subdivider the additional costs involved in installing the larger mains; but the developer has the responsibility of accomplishing the installation now.

A device previously alluded to, which has a good deal of potential as a means of pacing development, is the purchase of development rights through the use of easements. In this situation the municipal body, seeking to time or pace the subdivision of raw land in conformity with a long-range master plan for the region, buys the landowner's right to build, subdivide, or sell his land for purposes of subdivision. Since these easements become restrictions on the things the landowner may do, they are said to be negative. A continuation of present uses or expansion into a narrow range of similar land use alternatives is usually contemplated. The easement may be in perpetuity for those tracts designed to serve as permanent open space or may be for varying terms of years measured by the length of time that it will take for municipal facilities to be extended to a particular tract or the length of time before a tract will be needed to accommodate community growth. [19] The advantages of such a program other than the pacing of development include: the retention of open space needs close to and eventually within the community; cost savings, in that something less than the price of the full fee will usually be paid for those easements held in perpetuity, and the economic savings of ordered development will offset the cost of easements purchased for a term of years; maintenance costs also remain a private responsibility; and the property tax base is retained intact in that lands subject to an easement remain on the tax rolls. If later it seems best to permit development in the restricted land, this could be worked out between the private owner of the fee simple and the public owner of the easement.

Implicitly, a scheme of purchasing development rights must be undertaken beyond the present outermost limits of the developed urban areas of a region, beyond the so-called "greed line" where raw land may be purchased or, as in the case described, an easement may be purchased at a price reflecting the land's present use value and not

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[16] *198 N.Y.S. 2d 695, 24 Misc. 2d 366-369 (1960).*

[17] *Cf. Richard W. Cutler, "Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe," 1961 Wis. L. Rev. 370.*

[18] *Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 2d 422 (1965).*

[19] *See ORRRC Study Report No. 15, Open Space Action, by W. H. Whyte, p. 17, and ORRRC Study Report No. 16, Land Acquisition for Outdoor Recreation-Analysis of Selected Legal Problems, by Norman Williams, Jr.*

at a price reflecting its speculative value if subdivided. Purchasing development rights on vacant lands situated within already built up areas does not seem economically feasible.[20] Though some open space might be reserved and some land which has benefit to the public will remain on the tax rolls and maintenance costs on these lands will be privately borne, the main features of the entire scheme, that is, pacing development and realizing an economic saving by ordering the processes of growth and extending community facilities, will no longer be possible. Furthermore, as already intimated, the cost of easements of the type described within built-up areas may well approximate the cost of the full fee. Recent enabling legislation, as cited in Chapter VII, sections 161.34(5m), 62.22(1m) Wis. Stats. permits cities and villages to purchase easements for a wide range of purposes. Quite likely the purchase of development rights as a means of placing and pacing development would be recognized as a public purpose under this statute. This will enable a much wider and more effective use of this device as a plan implementing tool in Wisconsin. County and town easement purchase powers have not similarly been broadened by any general legislation, but towns that take on village powers will also be able to use the enabling legislation under the above statute.

A last device which, though quite familiar, is not often recognized as having a rationale based on the concept of pacing development is the official map. The whole premise of this tool, if it is examined, will be seen to be the ordered extension of streets and highways not presently needed but clearly anticipated. Not only is the land to be reserved, but development on the land is also to be minimized, so that when the land is actually purchased it may be had for a price reflecting only the value of the land and not the value of any improvements which may subsequently be placed on the land.[21] Private and public development is facilitated by an early determination of the location and the dimensions of streets, highways, and interstate systems. Pacing goals are facilitated by the early development of an official map as part of a comprehensive planning program.[22]

SUMMARY

The pacing of development is justifiable on economic grounds and as a necessary means of preserving the health, education, safety, and general welfare of the community. The courts stand ready to support as a valid exercise of the police power almost any device or technique that will pace development provided that the community is prepared to justify the imposition of the control by preparation and presentation of the underlying facts. All too often, though, pacing has been achieved by extralegal means; that is, by the misuse of planning tools rather than by their careful and well-chosen use. This seems unfortunate in that it has bred a judicial mistrust of some of the most useful and necessary planning and plan implementation devices. This makes the valid imposition of such tools more difficult. Capital budgeting, zoning, subdivision control, official mapping, and easement purchase all may contribute to the pacing of development. However, if used in conjunction one with another and within the framework of a well-conceived master (comprehensive) plan, they seem to offer the most potential.

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[20] *But if the significant problems of classifying lands appropriately and of keeping track of the transfers is mastered, as many of the proponents of Transfer of Development Rights (TDR's) argue is feasible, (see supra, Chapter I, note 4), then it might very well be economical.*

[21] *Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920).*

[22] *See Kucirek and Beuscher, "Wisconsin's Official Map Law," 1957 Wis. L. Rev. 176.*

Part Four

PLANNING FOR SPECIFIC LAND USE OBJECTIVES

This part of the report deals with three planning objectives of vital importance to the Southeastern Region of Wisconsin. The first of these covered in Chapter X directs the reader's attention to open space reservation and how the different levels of government may, through various forms of purchase and regulation, preserve lands for open space. The focus then shifts in Chapter XI to the problems confronting the various levels of government in reserving and protecting highways. The major thrust of this Chapter is directed at minimizing the ever rising costs associated with developing new highways and widening and protecting existing ones. As the use of highways continues to increase and the reliance by the public upon the automobile, shows little sign of weakening, especially in the southeastern Region, this Chapter takes on added significance. Finally, the third topic of this segment of the report discusses yet another aspect of society's reliance on the automobile for travel and the problems that have resulted. Specifically, Chapter XII considers urban mass transportation and the strong need in the Region for a balanced transportation system which will embrace an efficient mass transit alternative to the automobile.

Chapter X

OPEN SPACE RESERVATION

Many varied and cogent physical, economic, and sociological reasons may be offered for reserving open space.[1] It seems most frank to admit, however, that many individuals simply appreciate the aesthetic qualities which inhere in a tract of land left in its natural state. The spontaneity of each spring and the vivid colors of fall have a soothing or stimulating effect (whichever you will) on the most confirmed urban dweller. To the conservationist or rural dweller with a more practiced eye, these areas offer a glimpse of our vast country as it used to be—a natural habitat for innumerable varieties of plants and animals. To the ordinary person, the simple amenities of a wide horizon, a green resting place for the eye, and a sense of escape from the tensions of crowded urban centers are sufficient justification for keeping some lands within an urban region in open space use.

To many rural dwellers, especially in the upper Midwest and West, open space reservation has no particularly urgent ring. True, there are many undesirable encroachments on the beauties, grandeur, and the solitude of the existing open spaces; but the feeling is that there is still a lot of land and, if you know where to look, the beauties are still to be found. However, even in these circles the more knowledgeable realize that it is only a matter of time. Air and water pollution pose a greater threat as more people press into these remote areas to escape the cities. The delicate balances of nature are easily upset. As Wisconsin has sadly experienced, great forests once cleared may never reappear.

To the city dweller accustomed to walking a few or more blocks even to find a patch of grass and a few trees, open space reservation—with all of its aesthetic, naturalistic, and historical images—has in a comparatively short period of time become very important and very desirable. The idea that there be a Kettle Moraine, a Horicon Marsh, a parkway, a greenbelt, a wooded area, not only for the present use, but for the enjoyment of future generations, has become a popularly accepted goal of governmental action at federal, state, regional, and local levels.[2]

To the comparatively small body of recreation—or resource-oriented conservationists who until very recent

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[1] *Minimization of property loss, anguish, personal injury, and death in floodlands; enhancement of property values in areas possessing parks, parkways, and wooded areas; sociological need for play and outdoor recreation; preservation of scientific preserves; protection of groundwater recharge areas and storage areas for floodwaters; protection of wildlife habitat; and control of air pollution—to name just a few.*

[2] *Quoting from Whyte's Open Space Action, ORRRC Study Report No. 15, p. 3: "In going over the various floor debates in the different states, (concerning open space reservation enabling legislation) it is noteworthy how the different backers eventually warmed up to the same theme. The exposition would deal with economics, tax costs, and so on. When the real push came, however, there was one overriding refrain—our children."*

years were more like voices of lonely prophets, the present broad acceptance of open space reservation programs must be gratifying even though in some areas this acceptance comes too late to preserve that which has already been lost or nearly lost. Furthermore, the interval between public acceptance, expressed good intentions, policy formulation, and the commitment of funds to actual programs which will reserve parks, parkways, playgrounds, marshes, and scenic views must seem painfully slow. There is some cause for satisfaction in the speed at which events have unfolded recently in the actual progress that has been made in a relatively short time.

For example, the Southeastern Wisconsin Regional Planning Commission has identified certain areas of the Region as primary environmental corridors. These corridors and their preservation are considered essential to maintenance of the ecological balance, as well as the overall quality of life in the Southeastern Wisconsin Region. The areas so designated include such resources as: lakes, rivers, streams and their associated underdeveloped shorelands and floodlands; wetlands; woodlands; wildlife habitat areas; rugged terrain and high relief topography; significant geological formations and physiographic features; ground water recharge and discharge areas; and wet or poorly drained soils. The amount of territory initially identified by SEWRPC in 1963 constituted about 20 percent of the total area of the Region, or 341,500 acres. Of this total, 92,800 acres consisted of agricultural or related lands; wetlands composed 90,600 acres; and woodlands 64,700 acres.[3] As of 1973, over 176,500 acres, or 52 percent of the gross primary environmental corridors in the Region, were either permanently or temporarily preserved[4] (See Maps 11, 12, and 13).

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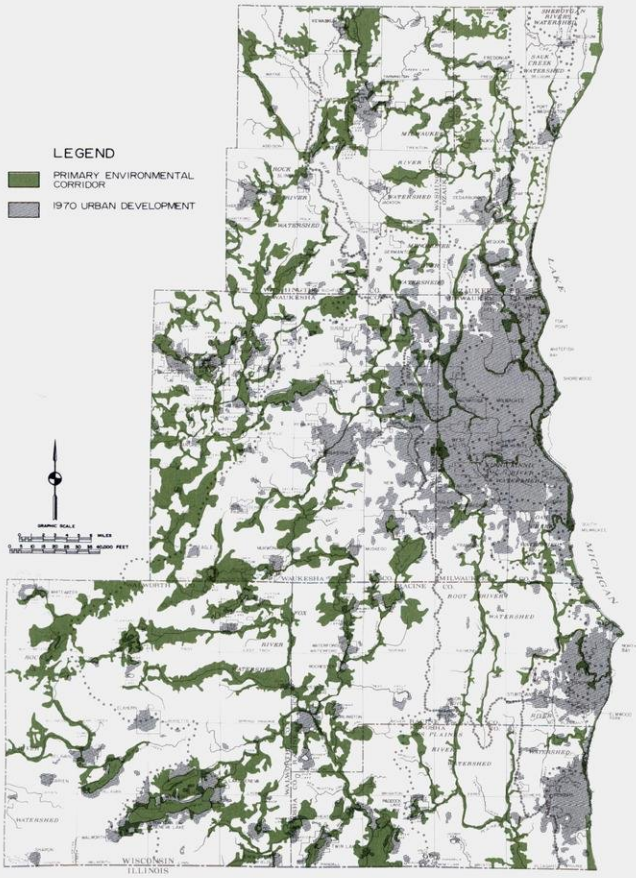
[3] *SEWRPC Planning Report No. 25, A Regional Land Use Plan and a Regional Transportation Plan for Southeastern Wisconsin—2000, Volume One, at pp. 151-157.*

[4] *As of 1973, 38 percent of the total 341,500 acres of primary environmental corridors, or 129,500 acres, had been permanently preserved. The majority of this area, 83,400 acres, is preserved through floodland zoning. Over 47,000 acres, or 14 percent, of the gross corridor acreage has been temporarily preserved, the majority of this acreage protected through conservancy zoning.*

Map 11

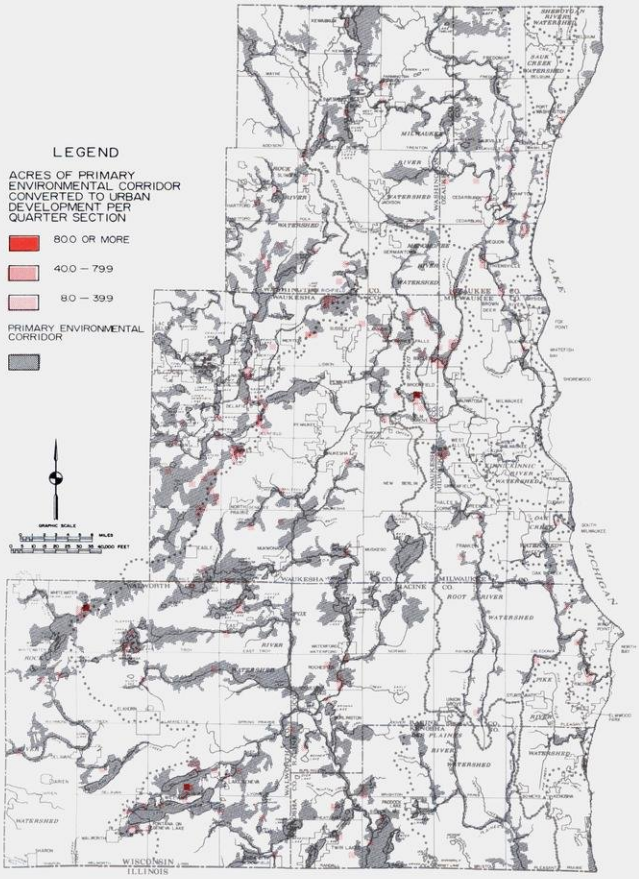
PRIMARY ENVIRONMENTAL CORRIDORS IN THE REGION: 1970



Source: SEWRPC.

Map 12

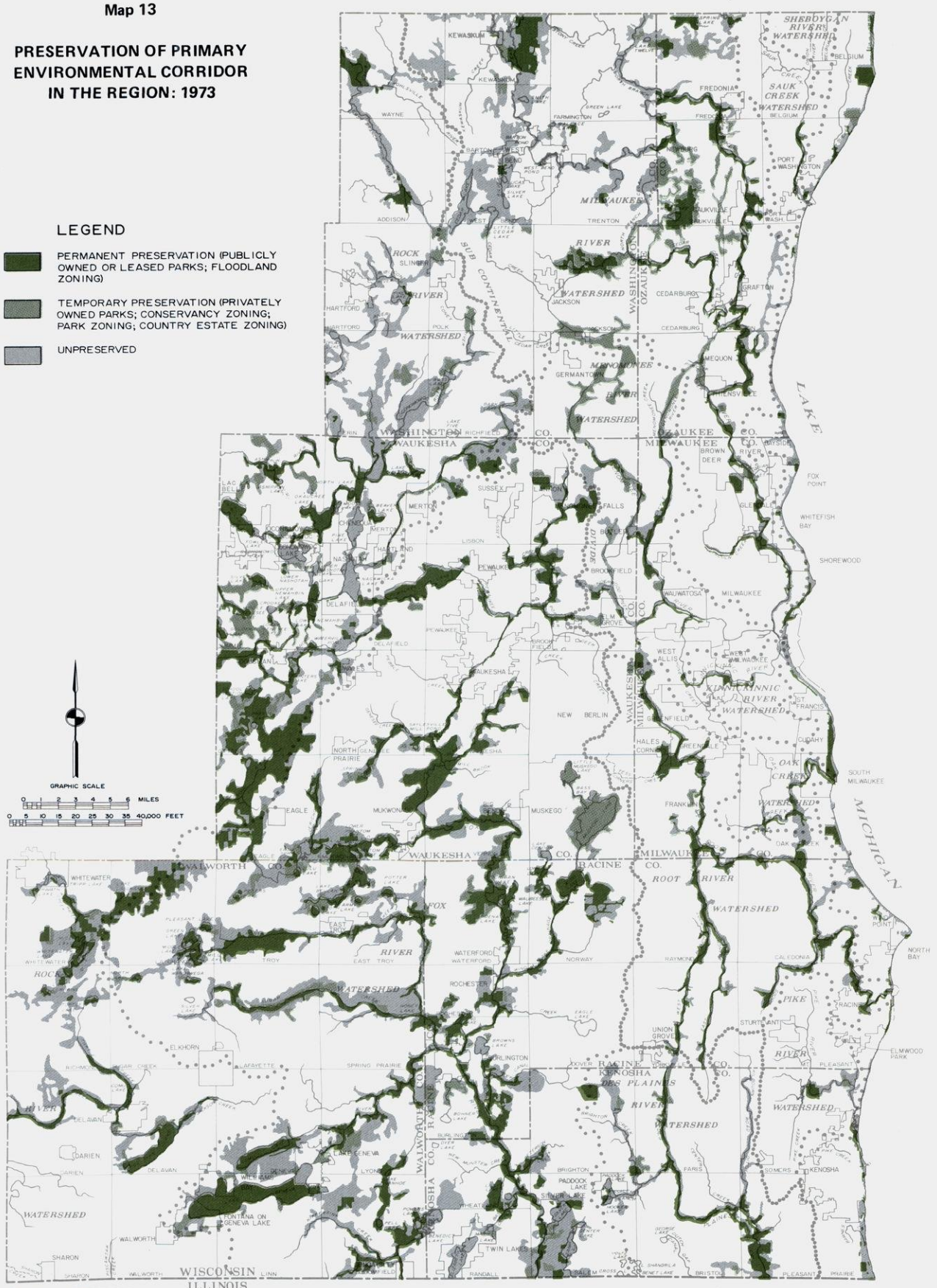
LOSS OF PRIMARY ENVIRONMENTAL CORRIDOR IN THE REGION: 1963-1970



Source: SEWRPC.

Map 13

PRESERVATION OF PRIMARY ENVIRONMENTAL CORRIDOR IN THE REGION: 1973



Source: SEWRPC.

WHAT KINDS OF DATA AND ANALYSES ARE NECESSARY TO LEGALLY SUSTAIN THE RESERVATION OF OPEN SPACE?

The answer to this question depends almost entirely on the particular piece of land involved and the means employed to reserve the open space. For example, if the land is being purchased by a municipal body as a park and is clearly desirable and suitable for such a use, less data may be necessary. Purchase of land for park purposes is a recognized function of government and hardly subject to challenge. The determination of "necessity" for the use and the tool of eminent domain to compel transfer of the land from private to public use will be virtually immune from adverse judicial decision.

However, if the land sought to be reserved is in a floodland and the device sought to be used is a fairly restrictive zoning ordinance, then a great deal more data and preparation will be necessary.[5] This is not to suggest that such a reservation will probably be invalid. Quite the contrary, it will probably be declared valid if the community can come into court prepared to show accurately the delineation of the floodland, the recurrence interval of floods of varying degrees of severity and their probable effect on the plaintiff's property, the reasonable (and imaginative) alternative uses which are permitted plaintiff, the overall comprehensiveness of the zoning ordinance, and the underlying policy rationale.

In short, inasmuch as the reservation of land for park or open space use is an accepted governmental function, the degree of legal homework necessary to sustain the action will depend almost entirely on the technique of reservation employed. Much less will be necessary where a purchase (either of the fee or a less-than-fee interest) is contemplated. Where some form of regulation is being employed to reserve the land in a more or less open state, the degree of preparation must be much more thorough and rigorous. Revenues available for open space purchase, even with recently provided state and federal aids added, are still far from adequate to preserve even the critical areas. Regulation, therefore, becomes a most vital tool.

Some of the specific types of information which would be useful to sustain open space reservation regulations include: accurate delineation of floodlands, coupled with carefully compiled flood damage data; thorough soils and topographic analyses, coupled with cost data showing the increase in cost to both the private individual and the public body which results from attempting to develop land in a manner not suitable to, or compatible with, the existing features of the land; data relating to the profitability of the permitted alternative land uses; and data in the nature of standards which show that minimal health, safety, or welfare considerations are barely being met by the challenged open space reservation regulations.[6]

Once again, it is impossible to state exactly what will influence a court. Comprehensiveness in approach and resort to facts, with emphasis on how these facts justify the open space reservation regulation, both in principle and as applied to the complainant, may be effective. But there must also be a showing that the regulations do not leave the landowner with a tract of land that he cannot use.

TECHNIQUES FOR ACCOMPLISHING THE RESERVATION OF OPEN SPACE

Federal

The Federal Government has played an important role in open space reservation. In its proprietary capacity, it exercises direct control over vast landholdings, mostly in the western states. The sale or lease of this land today is often conditioned on the preservation of the naturalness and outdoor amenity features of the land. At an early date, a program of reserving land as a national park or forest was begun. The number of sites so designated and the amount of land within these park, forest, or wilderness areas is continually being increased. In many instances the federal park system has spurred the development of state park systems managed along similar lines. Many of these facilities are nationally famous. However, all provide at least some of the following opportunities: recreational enjoyment; pleasure driving, hiking, camping; scientific study; preservation of timber reserves; preservation of unique or disappearing land forms such as the Ice Age Reservation in Wisconsin; necessary migratory bird flyways, of which Horicon Marsh is an important illustration; natural habitats for all species of plants, birds, and animals; and a sanctuary for those nearly extinct species of birds and animals.

Moreover, the increasing role of the Federal Government in assisting state and local government efforts to ensure that open space lands will be reserved is indicated by its grant-in-aid programs such as the land and water conservation program which provides monies for the planning and acquisition of outdoor recreation sites;[7] the Coastal Zone Management Program which is designed to ameliorate the misuse of the nation's coastal areas, including the Great Lakes shorelines;[8] and the Open Space

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[5] *The Wisconsin Law under sec. 87.30 mandates that all lands within floodlands, as delineated by the 100-year flood levels, be zoned to meet at a minimum the standards adopted by the DNR, (Wisconsin Administrative Code, NR 116.01 et seq.) Moreover, under sec. 59.971, counties must adopt regulations for all unincorporated lands within their jurisdiction that lie within 1,000 feet of a lake, pond, or flowage, or 300 feet of a river or stream, or to the landward side of a floodplain. These regulations must also meet the standards set out by the DNR at NR 115.03.*

[6] *Much of this information has already been gathered by the Southeastern Wisconsin Regional Planning Commission for the Region and is available upon request.*

[7] *16 U.S.C.A. secs. 460 L-4 to 460 L-11.*

[8] *16 U.S.C.A. secs. 1451-1464.*

Land Program which attempts to induce comprehensive planning for open space and encourage the provision of

> necessary recreational, conservation, and scenic areas by assisting state and local governments in taking prompt action to preserve open space land which is essential to the proper long range development and welfare of the nation's urban areas.[9]

In addition to these programs, the Federal Government may through indirect leverage (i.e., by providing monies with conditions) accomplish amenity and open space reservation goals. The Flood Disaster Protection Act of 1973 discussed earlier is a good example.[10] More particularly and directly relevant are the various highway policies which seek to screen unsightly roadside activities and areas or provide for scenic turnoffs and roadside rest and recreation areas. All of these enactments clearly evidence a federal intent to foster the preservation of open space lands.

State

It is also apparent that the State, too, can utilize its proprietary, spending, and grant-in-aid powers to reserve or encourage the reservation of open space. A big impetus to this program in Wisconsin is the Outdoor Recreation Program.[11] The Wisconsin Lesiglature has authorized under this program that over 50 million dollars may be encumbered over the years 1968-1981 primarily for reservation, maintenance, and development of open space areas.

In addition to these powers, the State now has a range of regulatory devices which affect open space; and the prospect is that state-level regulation will play an increasingly larger role in the future preservation of open space.[12] With strengthened enabling legislation, the Department of Natural Resources, the Department of Health and Social Services, and the Department of Local Affairs and Development, acting in accordance with state-developed standards governing the suitability of land for subdivision, could utilize the plat review powers of the State to preclude development on certain lands falling below these standards, thus leaving them in a raw and relatively open condition.[13] Tens of thousands of acres of open public water in Wisconsin are vital "open space" which needs to be "preserved" for those who desire to use it. The State, as custodian of state waters, can regulate their use to promote safety between competing recreational users of surface waters and competing public and private uses, thus preserving and maintaining these waters in as unspoiled a condition as possible.[14] Admittedly, greater coordination among state agencies to achieve these goals is needed. The growing number of legislative enactments and increased support for state-level control over all stream and lakeshore lands, floodlands, and highway interchanges has led to state-level regulation designed to maximize safety, welfare, and the inherent amenity features of these lands.[15]

Lastly, the State has a long history of open space preservation and regulation under state forest crop laws, fish and game regulations, irrigation and farm drainage laws, soil and water conservation laws, and permit laws—laws which all have an effect upon privately held open space areas usually in the direction of maintaining or improving their value as agricultural, open space, or recreation land.[16] And, as indicated in Chapter VIII, supra, an amendment to the State Constitution Art. 8, Section 1, was passed in 1974 which will permit the taxation of agricultural and open space lands on their present use value rather than on their market value. With effective enabling legislation, this new taxing policy could save thousands of acres from being converted to more intensive uses.

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[9] *42 U.S.C.A. sec. 1500 et seq.*

[10] *42 U.S.C.A. sec. 4001 et seq., and supra, Chapter III notes 8-11.*

[11] *Sec. 23.30 et seq. Wis. Stats.*

[12] *In the absence of local or regional open space planning, which can and should be coordinated with state level open space planning, the State very likely will use its regulatory powers to implement its own state level open space planning efforts. Such efforts are currently being carried on by such agencies as the Natural Resources Board, and the State Planning Office within the Department of Administration, and see, Chapter VI of this report.*

[13] *The rationale for such standards might be developed around the conditions relating to soils, slope, depth to water table, flora and fauna, and rock outcroppings.*

[14] *Under sec. 30.77, cities, villages, and towns may regulate the uses over water in the interest of public health, safety, and welfare. With the passage of Chapter 302, Laws of 1973, the DNR was given advisory review powers over the local regulations pertaining to equipment, use, or operation of boats. This review authority was granted in order that consideration be given to "the effect of the local regulations on the state from the standpoint of uniformity and enforcement and on the affected town, village, or city in view of pertinent local conditions." And see on this matter Kusler, "Carrying Capacity Controls for Recreation Water Uses," 1973 Wis. L. Rev. 1; Cutler, "Chaos or Uniformity in Boating Regulations: The State as Trustee of Navigable Waters," 1965 Wis. L. Rev. 311.*

[15] *Chapters 147, 144, 84, and Sections 87.30, 59.971 of Wisconsin Statutes.*

[16] *Chapters 26, 28, 29, 30, 88, and 92 of the Wisconsin Statutes.*

Regional and Local

As was the case in the placing and pacing of development, the major burden of regulating to achieve open space goals falls to local units of government.[17] Not only do these units of government spend the federal and state assistance funds earmarked for open space, but a major share of all land use planning and implementation and enforcement of the numerous land use control devices mentioned explicitly or alluded to in this report have traditionally been and will continue to be carried out by officials at this level of government.

The major regulatory devices by which open space can be reserved are the same familiar tools dealt with in this report: zoning, setback, subdivision control ordinances—that is, police power measures in general. To effectively reserve open space, however, the emphasis must be on the careful application of these seemingly wellknown tools. The word seemingly is appropriate because, though apparently familiar, these devices are all too often misused, underused, or not used at all, while in reality they are fully capable of achieving a very broad range of planning goals in a very valid way.

Zoning, for instance, can be designed to hold raw land contained within the floodlands in an almost natural state. Since 1965 Wisconsin has required that floodland zoning be carried out at the county and local level.[18] But in order to do this, the floodland boundaries must be accurately delineated; and then as many alternative land uses as are consistent with the degree of openness desired and which offer an economic return (albeit a minimum return) to the private owner must be conceived.[19] An area back from the 100-year recurrence interval floodland but part of the scenic corridor of the stream channel may also be desired as open space. Here less reliance can be placed on the danger of flooding as the underlying rationale justifying the zoning restrictions. Instead, reliance needs to be shifted in large part to soil characteristics, slope, water regimen, aesthetic considerations, the proximity of this land to other open lands within the floodlands, and the overall comprehensiveness of the zoning program.[20] But the zoning controls again must show imagination. An even wider range of permitted alternative land uses must be developed, but with an eye to retaining as much of the open character of the land as possible. Devices such as density controls, minimum building sizes, minimum lot sizes, tree cutting limitations, filling limitations, and requirements that sewer connections be available may all be incorporated in the zoning ordinance. The important thing to be remembered is that, if the public is now willing or able to buy the land in these scenic corridors, it must then be prepared to temper its open space goals to accommodate a limited but meaningful range of alternative land uses. A complete or nearly complete taking of these lands in the guise of a zoning ordinance will not be countenanced by the courts. The language of Justice Hall in Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills is particularly illuminating:

> We cannot agree with the trial court's thesis that, despite the prime public purpose of the zone regulations, they are valid because they represent a reasonable local exercise of the police power in view of the nature of the area and because the presumption of validity was not overcome. In our opinion the provisions are clearly far too restrictive and as such are constitutionally unreasonable and confiscatory.[21]

Justice Hall also cited an oft quoted passage of former Chief Justice Holmes, who in Pennsylvania Coal Co. v. Mahon said:

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[17] *No further discussion of fee or less-than-fee purchases of open space lands will be undertaken. The reader is referred to Chapter VIII, on Placing of Development, where a thorough discussion of these techniques was undertaken and to other comments in this and other chapters dealing with fee or less-than-fee controls. The emphasis here is on the reservation of open space by regulatory means.*

[18] *See sec. 87.30, Wisconsin Stats.*

[19] *See NR 116.01 et seq., Wisconsin Administrative Code.*

[20] *A shift in the underlying rationale for what may well be a comprehensive open space regulatory scheme is best accomplished by a direct statement to that effect in the planning report which gives rise to the regulatory device. It will be obvious to any court, which may be called upon to determine the validity of an open space regulatory scheme, that the farther away from the stream channel one moves the less likely the danger of flooding becomes. Thus, this justification alone cannot be relied upon to sustain the entire open space regulatory scheme. What is not as obvious to the court are the numerous other justifications which, as one moves back from the stream channel, may now become the cominant factors in supporting the regulatory device in question. A direct statement that these additional valid justifications exist and are being relied upon in these portions of the stream corridor will generally be well received by a court.*

[21] *40 N.J. 539 193 A. 2d 233, 232, 242 (1963). But the regulation of lands in question here, it should be reiterated, is not in a floodway or floodplain. Wisconsin's reasonable efforts to regulate those lands which border on navigable water and are contained within the floodplain would be upheld. In Just v. Marinette, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972) that constitutional question was settled for shorelands. In the regulation of floodlands, with the added justification of public concern for safety and the minimization of destruction from losses caused by flooding, even more judicial support could be expected.*

> The general rule at least is that while property may be regulated to a certain extent, if the regulation goes too far it will be recognized as a taking.... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[22]

Quoting again from Justice Hall:

> While the issue of regulation as against taking is always a matter of degree, there can be no question that the line has been crossed where the purpose and practical effect of the regulation is to appropriate private property for a flood water retention basin or open space. These are laudable public purposes and we do not doubt the high mindedness of their motivation. But such factors cannot cure basic unconstitutionality.[23]

To summarize then: A court may approve of the broad community goal of open space reservation. Furthermore, a court may approve of the principal and underlying rationale which allows land uses to be controlled by regulation; for example, zoning. But a court may declare a particular open space zoning regulation invalid because it overreaches and so limits private alternative uses of the land that it no longer can be classed as a mere regulation but instead becomes a prohibited taking.

Open space reservation may also be achieved as a secondary effect by zoning in areas. For example, 1) land near airports may be kept in as open a condition as possible;[24] 2) land bordering lakes may be kept open for purposes of water quality control, aesthetics, or to preserve the natural habitat of small game, birds, and fish;[25] and 3) particularly steep slopes; thickly wooded areas; wet, low-lying, or marshy ground; and soils unsuitable for urban use might well be maintained in open space for a combination of reasons ranging from aesthetic considerations to their unsuitability for most types of development.

In addition to the above-mentioned open space preservation techniques, the concepts of agricultural use zoning and large lot zoning are very important. As is noted in Chapter XIII of this report, large lot zoning within urbanized areas may be one of several methods used to perpetuate discrimination on the basis of wealth. In a rural setting, however, large lot zoning is an effective tool by which to achieve necessary open space reservation. Through the use of large lot zoning, population densities and land usage may be controlled to levels compatible with open space reservation and natural resource base protection goals.

Residential districts often are zoned so that some agricultural uses may be permitted. This discussion will center, however, on the propriety of zoning land as an agricultural district as a means of achieving the goal of open space reservation and natural resource base protection. Wisconsin statutes provide clear authority for counties, towns, villages, and cities to use zoning authority for the creation of exclusive agricultural districts. The authority to zone such districts agricultural is not challenged; however, several issues arise as to the scope of permissible activities within these agricultural districts. Various courts have been forced to determine on a case by case basis whether certain activities are permitted uses within the agricultural district. In the case of Kmiec v. Town of Spider Lake[26], the Wisconsin Supreme Court affirmed a trial court ruling that zoning ordinance which classified plaintiff's 296-acre parcel as agricultural was unconstitutional in that the classification substantially reduced the value of some 216 of the 296 acres. In addition, the Court found that the evidence showed that the property had not been utilized as farmland for over a decade and agricultural restoration was economically unfeasible. In addition, the Court determined that the best and highest use of the land was for residential-recreational purposes.

In the case of Town of Richmond v. Murdock[27], the Wisconsin Supreme Court held that a zoning ordinance which divided a town into residential, commercial, and agricultural districts was not invalid because it required a conditional use permit for operation of a trapshooting facility in an agricultural district. The Court further held that the Town, through the enactment of this ordinance, did not exceed its constitutional or statutory zoning authority since the power to zone is a broad power and includes the right to utilize conditional use permits.

It is generally accepted that agricultural uses include both the raising of crops and livestock. The raising of livestock, however, must be an incident of the overall agricultural use and not such a peripheral use as a riding stable or dog kennel. Commercial usage beyond the sale of farm products may also be excluded. General construction and industrial activities generally may be excluded from agricultural zones. Case law is split where the disputed uses include such activities as nurseries,

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[22] *260 U.S. 393 (1922)*

[23] *Supra, note 22, 193 A. 2d at 241.*

[24] *Of. Sections 114.135, 114.136, 60.74 (a) (b) Wisconsin Statutes. And also see a publication put out by the Wisconsin Department of Transportation, Division of Aeronautics, A Guide for Land Use Planning Around Airports in Wisconsin (1976).*

[25] *S. 59.971, Wis. Stats. Just v. Marinette, 56 Wis. 2d 7, 201 N.W. 2d 761 (1972).*

[26] *Kmiec v. Town of Spider Lake, 60 Wis. 2d 640 (1973).*

[27] *Town of Richmond v. Murdock, 70 Wis. 2d 642 (1975).*

Christmas tree farms, and greenhouse operations. Finally, a major issue which remains unresolved is the question of what minimum number of acres determines whether a given parcel is a farm within the meaning of an agricultural zone. If a very small land area requirement is utilized, open space preservation and natural resource base protection considerations will not prevail. In its place will result a residential pattern of large lot residential units. Lands once devoted to serious agricultural uses will no longer function as such but rather will attempt this function in a haphazard fashion with considerably reduced efficiency.

Within the Region, Walworth County has created an extensive system of zoning lands for agricultural purposes. Lands meeting certain soil and other criteria are placed in the category of prime agricultural lands, which allows farming and farm related housing. Occupancy of pre-existing dwellings is the only nonfarm housing allowed in this type of district. Minimum parcel size is 35 acres. A-2 land districts are those where farming is the main intended use but size restrictions are reduced to five acres. This reduced minimum size allows such specialized uses as horse farming, hobby farming, and orchards. A-3 lands are those lands located near cities and villages. Such land is intended to be urban land in the future and any change in use must be preceded by rezoning proceedings. For the present time, however, many of the restrictions placed on A-1 lands are present in addition to a 35-acre minimum lot size which prevents the area from being inundated by haphazard urban sprawl. Finally, A-5 lands allow for Agricultural-Rural Residential Districts to be developed. This type of land district allows for rural nonfarm residences on small parcels of land. Lands included within this category are those of marginal utility as agricultural lands. A minimum lot size requirement of 40,000 square feet is in effect. A prime consideration in zoning land A-5 is a situation in which the land has become a remnant parcel due to poor planning and agricultural utility is destroyed or greatly reduced. In addition to the above types of agricultural districts, various conservancy districts are established concerning those nontillable areas of farms, particularly slopes, wooded areas, and marshlands.

Chapter 91 of the Wisconsin Statutes, entitled "Farmland Preservation," was created by Chapter 29 Laws of 1977. Chapter 91 is an attempt by the Wisconsin Legislature to provide a series of property tax incentives and credits under which the continuation of agricultural activities and preservation of agricultural lands is financially feasible. Eligible farmlands are those tracts of land 35 acres or more devoted primarily to agricultural uses and producing gross profits of not less than $6,000 in the preceding year and not less than $18,000 during the three years preceding application. Agricultural use is defined in Section 91.01 as "beekeeping; commercial feed lots; dairying; egg production; floriculture; fish or fur farming; forest and game management; grazing; livestock raising; orchards; plant greenhouses and nurseries; poultry raising; raising of fruits, nuts, and berries; sod farming and vegetable raising."[28]

An owner may enter into a farmland preservation agreement if the county within which the land is located has a certified agricultural preservation plan in effect or the land is located in an area zoned for exclusive agricultural use. A county agricultural preservation plan must include a statement of policy on preservation of agricultural lands, urban growth, provision of public facilities, and the protection of significant natural resources, open space, scenic, historic or architectural areas. In addition, the plan must include "maps identifying agricultural areas to be preserved, areas of special environmental, natural resource or open space significance and, if any, transition areas. Transition areas shall be areas in predominantly agricultural use which the plan identifies for future development. Any agricultural preservation areas mapped must be a minimum of 100 acres. Any transition areas mapped must be a minimum of 35 acres."[29] Finally, such plans must include implementation programs indicating specific public actions designed to preserve agricultural lands and guide urban growth. County plans are to be submitted for review and certification to the Agricultural Lands Preservation Board. Exclusive agricultural use zoning ordinances are to be administered in accordance with statutory provisions regulating county, town, village, and city planning and zoning. A zoning ordinance shall be considered an exclusive agricultural use ordinance if it includes "those jurisdictional, organizational or enforcement provisions necessary for its proper administration, if the land in exclusive agricultural use districts is limited to agricultural use and is identified as an agricultural preservation area under any agricultural preservation plans adopted under subchapter IV and if it regulates the use of agricultural lands in such districts in the following manner:

1. The only residences allowed as permitted uses on newly established parcels are those to be occupied by a person who, or a family at least one member of which, earns a substantial part of his or her livelihood from farm operations on the parcel, or is related to the operator of the larger farm parcel from which the new parcel is taken. Preexisting residences located in areas subject to zoning under this section which do not conform to this paragraph may be continued in residential use and shall not be subject to any limitations imposed or authorized under S 59.97 (10).

2. The minimum parcel size to establish a residence or a farm operation is 35 acres.

3. No structure or improvement may be built on the land unless consistent with agricultural uses . . .

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[28] *Wis. Stats. sec. 91.01 (1) Chapter 29, Laws of 1977.*

[29] *Wis. Stats. sec. 91.55 (b) Chapter 29, Laws of 1977.*

4. Special exceptious and conditional uses are limited to those religious, other utility, institutional or governmental uses which do not conflict with agricultural use and are found to be necessary in light of the alternative locations available for such uses."[30]

An owner of land located in a county which has adopted an exclusive agricultural use zoning ordinance may not apply for a farmland preservation agreement if the town within which the land is located has not approved the ordinance. In addition, landowners in those counties with greater than 75,000 population or adjacent to a county with a population of 400,000 or more may apply for a farmland preservation agreement only if the county within which the land is located has adopted an exclusive agricultural use zoning ordinance. The above population restrictions would apply to all counties of the Southeastern Wisconsin Region with the exception of Walworth County. In the other six counties, a county exclusive agricultural use zoning ordinance is required before farmland preservation agreement may be entered into.

An owner of eligible lands must apply to the county clerk to enter into a farmland preservation agreement. The application must contain a legal description of lands to be included, a map showing significant natural features and physical improvements, soil classification, and any other data deemed necessary by the Board of Agricultural Preservation. Copies are forwarded to the local unit having jurisdiction; if not the county, the Department of Agriculture, Trade and Consumer Protection, the county planning and zoning committee, the Regional Planning Commission, the Soil and Water Conservation District and, if within the extraterritorial zoning jurisdiction, to the governing body of the city or village. The notified units of government and agencies have 30 days in which to review, comment, and make recommendations. The local governing body having jurisdiction shall approve or reject the application within 45 days of the date of application.

"The local governing body's approval or rejection of the application shall be based upon and consistent with the following:

a. Whether the farmland is designated an agricultural preservation plan...or is an area zoned for exclusive agricultural use...

b. The productivity and viability of the land for agricultural use.

c. The predominance of agricultural use on the land.

d. The inclusion of all contiguous lands which are in single ownership.

e. Whether the property is eligible farmland.

f. Consistency with the county agricultural preservation plan.

g. Other criteria established by the local governing body consistent with the agricultural preservation purposes of this chapter.[31]

A copy of the approved application must be sent to the Department of Agriculture, Trade and Consumer Protection. The Department may reject a locally approved agreement only if the land is not eligible farmland. If an application is rejected by the local governing body or by the Department, the landowner may appeal to the Agricultural Lands Preservation Board. Upon approval of the application, the Department shall send to the landowner a farmland preservation agreement containing the following provisions:

" a. A structure shall not be built on the land except for use consistent with agricultural use or with the approval of the local governing body having jurisdiction and the department.

b. Land improvements shall not be made except for use consistent with agricultural use or with the approval of the local government body having jurisdiction and the department.

c. A structure or improvement made as an incident to a scenic, access or utility easement or license shall be deemed consistent with agricultural use under pars. (a) and (b).

d. Farming operation shall be conducted in accordance with an approved U. S. Soil Conservation Service farm plan, to be reviewed annually by the appropriate soil and water conservation district board or its agent.

e. The state agrees to pay, with respect to each year the agreement is in effect, those credits claimable under section 71.09 (11), as such statutes exists on the date the agreement takes effect, if all the requirements of section 71.09 (11) are satisfied.

f. Any other condition and restriction on the land as agreed to by the parties that is deemed necessary to preserve the land for agricultural use if it is not in conflict with the county agricultural preservation plan."[32]

Upon recordation of the farmland preservation agreement, a lien is created for the total amount of credits received in the past 20 years upon relinquishment of the

[30] *Wis. Stats. sec. 91.75 Chapter 29, Laws of 1977.*

[31] *Wis. Stats. sec. 91.13 (4) Chapter 29, Laws of 1977.*

[32] *Wis. Stats. sec. 91.13 (8) Chapter 29, Laws of 1977.*

agreement, and such lien shall be subordinate to previously recorded mortgages. Farmland preservation agreements shall be for not less than 10 years nor more than 25 years.

An owner of lands identified as a transition area under a certified county preservation plan may apply for a transition area agreement. Such agreement shall be for not less than five nor more than 25 years.

Section 91.15 states that a city, town, village, county, or other governmental agency may not impose special assessments for sanitary sewers, water, lights, or nonfarm drainage on lands for which a farmland preservation agreement is in effect or on land zoned for exclusive agricultural use. Special assessments levied before the farmland preservation agreement was filed are valid.

A farmland preservation agreement is terminated at the expiration date of the agreement or may be terminated before such date upon application by the landowner. The local governing body may not approve an application for early termination unless it finds that one or more of the following conditions exist:

" 1) The agreement imposes continuing economic inviability causing hardships through the prevention of necessary improvements to the land...

2) Significant natural physical changes in the land which are generally irreversible and permanently affect the land.

3) Surrounding conditions prohibit agricultural use."[33]

Upon approval of the termination application by the local governmental body, the application is forwarded to the Agricultural Lands Preservation Board and within 60 days said Board must approve or reject the application. For those agreements terminated prematurely or upon the expiration date, the Department of Agriculture, Trade and Consumer Protection shall record a lien against the property formerly subject to the agreement for the total amount of all credits received by the owners of lands during the last 20 years that such lands were eligible for credit under the agreement. No lien may be recorded if, on the date of termination of the land preservation agreement, the lands are zoned for exclusive agricultural use under the certified ordinance. If an owner of land upon which a farmland preservation ordinance is in effect changes the use of the land without first terminating that agreement, the owner may be enjoined by the Wisconsin Attorney General or by the local unit of government. Civil damages may be sought in an amount not to exceed double the value of the land at the time of application.

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[33] *Wis. Stats. sec. 91.19 (2) (b) Chapter 29, Laws of 1977.*

Section 91.31 states that prior to October 1, 1982, a landowner may apply for a farmland preservation agreement in counties not having a certified agricultural preservation plan or exclusive agricultural zoning. No agreements may be made under Section 91.31 after September 30, 1982. Farmland agreements under Section 19.31 shall require that a United States Soil Conservation Service farm plan be under development or in effect. Such agreements shall be for no longer than five years.

Subdivision control ordinances offer another means of reserving land in open space. Not only are dedications for park purposes seemingly acceptable[34] but fees in lieu of dedication as previously mentioned, have been found acceptable in Wisconsin.[35] Open space for safety, street widening, and amenity purposes may be reserved by provisions requiring setbacks, wellplanted buffer areas which screen out the unsightly or effectively separate adjoining but divergent land uses. Moreover, open space may be reserved by dedication of street widening strips along the boundaries of the subdivision and quite possibly within the subdivision itself.[36]

An imaginative subdivision control device which offers large returns in the form of open space reservation is the planned unit development, including the much discussed cluster housing.[37] As a result of such a carefully planned development, a large open area can be retained for the common benefit of the entire development or subdivision;[38] and housing units are either grouped together in one section of the total tract or are built around the periphery of the common (shared) open area. This approach requires that certain standards applied to the more usual type of development be relaxed. Population to net lot area ratios; minimum lot sizes; floor and bulk space requirements; and front, side, and rear yard requirements based on the more usual lot envelope methods of subdividing, if strictly enforced, would negate the advantages of cluster development.

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[34] *In re Lake Secor Development Co., 252 N.Y.S. 809 141 misc. 413 (1931).*

[35] *Jordon v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965) and Mequon v. Lake Estates Co. 52 Wis. 2d 765, 190 N.W. 2d 912 (1971).*

[36] *Ayres v. Los Angeles, 34 Cal. 2d 31, 2-7 p. 2d 1 (1949).*

[37] *Section 62.23 (b) Wis. Stats., permits planned unit developments. Further description of their utility is found not only here in the main text but also supra Chapter VI, Notes 28 and 29 and accompanying test where the legal authority to create PUD's was discussed. See also Urban Land Institute Technical Bulletin, No. 50, October 1964.*

[38] *In some cases of cluster development, the open space reserved may be and often is dedicated to the municipality and then serves the entire community.*

This does not mean that overall population density requirements or that health, safety, or welfare standards need be abandoned. It does, however, require a certain flexibility and a willingness to consider a project area as a whole. The quid pro quo for the waiver of normal development requirements is the reservation by the planned unit developer of a major portion of the total tract for park, open space, and recreation use. Assurance that the area will be retained in this undeveloped condition is given in the form of an easement against development granted to the local unit of government. Assurance that the open space will be maintained is achieved through formation of a private homeowners' association and agreement. The provisions of Wisconsin State Section 236.293 provide a means of enforcement by the municipality if the reservation is accomplished by easement or covenant. If the reservation is accomplished by dedication, the municipality, of course, then owns the land and can improve and maintain it as necessary.

Planned unit residential developments that do not involve cluster housing often contemplate fewer departures from the existing zoning ordinance. House, lot size, and overall population density requirements are not usually altered.

The unique feature of planned unit developments, whether they involve clustering or not, is in the handling of the reserved open area. A property owners' association usually is formed with each lot owner in the control of the association. Thus, the open space remains private property, the common property of all of the owners of land in the development. The upkeep expense of the reserved open area is apportioned to each property owner and is usually collected on an annual basis. Quite often the association installs substantial improvements which then become part of the shared property; for example, swimming pools, tennis courts, golf courses, flower beds, walks, and bridle paths. In some instances, the association undertakes such tasks as garbage removal, water supply, and street maintenance. The planned unit development becomes a type of city within a city.[39] In some rural areas in fact, it has, been the forerunner to more substantial forms of local government.

The main difficulty with planned unit developments is enforcement of the covenants on the commonly held property. As long as the homeowners' association remains active, attracting capable people from within the development or receiving the continual support of the original developer, there is little difficulty. But once the association is left to disinterested parties, the common area, facilities, or services can begin to deteriorate. Appearance, maintenance, and upkeep may be neglected. When this happens, annual service assessments are difficult to collect; and this further hastens the deterioration. If this trend is not arrested by those interested homeowners within the development exercising their association or legal rights, it may become necessary for the municipal unit to assume the service burden or the maintenance and upkeep of the open space as a safety or health measure. The municipal unit granting a subdivision approval which contemplates the creation of a planned unit development should carefully scrutinize provisions regarding upkeep, enforcement, collection of assessments, voluntary disbanding of the association, and circumstances under which the municipality may acquire rights to maintain or acquire the common property. After a period of time, the large majority of homeowners in a planned unit development may be only too glad to dedicate the commonly held open space to the municipality. Provisions for accepting such a belated dedication should be clear in advance.[40]

Another means of preserving open space lacking the formality of cluster development or other planned unit development and lacking the official sanction of a public body as described in Lake George, New York, is the relatively simple device of private covenant. A number of homeowners may mutually agree to bind themselves in a manner that grants to each enforcement rights against the others. Covenants may establish setback screening, tree cutting, or any other open space preservation and maintenance provisions that are desired and mutually agreed upon. Many of these covenants appear either in a separate instrument of agreement, on the plat, or in the respective deeds of the covenanting parties; and notice is given by official recordation in the Register of Deeds Office. Generally, the covenants are made to run with the land; that is, it is intended that subsequent owners of the lots be bound by the covenants. These later owners take ownership with constructive "notice" because of the recordation. On the basis of this "notice" whether actual or presumed, the subsequent owners are bound. Again, enforcement, though provided for, is the major difficulty. A private party (one of the covenantees) may be dissatisfied with his neighbor's breach of the covenant, but he may not be willing to suc to enforce his rights under the covenant. In this manner, private restrictions tend to break down over time. Two approaches, neither of them completely satisfactory, are offered as a partial solution to this problem. The munic-

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[39] *CF. Wisconsin Law of Condominiums, sec. 707.06.*

[40] *A unique cooperative experiment in what might best be called a public-private planned unit development exists in New York in the Lake George area. Overlying county, town, and village governments which are still operative, an area extending one mile back from the high water mark of Lake George is established as the Lake George Park Commission. This body has a wide range of powers aimed in large part as preserving the amenity and natural characteristics of the area and at excluding almost all types of commercial activity. To achieve these ends, the Commission has a form of zoning power; and it may acquire property to prevent it from being used commercially. It relies to a large extent on voluntary agreements and private covenants to exclude commercial activity and to enhance and preserve the natural scenic beauty of the area. For a more complete understanding of this device, see Appendix B, which reproduces the pertinent sections (840-845) of New York State's Conservation Law.*

ipal body can be made a party to the covenant at the outset with specific enforcement rights or, as is done in Texas, state enabling legislation may authorize the municipal body to subsequently enforce the provisions of any restriction which is incorporated and made a part of any duly recorded plat, subdivision plan, or deed.[41] This latter approach may become a powerful and useful enforcement tool in areas where private covenants have been used extensively but are threatening to break down because of the difficulties of private litigation.

Another device for reserving open space which has been talked about considerably in legal and planning circles but which has not had much of an experimental trial is some form of compensated regulation.[42] The theory is that it offers some middle ground between costly fee or even less-than-fee (easement) purchases and the relative uncertainties of police power regulation. A scheme of compensated regulation would enable the public to more completely impose whatever controls were necessary to reserve a particular piece of open space. The controls could be tailored to the needs and proposed uses of the property and the desires envisioned by the public body. What might normally be called overreaching or a noncomprehensive application of a police power would be acceptable in a scheme of regulation because the private property owner is being recompensed for any loss of income he may suffer. One way in which the theory has been proposed to operate is as follows: The value of the particular tract is estimated before any controls are imposed. It is recognized that a certain reduction in value would be permissible under quite valid regulations so a margin, say the first 20 percent drop in value caused by the controls subsequently placed upon the land, would not be compensated. However, any decline in value resulting from the control greater than 20 percent of the originally estimated land value would be paid for by the public agency imposing the controls but only if there was a sale of the land or a clear indication that the existing owner can and does intend to change the use made of the land. Where existing uses continue unaffected and the land does not change hands, there is no loss to the original owner and thus no compensation need be paid. If the regulation causes a loss in property value greater than some predetermined percentage, say 80 percent, the public agency would be expected to buy the fee at the original appraised value. Between the range of 20 percent to 80 percent, these percentages being the decline in value caused by the regulations imposed upon the property, the public body stands ready to recompense the owner for any actual loss. Provisions can be built into such a scheme to take into account overall property value appreciations or depreciations that may be occurring in a particular area. The theoretical desirability of such a scheme of compensated regulation is that it offers a middle ground, something between normal police power regulation and taking by purchase. The open space can be reserved with more certainty and by a regulatory device admittedly stringent but designed to compensate the owner for any actual loss he suffers because of the stringency.[43]

As the need for open space reservation grows more acute, it seems certain that a device embodying the above principle will come into existence. The tools now at hand, even if used most fully and correctly, have certain inherent limitations. A scheme of compensated regulation has a necessary degree of flexibility, which once applied to the problems of open space reservation, will permit a much more varied and presumably a much more effective job to be done. In short, such a scheme enables more land to be more effectively controlled in the public interest.

SUMMARY

The reservation of open space has become more important in recent years for economic, sociological, and aesthetic reasons. At almost every level of government—federal, state, regional, and local—there are active programs underway bent on surveying, mapping, planning, acquiring, reserving, maintaining, and improving open space areas either in their natural condition or in a condition capable of being used as recreation areas. The inability to buy outright all of the land that might be desired has caused a great deal of reliance to be placed on regulation as a means of preserving open space. The number of regulatory tools available for such service is numerous and, if properly applied, can be very effective. Careful planning, the accumulation of factual data, and the wise application of the tool or tools most suited to the desired end must accompany any imposition of police power regulation. Zoning and subdivision controls undoubtedly will bear the brunt of the open space reservation burden. But such devices as setback, clustering, planned unit developments, private covenant, and, possibly in the near future, compensated regulation should not be overlooked as laternative means of saving and regulating land for the open space needs of the future.

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[41] *Vernon's Ann. Civ. St. of Texas, Art. 974 a-1 (1975).*

[42] *Strong, Controls and Incentives for Open Space, Univ. of Penn. Law School, November (1964). And see Note 4, Chapter 1, supra. And see the discussion on transfer of development right, supra, Chapter 1, Note 4.*

[43] *Budgeting for a program of compensated regulation in any political unit would have to proceed on the basis of experience. Clearly, the theoretical upper limit would be the appraised value at the beginning of the program of all the lands in the governmental unit desired to be held in an open category and to which the stringent regulations would attach. It is extremely unlikely, however, that this limit would ever be reached. In many instances, the decline in land value occasioned by even these stringent regulations would be minimal or, if not minimal, at least within the permitted range where only a portion of the fee value would need to be paid to the injured landowner as compensation. As in large scale easement purchase or condemnation proceedings, experience will soon indicate the annual cost of maintaining the program.*

Chapter XI

RESERVATION AND PROTECTION OF HIGHWAYS

INTRODUCTION

From the outset, it is important to note that public highways have had a significant effect on the development of the State and of the Southeastern Wisconsin Region in particular. The increasing reliance on highways by commercial and industrial enterprises as well as by the general citizenry of the Region is perhaps best evidenced by the fact that the number of vehicle miles of travel daily in the Region increased from 13.1 million in 1963 to 20.1 million in 1972.[1] As might be expected, the extensive use of highways has had a significant impact on land use in the Region. (see Maps 14 and 15 illustrating the arterial streets and highways of the Region.) It is because of these developments and their importance that this chapter will focus on: 1) regulatory controls to reserve land for highway widening and for future highway construction; 2) protection of the highway from interfering land uses located on abutting lands; and 3) legal devices to achieve scenic corridors along highways.

The legal basis for the reservation and protection of public highways, it should be emphasized, has a long history. As long ago as 1285 A.D., Edward the First of England and his Parliament restricted the use of land for 200 feet back from each side of market town roads to prevent highwaymen from lurking.[2] Very early English legislation required abutting owners to maintain ditches on their own lands to help drain the highway. If the highway became founderous, that is, so muddy as to be impassable, the highway user had a right to detour through privately owned roadside land even at the cost of breaking fences and traversing cultivated fields. And by statute highway supervisors had the right to enter private roadside lands to drain highways or trim foliage or to get materials for highway construction or maintenance without compensation. In 1835 the English Parliament, to prevent the frightening of horses on the highway, required that unscreened windmills, steam engines, and kilns be set back from the highways 50, 25, and 15 yards, respectively. Underlying these early controls was a notion that the presence of the public highway and the rights of public passage on it burdened abutting privately owned land, that the highway imposed a servitude on abutting land. This concept was imported into this country from England, along with most of the rest of the common law of England.

During the latter part of the nineteenth century, American courts evolved and tended to emphasize special rights rather than duties of abutters. Probably this was because of the kinds of issues presented to them by the cases which mirrored great urban growth. A transportation revolution with the development of streetcars and elevated railroads was taking place to accommodate the enormously increased flow of traffic. Abutters' rights often were emphasized in cases in which the courts were seeking to protect abutters against excessive or unnatural use of public streets. Because of these factors, American legal text writers often tended to overstate abutters' rights as absolutes. There were the right of access, the right to have light and air come to abutting land across the highway, the right to see and be seen from the highway, and the right to lateral support of abutting land during the construction of the highway. Actually, as Ross Netherton has stated:[3]

> As these (abutters') interests compete with those of the traveling public and the community in general, this doctrine (of abutters' rights) is interposed as a device to limit or modify the servitude of the roadside land to the highway.... It (the doctrine of abutters' rights) has yielded to new types of regulatory measures for the safety and efficiency of highway travel only when their need and public acceptance has been preponderantly demonstrated.

CONTROLS TO RESERVE LAND FOR FUTURE HIGHWAYS

In general, the alternatives by which land is reserved for future highways are purchase or regulation. Purchase might involve outright acquisition of the full fee simple, or it may involve a less-than-fee (temporary) interest designed merely to hold the land until money is available for purchase of the full fee simple. Regulation will typically involve the use of an official map, but other regulatory devices seem to offer some promise as well.

Purchase

The State Constitution requires that the taking of private property by eminent domain involve a "public use."[4] This does not bar the acquisition of land for a highway to be built perhaps years hence. But courts have tested the validity of such acquisitions by a realistic appraisal of how certain the eventual highway use

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[1] *SEWRPC Planning Report No. 25, A Regional Land Use Plan and Regional Transportation Plan for Southeastern Wisconsin—2000, Vol. 1, p. 380.*

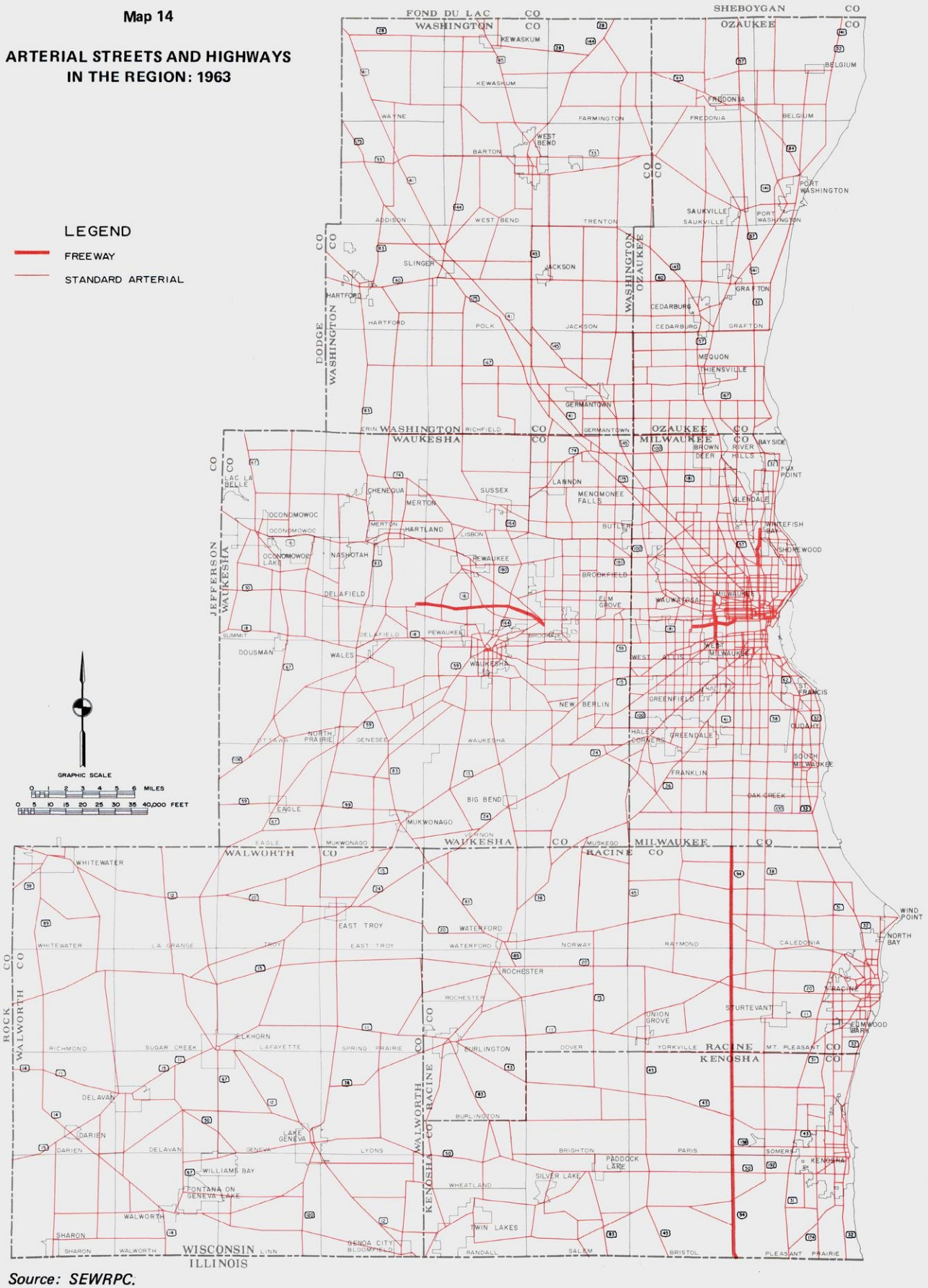
[2] *For more detailed treatment, see Beuscher, "Roadside Protection Through Nuisance and Property Law," Highway Research Board Bulletin 113 (1956), and Netherton, Control of Highway Access (1963), p. 11 et seq.*

[3] *Netherton, Control of Highway Access (1963), pp. 58-59.*

[4] *Art. I, sec. 13.*

Map 14

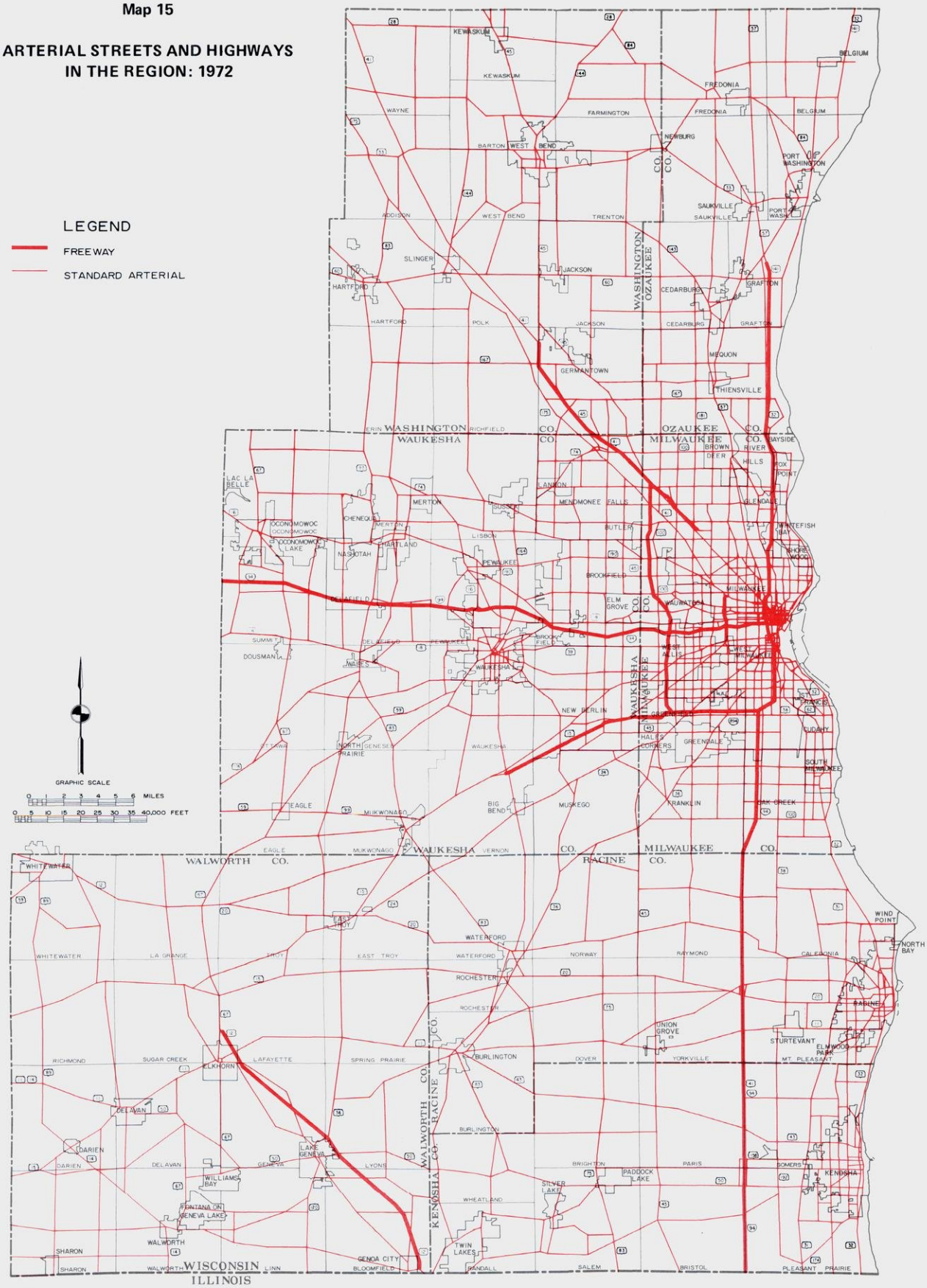
ARTERIAL STREETS AND HIGHWAYS IN THE REGION: 1963



Source: SEWRPC.

Map 15

ARTERIAL STREETS AND HIGHWAYS IN THE REGION: 1972



Source: SEWRPC.

is.[5] This raises an issue crucial to the entire discussion of reservation of rights-of-way whether by purchase or by regulation. Has the purchase or regulatory measure been preceded by sufficient highway planning to reasonably assure that a highway will probably be constructed at the particular location? The validity for purposes or regulation of a general statement alleging future need, unsupported by any definite implementing plan, is doubtful.[6] Courts insist on evidence of actual highway planning. State and local units of government have sometimes found themselves in legal difficulty where they have sought to lease land acquired well in advance of actual construction needs as a means of earning a return during the interim period between purchase and actual use.[7]

The Wisconsin Statutes authorize the State Highway Commission and/or local units of government to acquire land a substantial time ahead of actual highway construction if a plan or planning program indicates with some definiteness the need for particular parcels of land.[8] The latter makes actual construction more probable.

Reservation of Land for Future Highways by Police Power Action

Reservation of lands needed for future highways or highway widening may sometimes be accomplished by regulation without payment of compensation. In addition to the device of official mapping, zoning, subdivision control, and setback ordinances may be used with effect.

Zoning is more likely to be used in connection with the accomplishment of other major highway-related land use goals: for example, frontage control, interchange control, and scenic corridor protection. Nevertheless, the zoning tool could be adapted for highway reservation although as yet it is little used for this purpose. In this latter context, zoning appears to be a useful device where highway planning is not yet sufficiently refined to delimit precisely and accurately the centerline and right-of-way lines of a proposed highway. If planning indicates that the strip will ultimately lie somewhere within a wider corridor of land when such precise engineering has been completed, zoning of this wider strip might keep the land relatively free of buildings or other developments and thus make ultimate acquisition of the actual highway strip less costly.[9] Where zoning is used in this way, it is important to make clear through planning studies and otherwise (see Chapter VII) that there are legitimate community reasons justifying the control other than an attempt merely to force down the price of land ultimately needed for the highway. The Wisconsin Supreme Court has annulled zoning which had this as its sole motive.[10] Some of the reasons justifying zoning of the type suggested are: protection of persons who would otherwise build in the right-of-way from uncompensated losses, that is, inconvenience, sorrow, discomfort, and time lost in moving; in the case of commercial property, the good will losses which will result when highway construction begins and the activity is forced to move to a new location; and protection of the new highway itself so that, once definitely located, adjacent development can proceed in an orderly manner which will prevent the highway from becoming prematurely obsolete by excessive commercial or residential building in too close a proximity to the roadway.

The reservation of highway construction corridors zoning may be subject to attack on constitutional ground when a particular parcel of zoned land simply cannot be used to earn a fair return. To avoid invalidation on such grounds, the ordinance might provide that, if on an appeal to the zoning board of adjustment the landowner sustains the burden of showing that he cannot earn a fair return, then the zoning unit must buy either a temporary or permanent interest in the land within a reasonably short period of time, say 60 days. The ordinance also might provide that upon such a showing, the board of adjustment, instead of recommending purchase, may work out an agreement with the landowner authorizing for a specified period which will yield a fair return to the landowner. Should the particular parcel be needed for the highway, the purchase price would include both the land and the development; but presumably the cost of the latter would be kept as low as possible.[11]

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[5] *State v. O.62033 Acres of Land, 49 Del. 174 112 A. 2d 857 (1955); Port of Everett 486, 214 Pac. 1064 (1923).*

[6] *Netherton, Control of Highway Access (1963), p. 222. And see Mandelker and Waite, A Study of Future Acquisition and Reservation of Highway Rights-of-Way, U. S. Bureau of Public Roads (1963), p. 76 et seq.*

[7] *See Smith v. State Highway Commission, 185 Kan. 445, 346 P. 2d 259 (1959), and State v. Grissel, 265 Wis. 185, 60 N.W. 2d 873 (1953).*

[8] *Wis. Stats. 84.09 and 83.08 deal with the State Highway Commission and County Highway Committees, respectively; Wis. Stats. 62.22(4) (d) deals with cities; Wis. Stats. 61.36 deals with villages; and Wis. Stats. Chapter 81 deals with towns.*

[9] *The zone might be called a highway construction or a highway right-of-way zone. It might provide an alternative set of restrictions which become applicable when the precise location of the highway within the zone is fixed, and it might well provide for the removal of all restrictions if the highway is not built within a specified number of years.*

[10] *State ex rel. Tingley v. Gurda, 209 Wis. 63, 243 N.W. 317 (1932).*

[11] *See Mandelker and Waite, A Study of Future Acquisition and Reservation of Highway Rights-of-Way, U. S. Bureau of Public Roads (1963), pp. 50 et seq.*

As a condition to subdivision plat approval, dedication of widening strips along existing highways bordering on the subdivision may be required.[12] In addition, of course, the subdivider will be required to dedicate land needed for an internal street system within the subdivision.[13] In some cases, the bordering highway or an internal street may be or may become a major traffic artery. Far more land may then be demanded for street dedications than could reasonably be required for the additional traffic generated within or because of the subdivision. To require a subdivider as a condition of plat approval to make available all of the land needed for such an artery may be unreasonable and therefore unconstitutional. The Wisconsin Court has never had to address itself to such questions. Non-Wisconsin cases, however, demonstrate a judicial willingness to sustain fairly burdensome street dedication requirements. For example, in a Michigan case[14] the city's master plan marked a street bordering a proposed subdivision as a main throughfare ultimately to be widened from its then width of 66 feet to 120 feet. A requirement that the subdivider dedicate a 17-foot widening strip on his side of the street was upheld.[15] Again in a California case[16] involving a rather small 13-acre tract, the city required as a condition of plat approval dedications of 1) a triangle of land between two traffic arteries, 2) an 80-foot instead of the usual 60-foot strip for a street through the subdivision, 3) a 10-foot widening strip along a principal street along one side of the subdivision, and 4) a restrictive covenant over an additional 10 feet along that same side to bar access into the main artery. All of these were upheld. Nevertheless, there are limits set by criteria of fairness beyond which it is unsafe to go. A pair of Illinois cases suggest that a subdivider should not be made to dedicate land beyond the needs of his subdivision.[17]

The oldest and principal regulatory device for the advance reservation of needed street and highway rights-of-way is the official map.[18] There have been several comprehensive studies of this tool so that the analysis here may be brief.[19] The caveat previously stated that the reasons for the control should be more than merely to obtain needed highway rights-of-way at the lowest possible price applies as well to the official map. To the justifications previously listed in the discussion of right-of-way zoning may be added the practical reasons that effective official map controls facilitate proper street construction and an orderly pattern of streets without the discontinuity which can result where buildings too expensive to condemn are built in the proposed bed. Maximum traffic flow capacity also can be provided by a systematically designed street system.

As indicated in Chapter VI, enabling legislation for the mapping of streets and highways exists in Wisconsin at the state, county, city, and village levels. But, unfortunately, each of these delegations differs sharply from one another.

The mapping authority of the State Highway Commission is contained in Wis. Stats. 84.295(10). It applies only to freeways and expressways. A freeway is defined in the statutes as "a highway with full control of access and with all crossroads separated in grade from the pavements for through traffic."[20] An expressway is a divided arterial highway for through traffic with full or partial control of access and generally with grade separations at intersections.[21] Thus, only a portion of the state highways may be given the freeway or expressway designation by the State Highway Commission.

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[12] *See Wis. Stats. secs. 236.13(2) (a) and (2) (b); Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928); and Newton v. American Security Co., 201 Ark. 943, 148 S.W. 2d 311 (1941).*

[13] *Town of Windsor v. Whitney, 95 Conn. 357, 11 Atl. 354 (1920); Bleven v. City of Manchester, 103 N.H. 284, 170 A. 2d 121 (1961); Melli, Subdivision Control in Wisconsin, 1953 Wis. L. Rev. 389; and Beuscher, "Protection of Highways and Feeder Streets Through Subdivision Controls," Highway Research Board Bulletin 101 (1954); and Trends in Land Acquisition (1955).*

[14] *Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928).*

[15] *The plan commission originally demanded 27 feet but later reduced it to 17 feet.*

[16] *Ayres v. Los Angeles, 34 Cal. 2d 31, 207 P. 2d 1 (1949).*

[17] *Pioneer Trust and Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.W. 2d 799 (1961), and Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E. 230 (1940). The cases involved lot fees and land dedications for school purposes, not street dedications. Nevertheless, the principle stated applies. And in Zastrow v. Brown Deer, 9 Wis. 2d 100, 100 N.W. 2d 359 (1960), which involved a dedication of a water system to a municipality, the Wisconsin Court noted that a subdivider could be required to provide "public improvements (that were) reasonably necessary," at 108.*

[18] *See Kucirek and Beuscher, Wisconsin's Official Map Law, 1957 Wis. L. Rev. 195.*

[19] *Id., p. 176, and SEWRPC Planning Guide No. 2, Official Mapping Guide (1964).*

[20] *Wis. Stats. 990.01 (9a).*

[21] *Wis. Stats. 990.01 (7a)*

Accordingly, the state level mapping statute is of strictly limited geographic application. There is no mapping law for ordinary state trunk highways. Wis. Stats. 84.295 can, however, be used for relocations and proposed new construction on parts of the state trunk system which will be carrying the very highest traffic volume and in this sense is important.[22] It is also important as a possible first step toward a mapping law of wider application.

Under the freeway-expressway mapping statute, after notice and hearing, the State Highway Commission prepares a map and files it with the register of deeds of the county concerned. The map must show the location and the "approximate widths of the rights-of-way needed for the freeway or expressway." After this has been done, the State has, in effect, a first right of purchase before any structure is moved onto, erected upon, or improved in the mapped area. Upon receipt of a notice by registered mail from an owner of land in the mapped area that the owner desires to build in, or move a structure onto, the mapped land or desires to improve an already existing structure, the Commission has 60 days within which to decide to buy or not to buy the land. If the owner fails to give notice or to comply with the 60-day waiting period, then, when the right-of-way ultimately is acquired by the State, "no damages shall be allowed the landowner for any construction, alterations or additions...."[23]

As was pointed out in Chapter VII, Wisconsin counties have highway mapping powers under two statutes, Wis. Stats. 80.64 and 236.46. There is no need to repeat here what was said about each of these statutes in Chapter VII. Instead, the following summary points can be made:

1) Although successfully used by some counties, especially for the protection of widening strips, Wis. Stats. 80.64 is ambiguous on the vital question of whether or not it applies to lands located in towns or only to lands in incorporated municipalities. Previous reasoning in this report leads to the conclusion that towns were included; but until the question is finally resolved by either the Legislature or the courts, the ambiguity remains.

2) Wis. Stats. 80.64 contains no building permit requirements, nor does it indicate any sanction to be imposed upon the landowner who builds or alters a structure in the bed of a mapped widening strip or future street. Nevertheless, if the county exercises subdivision plat approval authority and especially if the county passes a subdivision control ordinance under Wis. Stats. 236.45 to bolster that authority, the subdivision and development of mapped beds can be prevented.

3) Wis. Stats. 236.46 clearly applies only to the unincorporated areas of the county. Again, no procedure for administration and no sanctions are specified. However, assuming that there is town board approval, a Wis. Stats. 236.46 map ordinance can also effectively bar the subdivision of mapped lands if the county exercises plat approval authority and especially if this authority is implemented by a specific county subdivision control ordinance enacted under the authority of Wis. Stats. 236.45.

4) Unlike the city-village law, neither of the two county mapping statutes contains any provision to take care of the hardship case in which the landowner finds that so substantial a part of his land has been mapped that he cannot earn a fair return and will be substantially damaged by placing his building outside the bed of the mapped street or highway.

Like the county mapping laws, Wis. Stats. 62.23(6) (which permits cities and villages and towns with village powers to map widening lines and future streets) was discussed in Chapter VII. It suffices here to make the following points about this statute:

1) Wis. Stats. 62.23(6) is broader in its coverage than the county laws in that it applies not only to streets and highways but also to parkways, parks, and playgrounds.

2) Wis. Stats. 62.23(6) does provide for a system of administration through use of building permits. As has been pointed out elsewhere, the general provisions of the statute should be supplemented by specifications in the local map ordinance indicating what information the applicant is to provide and the municipal official to whom the building permit application should be submitted.[24]

3) Wis. Stats. 62.23(6) seems to have been written on the assumption that all mapped land will be vacant and unoccupied by buildings at the time the map ordinance is adopted. In fact, it frequently happens, especially where widening lines are involved, that buildings are already on the mapped land. Neither the county mapping enabling laws nor Wis. Stats. 62.23(6) provide for this contingency.[25] Nevertheless, the local map ordinance would do well to provide for it.

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[22] *The statute, in fact, requires that, as a precondition to freeway or expressway designation, there must be a currently assignable traffic volume in excess of 4,000 vehicles per day. Wis. Stats. 84.295 (3).*

[23] *Wis. Stats. 84.295 (10) (b).*

[24] *See Kucirek and Beuscher, Wisconsin's Official Map Law, 1957 Wis. L. Rev. 176, 192.*

[25] *The state freeway and expressway law (Wis. Stats. 84.295(4)) does expressly provide for the contingency.*

4) The hardship (escape) provisions of Wis. Stats. 62.23(6) are more generous to the landowner than are the variance provisions of the zoning enabling act. This fact may suggest that, from the point of view of the municipality, the use of zoning power to establish setbacks or highway construction corridors is to be preferred over the use of the official map.[26]

Setback controls are more important as protectors of existing highways from interfering roadside uses than they are as devices to protect corridors for new highway construction. Nevertheless, they do play a role in the latter regard. When an existing highway proves too narrow for its traffic volume, the existence of adequate setbacks means that land on which to construct a widened highway can be obtained at bare land prices, at great savings of public funds.

Setback building lines can be established by: inclusion in zoning ordinances, widening lines established by official maps, building lines established in the process of subdividing either by voluntary action of the subdivider or because dedication of setback easements is made a precondition to plat approval, private conveyances containing restrictive covenants, the now virtually obsolete eminent domain purchase of setback easements, and setback easements, and setback ordinances under Wis. Stats. 80.64 and 62.23 (10) (11).

The latter device, the conventional setback ordinance, establishes a building line a specified distance back from the edge or centerline of an existing street. This has the effect of reserving a front yard against buildings or improvements. Designed as a planning tool for urban areas, the setback ordinance antedated zoning and typically was not premised upon a comprehensive plan. An early United States Supreme Court decision, Gorieb v. Fox,[27] upheld the constitutionality of a setback line.

In Wisconsin the case of Bouchard v. Zetley upheld the validity of an urban setback included in a zoning ordinance.[28]

Unfortunately, the Gorieb case cited only urban reasons for upholding the setback ordinance, reasons of light and air and prevention of overcrowding. But in many nonurban settings, highway safety is also a sound reason for upholding the reasonableness of setback ordinances. Lines of sight, prevention of distracting billboards or structures, exposure of private and public access roads so that they are more readily observed from the highway—these are all sound reasons of safety that can be urged. Nevertheless, some state courts have invalidated setbacks merely because they applied to open and undeveloped rural land.[29] The Wisconsin Court has been willing, however, to accept a setback as constitutional until clearly proven otherwise, under the familiar presumption of constitutionality.[30] Certainly the presumption can be overcome in some cases. For example, the setback may be so deep as to render an entire parcel of land virtually unusable.[31]

A setback ordinance is comparatively simple. It is easier to pass than is a more complicated zoning or official map ordinance. This probably explains its continued use in Wisconsin, particularly by unzoned counties.

PROTECTION OF EXISTING HIGHWAYS

The following are the major devices available to protect an existing highway from the suffocating effects of roadside uses: setback ordinances; zoning, which includes setback provisions; subdivision controls, including required service roads; lots turned away from busy highways to subdivision streets and restrictions on access from roadside lots; widening lines set by official maps; limited access controls administered by the State Highway Commission; and billboard controls.

A principal tool will be the setback, which has already been discussed in restricting abutting land to uses that generate little traffic and require only infrequent access to the highway. Under the Federal Highway Beautification Act of 1965, local zoning of lands along federal aid highways took on a new significance.[32] If the lands are zoned for commercial or industrial uses, the Secretary of Transportation is bound by this zoning; and the full requirements of that Act for the control of junkyards and billboards do not apply. If the land is zoned for noncommercial and nonindustrial uses, then junkyards and billboards must be prohibited. These things must be done on pain of having the state's federal highway

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[26] *See Kucirek and Beuscher, Wisconsin's Official Map Law, 1957 Wis. L. Rev. 176, 194.*

[27] *274 U.S. 603 (1927).*

[28] *196 Wis. 635, 220 N.W. 209 (1928).*

[29] *Schmalz v. Buckingham Township Zoning Board, 389 Pa. 295, 132 A. 2d 233 (1957). But see Householder v. Town of Grand Island, 114 N.Y.S. 2d 852 (Sup. Ct. 1951); aff'd. 305 N.W. 805, 113 N.E. 2d 555 (1953).*

[30] *Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W. 2d 85 (1959).*

[31] *Zampieri v. River Vale Township, 29 N.J. 599, 152 A. 2d 28 (1959); and Kipp v. Village of Ardsley, 205 N.Y.S. 2d 917 (Sup. Ct. 1960). Even though it might be wise to do so, a hardship escape clause like that provided in Wis. Stats. 62.23(6) usually is not included in a setback ordinance.*

[32] *23 USCA Sec. 131*

aids reduced by 10 percent. Compensation mostly from federal funds is to be paid for removal of junkyards or billboards.[33]

Wisconsin has developed state-level subdivision control for the protection of state trunk highways to a point beyond that of any other state. Since 1949 the statutes have required review by the State Highway Commission of plats for subdivisions which abut a state trunk highway or connecting streets.[34] The revision of the subdivision chapter in 1955 gave the State Highway Commission rule-making power, and pursuant to this power it has promulgated Chapter Hy 33 of the Wisconsin Administrative Code. Administered largely by the District Highway Engineers, these administrative regulations attempt to guard against developers that plat all but a strip along the state trunk highway. There is a flat requirement, "Subdivisions (which abut on state trunk highways) shall be so laid out that the individual lots or parcels do not require direct vehicular access to the highway." Dedication of land for frontage roads may be required. Also required is a minimum setback 110 feet from the centerline of the highway or 50 feet outside the nearest right-of-way line, whichever is greater.

These and other regulations in Hy 33 go a long way toward protecting state trunk highways from interfering uses on abutting lands. There are, however, two difficulties. First, the restrictions do not apply to nonstate trunk highways, no matter how busy they may be. Control of lands along such roads is left to local units and frequently this has meant, as a practical matter, little or no regulation.

Second, a great deal of land that does abut on state trunk highways escapes regulation. Wisconsin's definition of subdivision is not very restrictive. To have a subdivision, five or more parcels must be created within a five-year period. And each parcel must be an acre and a half or less in area. So-called metes and bounds divisions into less than five parcels or into parcels larger than an acre and a half escape regulation by the State Highway Commission.

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[33] *The Act also requires that the states provide for effective control of future erection of advertising and display signs as well. Pub. L. 93-643, Sec. 109(a) (1975) amended the Act to provide for the reduction in federal aid for those states not taking effective action to preclude advertising or display signs by Jan. 1, 1975, or the expiration of the next regular session of the State Legislature whichever is later.*

[34] *Chapter 138, Laws of 1949. References in the text to "Lands Abutting on State Trunk Highways are intended to include lands abutting on "connecting streets", that is, on streets in villages and cities which are a part of the state trunk system. And see Wis. Stats. secs. 236.12 (2) (a) and 236.13 (1) (e).*

Assume that a stretch of state trunk highway is not subject to controlled access regulation or to local controls over abutting lands. "A" owns land abutting on this highway. He sells off four metes and bounds parcels for a filling station, a drive-in ice cream vending stand, a TV outlet, and a drive-in restaurant. There is no way in the described circumstances that the State Highway Commission can prevent access, require frontage road dedications, or require adequate setback except by going into court to prove that these uses in the particular location constitute common law nuisances, a very difficult task.

"B" owns land on the same highway immediately south of the parcels sold by "A". "B" subdivides his land into 15 lots, each less than one and one half acres in area. Hy 33 applies. The control imposed upon him may mean, as a practical matter, that none of his land can be used for commercial purposes and that even so he may have to dedicate a substantial part of it for frontage road purposes.[35]

Of course, a local zoning or a local subdivision control ordinance could prevent such discrimination. But to enact the subdivision control ordinance, the county, town, village, or city would need to have an established planning agency.[36] The settling of widening lines by an official map ordinance can keep private uses back from the right-of-way line and thus protect the highway. Enough has already been said in Chapter VII and in a previous section of this chapter to make clear how this can be accomplished at the several levels of local government. The state's power to map land for freeways and expressways does not include any power to establish widening lines along existing highways, nor is this power granted by any other statute.

A control of great effect in protecting the highway from the choking effects of private uses is the limited-access control. Freeways are so constructed as to be fully controlled so far as concerns access; that is, there are no private driveway connections, and grade separations exist at all public road intersections. On other state trunk highways, there is only partial control of access so that, in addition to interchange connections with certain public roads, there may be some public road crossings at grade and some private driveway connections. Since 1949 the State Highway Commission in Wisconsin has had power under Wis. Stats. 84.25 to direct that certain highways be designated as limited access roads.[37] This is in effect limited state-level zoning

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[35] *For further discussion of the use of subdivision controls for highway protection, see Netherton, Control of Highway Access, (1963) and Beuscher, "Protection of Highways and Feeder Streets Through Subdivision Controls," Highway Research Board Bulletin 101 (1954).*

[36] *Wis. Stats. 236.45 (2).*

[37] *Such an order can be issued only after notice and a public hearing. Wis. Stats. 84.25 (1).*

along these roads because, if access directly onto the highway from abutting land is limited or restricted, commercial and other types of development are unlikely to occur except at points where frontage roads are built or at intersections with roads for which access is not controlled. There are a number of statutory limitations on the Commission's access control powers. The Commission's power can be used only for rural portions of the state trunk system; it has no access control powers over connecting streets in incorporated municipalities nor, of course, over highways which are not parts of the state trunk system. The Commission must find after traffic surveys that the average traffic potential is more than 2,000 vehicles per day. Copies of the Commission's findings and order must be recorded with the appropriate county clerk and register of deeds, and published as a class 1 notice.

In addition to statutory limitations on the Commission's access control powers, there are also, of course, constitutional limitations. Two situations should be noted in this respect. In the first, a highway is being built on a new location. Before land was acquired for it, the future road was declared by the Commission to be a limited access highway. When the land needed for the right-of-way was acquired, it was already subject to the access limitation. In this kind of a case, the Wisconsin Court and other courts have held that a landowner cannot claim that the regulation deprives him of property in the form of a right of access, because he never possessed such a right on the new highway.[38]

In the second situation, the access control order is attempting to change an existing highway from an uncontrolled to a limited access road. Here the case of Nick v. State Highway Commission is instructive.[39] The State Highway Commission declared existing Highway 30 to be a controlled-access highway. The order forbade direct access from a sizeable tract owned by one Reinders onto Highway 30. Instead, access from the Reinders tract was required to be onto Calhoun Road, which bordered it on one side, and thence onto Highway 30. Later Reinders sold part of his land to Mrs. Nick. This parcel was 990 feet east of Calhoun Road. Mrs. Nick's application to the Commission for a driveway permit from her land directly to Highway 30 was denied.[40] She then sued in "inverse" condemnation asking for eminent domain compensation. Her request was denied. The Court first held that the order as it operated when Reinders owned the entire tract was reasonable and, therefore, constitutional. Then the Court said: "It must be apparent that no right of compensation was created by fractional changes of ownership when no such right pertained to the ownership of the whole."

Mr. Justice Currie, in a concurring opinion, points to the fact that a conflict exists between states which say that any access control which extinguishes existing direct access rights of an abutting owner requires eminent domain compensation and those which, like Wisconsin, say that such compensation need not be paid if a reasonable alternative (though indirect) access exists. When a reasonable alternative access exists has been the subject of substantial litigation, which is summarized in the leading work on the subject.[41] Existence or nonexistence of an actual driveway at the time of the access order, the highest and best use of the affected land, whether the alternative access is a frontage road or some other means, whether the limited access road is principally a through rather than a local road—all of these variables have bearing upon the issue of reasonableness.[42]

State enabling legislation Wis. Stats. 83.027 permits county boards to designate up to 35 percent of the county trunk system as limited access highways. Those portions of the system so designated must have a traffic potential in excess of 1,000 vehicles per day. Designations within city or incorporated village limits must be concurred in by the governing body of that city or corporate village. In addition, requirements of notice, hearing, and filing of the designation order must be complied with. In almost all respects, county authority to control highway access is patterned after the previously discussed state highway access control authority, Wis. Stats 84.25.

The last highway protection control to be discussed is billboard regulation. Wis. Stats. 86.191 includes a general regulation of advertising signs located "within the highway" or "within a distance of 1,000 feet from the intersection of any two or more highways."

Provision for the removal of any signs so located is included, provided the signs in any way menace public safety. The only other state-level regulation of billboards in Wisconsin applies solely to lands along interstate system highways.[43] This statute enables the state to receive a bonus of one-half of 1 percent of its federal-aid interstate highway system allotment. The zone of regulation extends 660 feet out from

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[38] *Carazalla v. State, 269 Wis. 593 (1955) and State v. Burk, 200 Or. 211, 265 P. 2d 783 (1954). And see Covey, Highway Protection Through Control of Access and Roadside Development, 1959 Wis. L. Rev. 567.*

[39] *13 Wis. 2d 511, 109 N.W. 2d 71 (1961).*

[40] *Mrs. Nick was again unsuccessful in Nick v. State Highway Commission, 21 Wis. 2d 489, 124 N.W. 574 (1963).*

[41] *Netherton, Control of Highway Access (1963), 157 et seq.*

[42] *Stefan Auto Body Co. v. State Highway Commission, 21 Wis. 2d 363 (1963).*

[43] *Wis. Stats. 84.30.*

the edge of the interstate highway right-of-way. Exempt are signs advertising the sale or lease of the land on which they are located; signs advertising activities on the premises of land abutting the interstate highway; signs located in business areas; and directional and other official signs. All signs falling into one of these categories must meet the specific requirements as outlined in the statutes, s. 84.30(4), requirements which are administered by the Highway Commission.

Cities, villages, towns, and counties in Wisconsin undoubtedly have power to control billboards along highways and elsewhere through zoning under their respective enabling acts. Wis. Stats. 59.07(49) gives county boards power to adopt billboard control ordinances which would have effect on lands abutting highways maintained by the county. It seems likely that villages and cities have authority under their general charter powers to regulate billboards by separate billboard ordinances, whether the signs are along highways or elsewhere.

PROTECTION OF HIGHWAY SCENIC CORRIDORS

A highway scenic corridor has outer limits that are irregular. At one point the outer boundary may be close to the highway as in the case of a nearby cliff. At another point it may be far away from the highway as in the case of a distant view of a hilltop. How can the scenic values in such "undulating" corridors be preserved and protected? Much of what has been said in previous chapters is pertinent to the answer to that question.

Assume that the view to be preserved is that of a lake located a half mile from the highway. Involved might be the use of the power of eminent domain to purchase a turnout area so people can park to admire the view. Then, just outside the turnout area, it may be necessary to purchase an easement so as to authorize the governmental unit or agency which maintains the highway to go upon the adjacent private land and cut trees or shrubs to open the view. Beyond the easement area and all the way to the lakeshore, open-space or low-density zoning could be used to prevent erection of structures which will interfere with the view, architectural control of such structures as will be permitted would also be in order. An expensive alternative to such zoning is the purchase of a scenic easement over the entire tract all the way to the lake. The familiar but arbitrary 350-foot-wide scenic easement used along the Great River Road will probably not be adequate for the job. Development beyond the 350-foot line may ruin the view. Whether to use zoning or the easement device involves a policy decision and is not usually a legal issue. But it is important, once a policy has been established for a particular place, that it be followed in similar settings at other locations.

What is required is a total protection plan for an entire stretch of highway. The plan should specify the means of implementation at various points within and outside the highway right-of-way.

A principal problem, however, is the familiar one of dispersion of power among various levels of government and inadequate delegations of sufficient authority for the accomplishment of a total and integrated program of planning. Suppose the highway involved is a state trunk highway. The State Highway Commission has the power to purchase the turnout,[44] but its power to buy scenic easements may be limited to 1) land along the Great River Road and 2) land along certain other state trunk highways where easements are purchased under the Outdoor Recreation Program.[45] But it would have to rely upon local zoning if zoning were selected as a means of implementation. Lands involved might be located in more than one local unit. If, as is likely, the land is in an unincorporated town, approval of both the county and town boards would usually be necessary. But suppose the requisite zoning is enacted and that the State Highway Commission in reliance makes a substantial investment in the turnout and nearby easement. The Commission would have no legal assurance that the local zoning would hold; in spite of Commission protests, it could be changed at any time possible to permit destruction of the scenic values the Commission was seeking to preserve.

If landowners in the critical area banded together and by private covenants restricted the land in order to preserve the view, the State Highway Commission might be made beneficiary of the private covenants. Enforcement of such covenants may be very difficult, however. Enabling legislation of the New York Lake St. George type would help assure legal enforcement in those relatively rare cases in which landowners do so covenant.[46]

Where the highway is a part of a county highway system, limited purchase authority for the turnout area exists,[47] but power to buy the easement beyond

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[44] *Wis. Stats. 84.04 and 84.09.*

[45] *Wis. Stats. ss. 23.30, 84.04, and 84.09. And see Kamrowski v. State 31 Wis. 2d 56, 142 N.W. 2d 793 (1966).*

[46] *See Chapter X of this report.*

[47] *Wis. Statutes 83.07 (3). It is possible that counties have power to acquire such areas only in connection with highway relocation or straightening. See 83.07 (3). Section 80.39 does, however, authorize counties to widen highways, and a turnout might constitute such an authorized widening.*

is doubtful.[48] The county could zone the land between the road and the lake, but this zoning would not be in force until approved by a town board.

A town board probably lacks power to purchase the turnout even if the highway is a town road.[49] And it almost certainly lacks power to purchase an easement of the type contemplated. It could zone the land beyond, but only with county board approval.[50]

If the entire area—the highway, the view, and the land between—were located in a village or city, the general charter and specified powers of these incorporated units are probably such as to permit a unified implementation of the scenic preservation plan.

SUMMARY

Highways are the singly most important means of transportation in our society. As such, it becomes necessary to reserve land for future highway widening or for completely new rights-of-way and it is important to protect existing highways from the interference of abutting land uses. The creation or preservation of scenic highways also is a means of achieving our open-space, beautification, and amenity planning goals. To support these efforts, however, effective planning for transportation needs of our society must be undertaken to identify those area and land uses which will be affected by the reservation and regulatory programs. The justification for such reservation or regulation, as the case may be, will largely be on economic grounds, though safety factors are also important. New highway costs are very high. A large part of these costs are for land acquisition. It then becomes patently unwise to allow development in too close a proximity to the highway or near key interchanges so that the highway becomes congested and its traffic-carrying capacity or safety impaired. Proper planning in conjunction with the effective legal techniques will do much to minimize these costs.

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[48] *No statute authorizes counties or towns to buy scenic easements. Since these are not "home rule" general charger units, it is doubtful that they have the authority.*

[49] *Id.*

[50] *Wis. Stats. 60.74 (8) and (9).*

Chapter XII

DEVELOPMENT OF A COORDINATED URBAN MASS TRANSPORTATION SYSTEM

INTRODUCTION

This chapter centers its discussion on yet another aspect of transportation. It relates recent attempts to develop higher levels of mass transportation service as an alternative to the automobile.[1] But an immediate question the reader may ask after having read the previous chaapter, is why is there a perceived need for such a system. After all, as indicated in the foregoing chapter, society's present reliance on the automobile has been clearly documented. So why not build more highways that can adequately meet the additional demands of private vehicle use? As also indicated in the preceding chapter, and in earlier ones as well, the almost total reliance on the automobile has created some attendant problems. There has been a substantial conversion of valuable agricultural and open space lands to highways. There has been significant increases in air and noise pollution. Highway construction and maintenance have proven extremely costly. The cost of motor fuel may become prohibitive. Where high concentrations of trip origins and destinations exist, the use of the automobile may be inefficient requiring an excessive amount of highway and parking capacity.

More importantly perhaps—for the previously cited problems can be addressed and resolved—total reliance on the private automobile may deny certain people full participation in our society: the elderly, for example, and those individuals in low income households who cannot afford the resources to purchase an automobile. And yet, because of society's increasing reliance on the automobile, alternative modes of travel such as those supplied by mass transit have declined. This condition further hinders the mobility of those individuals who rely on public transportation and who can least afford a shift in transportation modes. SEWRPC estimates, for example, that scheduled total bus and seat mileage of service in the Region decreased from 85,000 miles and 3.4 million seat miles in 1963 to 64,000 miles and 3.3 million seat miles in 1972.[2]

Thus, a more balanced transportation system is vitally needed. Such a system can be developed which would consider and facilitate the provision of a variety of modes of travel. Included would be the one focused on here in this chapter—mass transportation in urban areas. However, it should be emphasized that the development of an efficient urban mass transportation system will have to rely extensively on sound planning and draw upon much of the preceding discussion for the land use regulatory techniques for implementing those plans. Furthermore, the planning and development of the system must go beyond mere functional and engineering considerations and realize the important role that transportation has in serving all segments of the population in providing easy access to centers of employment, adequate housing, and the amenities of life, including cultural activities and pleasant environmental settings.

FEDERAL ASSISTANCE: THE URBAN MASS TRANSPORTATION ADMINISTRATION PROGRAM

The United States Congress, recognizing many of the foregoing problems and the fact that the predominant part of the nation's population lives in urban areas, enacted into law the Urban Mass Transportation Act of 1964.[3] The threefold purpose underlying the Congressional enactment of the Act were:

1. To assist in the development of improved mass transportation facilities, equipment, techniques, and methods, with the cooperation of mass transportation companies both public and private.

2. To encourage the planning and establishment of areawide urban mass transportation systems needed for economical and desirable urban development with the cooperation of mass transportation companies both public and private.

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[1] *Mass transportation may be defined as the transportation of relatively large groups of people by relatively large, generally publicly or quasipublicly owned vehicles routed between or along significant concentrations of related trip origins and destinations; see SEWRPC Planning Report No. 25, A Regional Land Use Plan and A Regional Transportation Plan for Southeastern Wisconsin—2000, Volume I, p. 285.*

[2] *SEWRPC Planning Report No. 25, supra, note 1, at p. 308. Declines were experienced in the major cities of the Region: Kenosha, Racine, Waukesha, and Milwaukee. Another common problem associated with these facts is that, as more people turn to the automobile for transportation, a decrease in ridership of the mass transit system occurs. The result is a loss of revenue, which in turn creates higher fees for the remaining riders (who are usually those who can least afford it) and/or a reduction in service (again this unfairly burdens those who cannot afford an automobile). To compound the problem, the federal and state expenditures for highways act as a form of public subsidy which actually benefits only a certain segment of society—the regular users of automobiles.*

[3] *Public Law 88-365, 49 USC sec. 1601 et seq. In subsequent amendments to the Act, the amended sections were cited as the National Mass Transportation Assistance Act of 1974, P.L. 93-503. It was estimated in the recent amendments that 70 percent of the nation's population lived in urban areas.*

3. To provide assistance to state and local governments and their instrumentalities in financing such systems, to be generated by public or private mass transportation companies as determined by local needs.[4]

In order to implement these federal objectives, the U. S. Congress authorized the Secretary of Transportation to extend $10 billion on the Urban Mass Transportation Program through the 1970s. These funds in the form of grants and loans may be expended on personal property, including buses and other rolling stock, real property (but not public highways), and other facilities needed for a mass transportation system. Assistance in the form of grants also is provided for technical studies on mass transportation systems, for managerial training programs, and for research and training in urban transportation problems.[5] The federal share for any construction grant may be up to 80 percent of the cost of the project and 50 percent of the cost of operating a mass transit system.

In the dispersal of monies under this program, the U. S. Secretary of Transportation must act within certain prescribed limits mandated by Congress. The Secretary must ensure that due consideration has been given to possible adverse economic, social, and environmental effects relating to a proposed project.[6] Each project must be accompanied by an environmental impact statement which delineates the potentially adverse impacts of the proposed project and outlines other alternatives to the project.[7] Public hearings must be held on each proposed project with the views of all interested citizens being afforded adequate consideration. Upon reviewing the impact statements, the Secretary may approve only those projects which have no adverse environmental effects. Or, where the potential for detrimental effects exists, the project may be approved but it must be shown that there is no prudent alternative to the proposed project and all reasonable steps have been taken to mitigate the adverse effects.[8]

Under the Urban Mass Transportation Program, grants totaling $21.6 million for the fiscal year 1975 were committed to Wisconsin communities for various capital grants programs.[9] Of this total, over $17 million went to Milwaukee County to finance its acquisition of the Milwaukee and Suburban Transport Company and for the purchase of 100 new 53-passenger air conditioned buses.[10] In addition, the City of Racine received over $1.8 million. The City used the federal monies to purchase an existing transit company, to construct a new bus storage facility, and to purchase new passenger buses.[11]

Areawide Transportation Planning

The initial guidelines provided by Congress when it passed the 1962 Federal Aid Highway Act contained a requirement that a comprehensive, long-range transportation planning process be initiated in every urban area of the United States.[12] As a condition to the receipt of federal assistance for the improvement and operation of highway and, later, transit facilities, federal rules and regulations have required for over a decade that each urbanized area carry on a continuing, cooperative, comprehensive transportation planning process.[13] On September 17, 1975, the U. S. Department of Transportation published in the Federal Register new rules and regulations governing the conduct of urban transportation planning for the urbanized areas of the United States. The new federal

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[4] *49 USCA sec. 1601(b).*

[5] *49 USCA sec. 1602(a)(1). There are certain exceptions to the expending of the federal monies, such as no grant or loan funds may be used for ordinary governmental or nonprofit operating expenses, nor may any funds be used to support procurements utilizing exclusionary or discriminatory specifications, id. Also, no federal assistance will be provided for acquiring private mass transportation companies unless the Secretary finds that such assistance is vital to a coordinated urban transportation system and unless there has been a good effort to include participation of private mass transportation companies. Furthermore, no federal assistance will be granted for buses unless the applicant agrees not to engage in charter bus operations outside the urban area, unless otherwise stipulated by the Secretary. Nor will assistance be provided for school bus operations that transport students and school personnel in competition with private school bus operators unless private school bus operators are unable to provide adequate transportation at reasonable rates and in conformance with applicable safety standards, id. secs. 1602(e)(f)(g) and 1602(b).*

[6] *49 USCA sec. 1604(h)(1). Specifically the Secretary in reviewing applications must ascertain whether consideration has been given to costs of eliminating or minimizing such adverse effects, including "a) air, noise, and water pollution; b) destruction or disruption of manmade and natural resources, aesthetic values, community cohesion, and the availability of public facilities and services; c) adverse employment effects, and tax and property value losses; d) injurious displacement of people, businesses, and farms; and e) disruption of desirable community and regional growth."*

[7] *49 USCA sec. 1610(b).*

[8] *49 USCA sec. 1610(c).*

[9] *Wisconsin Urban Transit Trends, a publication of the Wisconsin Department of Transportation, Division of Planning, No. 34, August 1975.*

[10] *This purchase occurred on July 1, 1975. Part of this money also was used for the purchase of 105 two-way radios. The local share to match this federal assistance grant was over $4.25 million, or 20 percent of the net project cost, id.*

[11] *The City of Racine's local share of the net project cost was approximately $450,000, or 20 percent of the cost of the project.*

[12] *23 USCA sec. 134.*

[13] *Id.*

rules and regulations basically require that the urban transportation planning process develop an areawide transportation plan which consists of two elements: the traditional long-range element and a new short-range transportation systems management (TSM) element. These two elements are to be implemented by an areawide transportation improvement program (TIP).[14] The long-range transportation plan element prepared by the Commission geographically includes the entire seven-county Southeastern Wisconsin Region. TSM and TIP plan elements are to be prepared separately for the three urbanized areas of the Region—Milwaukee, Racine, and Kenosha. Three technical and intergovernmental coordinating and advisory committees were created for the Milwaukee, Racine, and Kenosha short-range urban transportation planning and transportation improvement program areas. The long-range planning effort will be under the direction of the Regionwide Technical Coordinating and Advisory Committee on Regional Land Use-Transportation Planning.

Long-Range Element: The long-range element of the transportation plan is intended to provide for the long-term transportation needs of the urban area, including mass transit considerations, and is to identify new transportation facilities and major changes in existing facilities required to meet those needs by location and mode. The long-range element is thus intended to emphasize major capital investment projects required for the sound resolution of areawide transportation problems. The required transportation plan prepared and adopted by the Commission in 1966 and currently being revised provides that element, integrating it, as required by federal regulations, into the comprehensive regional development plan and into the overall social, economic, environmental, and physical development of the area.

Short-Range Transportation Systems Management Element: The TSM element is intended to comprise a new short-range element of the areawide transportation plan. The TSM element, together with the long-range plan element, will provide the basis for the preparation of the transportation improvement program including the annual element thereof. The objective of the TSM element is to make more efficient use of the highway and transit systems already in place through minor capital investment projects or new policy initiatives and thus reduce or postpone the need for new major capital investment in transportation facilities. The short-range TSM element is intended to emphasize such relatively low capital investment solutions to transportation problems as traffic engineering, transportation pricing, management, and operation. The newly adopted federal rules and regulations specify four major categories of actions which should be considered in the preparation of the transportation systems management element of the areawide transportation plan:

1) Actions to ensure the efficient use of existing road space;

2) Actions to reduce vehicle use in congested areas;

3) Actions to improve transit service; and

4) Actions to increase internal transit management efficiency.

Transportation Improvement Program: The TIP element is intended to be a staged multiyear program of projects designed to implement both the long-range and short-range (TSM) elements of the areawide transportation plan. The program is intended to cover a period of from three to five years, and is to include the transportation improvements recommended for implementation during the program period. The TIP will indicate the areawide priorities of those improvements; summarize the estimated costs and revenues associated with the improvements; and describe how the recommended improvements relate to both the long- and short-range elements of the areawide plan. The program must include an annual element for the ensuring year consisting of a list of transportation improvement projects proposed for implementation in that year. The program must be updated annually so that it always consists of at least a two- to four-year period beyond the annual element.

STATE INVOLVEMENT WITH MASS TRANSIT EFFORTS

The State of Wisconsin also has made an effort to encourage the development and improvement of public mass transportation systems. The Wisconsin Legislature under Section 84.01 Wis. Stats. has authorized the State Highway Commission to expend state funds on such facilities as "exclusive or preferential bus lanes, highway control devices, bus passenger loading areas, and terminal facilities, including shelters and fringe and corridor parking facilities to serve bus and other public mass transportation passengers."[15]

Elsewhere in the Statutes authority is granted to the Wisconsin Department of Transportation to make and execute contracts that would permit the reduction or stabilization of public transit fares.[16] This provision was made in part to bolster the deficit-plagued public mass transit systems of the State. In addition, the Legislature has authorized the Wisconsin Department of Transportation to engage in mass transit planning and demonstration projects.[17] Under this authority, planning and project grants may be given up to 100 percent of the cost for undertaking such efforts. The law requires that such projects and planning be designed to reduce urban vehicular travel and highway and parking facility requirements while meeting comprehensive transportation needs.

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[14] *23 USCA sec. 450 and 45 USCA sec. 613.*

[15] *And see, sec. 84.03(3) Wis. Stats.*

[16] *Sec. 85.05 Wis. Stats. For the 1975-1977 biennium budget, the State Legislature appropriated $6,478,800 for operating assistance, source supra, note 10.*

[17] *Sec. 85.06 Wis. Stats. For the 1975-1977 biennium budget, the State Legislature appropriated $382,300 for demonstration grants; id.*

SUMMARY

Transportation has and will continue to have a significant effect on the life styles of the residents of southeastern Wisconsin. Planning for the transportation needs of this population must, however, go beyond the consideration of merely moving automobiles from one point to another. It must consider the present and long-range effects on the environment, job centers, residential patterns, and, in particular, the needs of those who cannot afford their own private vehicles. Recently, there has been some evidence of a growing commitment by government to plan and develop comprehensive transportation systems. Wisconsin's appropriation for the recent budget is indicative of this commitment as are the federal grants for mass transit facilities which have specific conditions to stimulate comprehensive long-range transportation at the state, regional, and local levels of government. And while the state monies and the $10 billion that Congress has authorized for development of improved mass transit facilities over the next several years are seemingly large sums, the problem is of such a magnitude that these funds can represent only a beginning. Further efforts are vitally needed from all levels of government if alternative modes of transportation are to be developed and maintained. Nothing short of strong governmental involvement can reorder priorities away from the increasingly heavy reliance on the automobile and the problems that result from relying on a single mode of transportation.

Part Five

CURRENT PROBLEMS ASSOCIATED WITH LAND USE PLANNING AND DECISIONMAKING

The focus of Part Five of this report will be problems which have resulted from abuse of local planning authorities and will include recommendations for coordinating land use planning and growth management strategies at the local, regional, and state levels. Chapter XIII provides an analysis of discrimination in residential development on the basis of wealth. Residential exclusion on the basis of wealth sweeps more broadly than those exclusions based on race, ethnicity, or creed. The mechanisms of exclusion are of an economic nature and affect many individuals and families occupying the lower economic strata. Recent judicial developments address the issue of local government's right to regulate the use of land in furtherance of the health, safety, or general welfare of its residents in opposition to fundamental individual rights and growing regional problems. Chapter XIV provides a summary of the preceding material contained in this report. In addition, an analysis is presented of the problem of uncoordinated local, regional, and state planning authority. Three major problems are identified as follows: Local governments do not engage in planning for future growth but rather react to individual development pressures; much planning that does take place is done with a narrow objective in mind; and, if comprehensive planning is undertaken by local government, it is limited to that government's jurisdiction and does not consider other closely and similarly situated jurisdictions. A series of recommendations for overcoming the problems caused by lack of coordinated planning also is presented.

Chapter XIII

EXCLUSIONARY PRACTICES IN RESIDENTIAL DEVELOPMENT: DISCRIMINATION ON THE BASIS OF WEALTH

INTRODUCTION: THE BROAD SETTING

For centuries this country has suffered with land use development that has been mislocated, ill timed, and ill designed. Wisconsin and the Southeastern Wisconsin Region have not missed the adverse effects of these developments. It was because of these occurrences and their detrimental effects to the general health, safety, and welfare of the public that laws were enacted to regulate new growth and attempt to interject some reason to its progression. This report has been devoted in large part to delineating this legal authority which provides some basis for achieving development that is wisely conceived. However, this legal authority, as any such grant of power, is subject to misuse, either intentionally or unintentionally. Clearly, that has been the case with the topic of this chapter—residential exclusionary practices based on wealth. Some background on this point might be helpful.

While there are numerous objectives of exclusionary practices, the discussion in this chapter will be concerned with residential segregation on the basis of wealth.[1] Generally, such practices have a disproportionate effect on minority groups which tend to form a larger segment of the lower income levels. However, the impact of residential exclusionary policies on the basis of wealth also affects vast numbers of individuals who are not members of a minority group but who lack affluence. Thus, this focus is more inclusive of the number of people affected, but it recognizes that the exclusionary practices often have as one of their key but unstated objectives, the prohibition of minority groups from certain communities.[2]

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[1] *Historically some successful attempts at exclusion also have involved the prohibition of certain groups based on race, creed, and national origin.*

[2] *It might also be noted that in many parts of the United States exclusionary practices have been implemented by local governments prohibiting population growth entirely or at least to slow its pace. However, a more serious problem in the Southeastern Wisconsin Region is not the placing of finite limits on population growth but barriers erected on the basis of income. Although the two, of course, can be and often are interrelated, the exclusionary practices in the Region do not prohibit growth per se.*

In addition, one might consider the fact that a particular land mass may only be capable of sustaining a certain number of individuals because of soil type, water supply, and other natural resource related limitations. In that situation, then, population limits may well be necessary but exclusionary policies may still be enforced by ensuring for example that only the wealthy can get in (including wealthy minority members). It is the premise here that in some instances the former exclusionary practice based on unique natural resource limitations may well be justified while the latter exclusion on the basis of wealth is not.

The techniques used to promote policies of exclusion actually represent a cross section of a number of the police powers available to local units of government. These might include the authority to zone lands for different uses, subdivision controls, building code ordinances, and taxing powers (e.g. property taxes). But whether these powers are used separately or in conjunction with one another they can implement public policies which have extremely adverse effects upon certain segments of society. The unwillingness to provide adequate housing for all income levels has after all much wider social significance than merely denying shelter to someone. Involved are the needs of all people to have a pleasant environment, one which has adequate open space and recreational facilities, the provision of municipal facilities on an equal basis, the ensurance of quality education, and the availability of viable employment. All of these factors and many more are dramatically affected by the approximate location of an individual's residence. To deny the opportunity to certain segments of society to share equally in the environmental, education, and economic necessities of life on the basis of wealth carries with it all the costs attendant on a segregated society.

Recognition of this problem actually is not that recent as evidenced by some leading commentary.[3] But what has inflamed the issue to new heights in recent years is the increasing movement on the part of many communities which ring the large urban centers of the nation to enforce public policies which attempt to inhibit or prohibit growth, at least certain kinds.[4] Consequently, a great debate within legal and planning circles has surfaced on whether local governments may shut the door on these growth pressures and more significantly close off a viable range of housing for all income levels.[5]

If the issue raised here was merely whether a given community could exclude specific groups from living within its boundaries on the basis of wealth, it could perhaps be more easily resolved, legally or otherwise. But arrayed against the challenge to exclusionary practices are many legitimate goals being pursued by local interests. Many of these goals have been discussed earlier in this report, such as the preservation of open space, a community's "timing" of development over an extended period of time to prevent heavy burdens on its fiscal resources, or the desire to maintain property taxes at a reasonable level.

Further confusing the problem is the fact that the shortage of low and moderate income housing is often an areawide or regional problem and not just the concern of one or two communities. And yet many local governments (where the major land use decisions are made) continue to ignore this fact, reinforcing and worsening the situation. The result is a conflict between the advancements of several interests all ostensibly seeking to promote the general welfare.

With the above as a broad setting, the following sections of this chapter will deal with the emerging trends in residential exclusionary practices; an analyses of some of the recent legal developments over this issue; and, finally, the remainder of the chapter will posit some alternatives for resolving the problem in southeastern Wisconsin.

EMERGING PATTERNS OF SANCTIONING RESIDENTIAL DEVELOPMENT ON THE BASIS OF WEALTH IN SOUTHEASTERN WISCONSIN

Three of the largest and oldest cities of Wisconsin—Milwaukee, Kenosha, and Racine—are located in its southeastern Region. As with most of the metropolitan areas in the United States, however, the more recent and significant trends in population growth and development are occurring in the outer suburban and rural areas which surround these established urban centers (see Map 16).

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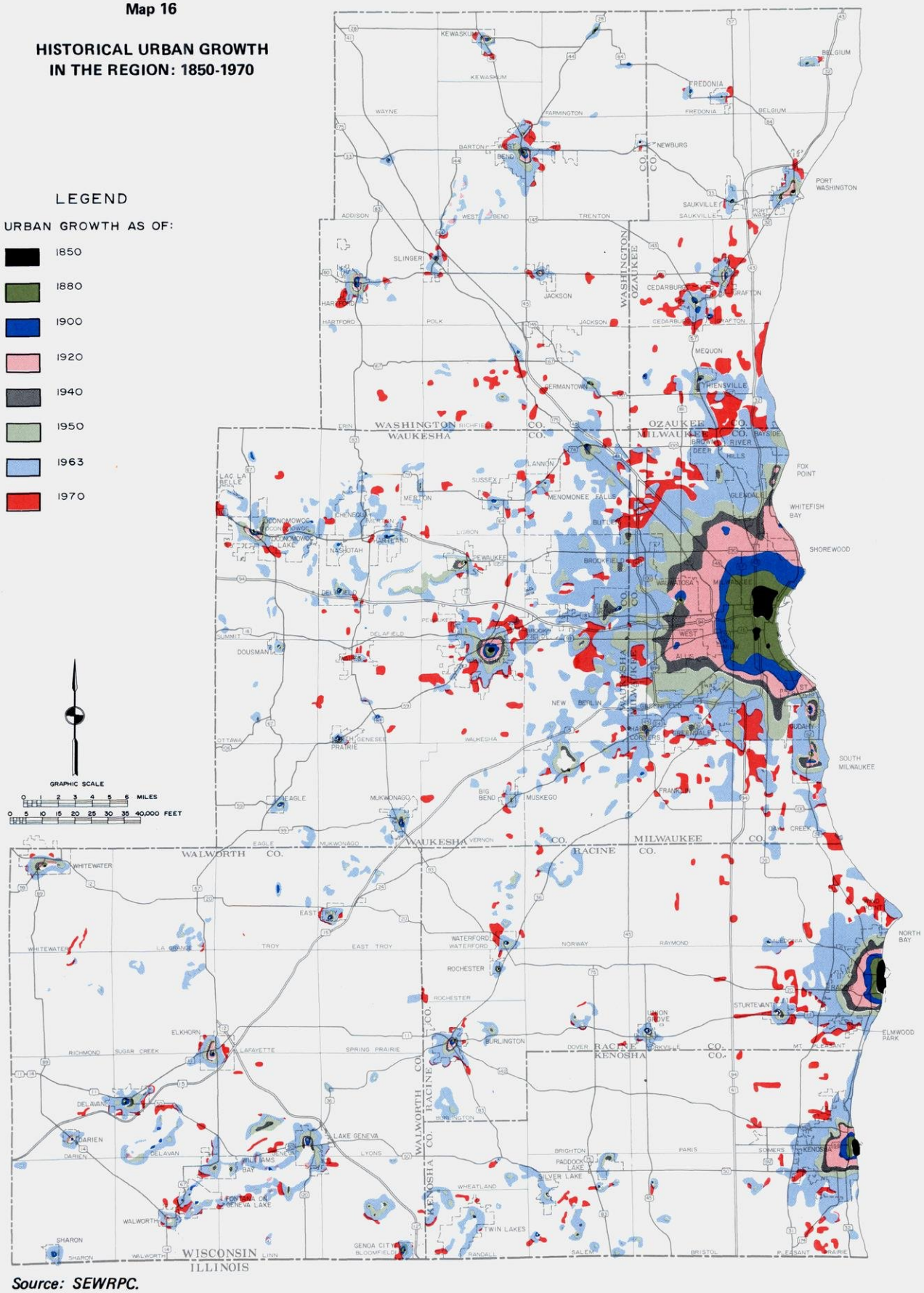
[3] *See Harr, Zoning for Minimum Standards: The Wayne Township Case, 66 Harv. L. Rev. 1051 (1953) in which the author criticizes the isolationist view which the New Jersey court upheld in this case. And Harr, Wayne Township: Zoning for Whom?—In Brief Reply, 67 Harv. L. Rev. 986 (1954). Or see the dissent of Justice Hall in Vickers v. Township Committee of Gloucester Township, 181 A. 2d 129, 140 (1962) cert. den. 371 U.S. 233 (1963), against exclusionary practices. Justice Hall was later vindicated in the now famous case of So. Burlington City NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A. 2d 713 (1975), which will be discussed infra, notes 38-42. And see also Williams & Wacks, Segregation of Residential Areas Along Economic Lines: Lionshead Revisited, 1969 Wis. L. Rev. 827, which is a follow-up study involving the same opinion which Harr criticizes above. They state: "The present system of land use control (in Wayne Township) tends to subsidize anti-social conduct by local governments; it actually puts a premium on kicking the poor around," at p. 829.*

[4] *The phenomenon of excluding certain peoples from a given locale is of course not new for, prior to the large scale use of the governmental police powers, it was being successfully achieved through such mechanisms as restrictive deeds or covenants.*

[5] *For comments on the recent controversy, see a three-volume work published by the Urban Land Institute which deals extensively with this issue, entitled Management and Control of Growth (1975). Within this publication, there is a short but excellent analysis of land use controls which effectively exclude certain individuals or groups from a particular community. The analysis explores certain constitutional challenges to these practices. The paper is written by Babcock and Bosselman, "Land Use Controls: History and Legal Status," Vol. 1, pp. 196-210. Also within the same publication, see Scott's article, "Exclusion and Land Use: A Comment and a Research Bibliography," Vol. 1, at pp. 445-464. Another book which deals with the issue is Burchell and Listokin's, Future Land Use (1975), Rutgers, the State University of New Jersey, which is also a compilation of papers by leading commentators. The reader might also see, SEWRPC Newsletter Vol. 15, No. 4, Cutler and Baxter, "Highlights of the No Growth/Slow Growth Movement."*

Map 16

HISTORICAL URBAN GROWTH IN THE REGION: 1850-1970



Source: SEWRPC.

In the Southeastern Wisconsin Region another familiar pattern, also common to many large metropolitan areas of the United States, has been occurring. The newer suburban and rural communities often seek to limit development to large spacious lots with expensive homes. The effects of such limitations are many. One is to foreclose the local community to those individuals who comprise the lower and moderate levels of the economic spectrum and who in turn are disproportionately made up of the elderly and the minorities. A second is that the older and larger cities of the Region are left with increasing numbers of individuals who are in need of adequate housing and other fundamental services. Yet these older cities are finding it increasingly hard to deal with those basic needs given a shrinking tax base, which has been caused in large part by the outmigration into the suburbs and rural areas of middle and upper middle income families along with many commercial enterprises.

THE PROBLEM SYNTHESIZED

A primary vehicle with which these newer enclaves of wealth have shielded themselves from low and moderate households has been the police powers. Of those powers, zoning for low-density development, i.e., —large lots, the exclusion of multifamily housing units, and inflated minimum footage requirements for residences—have combined to foreclose adequate housing for a large number of individuals. Assuming that the current trend of economic growth continues to shift more jobs to the outlying areas, these same individuals, who make up the lower and moderate levels of the income spectrum, will be denied the opportunity to share in this as well. Moreover, other socioeconomic problems currently plaguing the larger metropolitan areas of the State can expect to mount. Some of these are: the inability to provide health care facilities; inadequate schools and transportation systems; the loss of important job centers; and the likely result that cities, whose economic vitality is being drained, will be unable to provide quality services overall while demands for the services are increasing.[6]

Finally, as indicated in the introduction of this chapter, balanced against these immediate problems of the low and moderate income households are the legitimate goals of local governments. These goals are attempting, in the face of extensive developmental pressures, to effectively shape the new growth according to local demands. The question, then, becomes: may local government proceed towards promoting its own local objectives without also addressing regional problems and concerns associated with the low and moderate income households?

This, then, is the nexus of the problem currently facing the Southeastern Wisconsin Region and its various units of government, and it may become a legal one. Some communities have already made valiant efforts to ameliorate these problems and conflicts, while others perpetuate it, either intentionally or unintentionally, by excluding low and moderate income groups altogether. At the present time neither the Wisconsin Legislature nor the Supreme Court of Wisconsin has addressed this issue on point. So what will follow is a discussion of other jurisdictions' attempts to deal with the problem—or not to, as the case may be. The only element which is certain in the following discourse is the split among the various jurisdictions on how best to handle the matter.

The reader should be cautioned also on the fact that, in the following analysis, many of the judicial decisions involving exclusionary practices were handed down by courts whose legal precedents need not have any bearing on Wisconsin law. However, much of the reasoning which underpins those decisions could have great influence on the Wisconsin Legislature and/or Supreme Court in attempting to resolve the conflict between exclusionary practices and local governments' efforts to control and shape community development. It is with that possibility that the next section proceeds.

RECENT CASE LAW DEVELOPMENTS PERTAINING TO EXCLUSIONARY PRACTICES: THE SPLIT AMONG JURISDICTIONS

Within the past several years, a number of communities throughout the United States have attempted to manage or limit their growth through a variety of methods. The majority continue to rely most heavily upon their police powers to accomplish these goals rather than pursuing what usually are the more costly alternatives of outright purchase and public ownership, easements, or leaseback arrangements. As the number of these communities attempting to limit their growth and the composition of that growth increases, the amount of litigation has risen correspondingly. The legal issues being framed in these actions often concentrate on various fundamental rights of individuals and regional problems versus a community's delegated right under the state's police power to regulate the use of land in furtherance of the health, safety, or general welfare of its residents. Thus, the conflicts resemble in many respects the emerging problems as posed above for southeastern Wisconsin. The judicial opinions among the various jurisdictions, however, have been anything but consistent in addressing these issues. Taking cognizance of that fact, an analysis of some of the leading cases is provided to further illustrate the basic issues involved and to show the current split among the judiciary in the disposition of these problems.

Jurisdictions in Which Exclusionary Practices Are Struck Down: A Recognition of Regional Needs by the Courts

The Supreme Court of the State of Pennsylvania was one of the forerunners in the country at carefully scrutinizing local governments' erection of legal barriers to newcomers. In National Land and Investment Co. v. Board of Adjustment of Eastown TWSP, the Court struck down a zoning ordinance that required a minimum of four acres per building lot in certain residential districts of the township.[7] The Court found the township's zoning

[6] *And see infra note 81 and accompanying text for the findings of the Wisconsin State Legislature on this matter.*

[7] *419 Pa. 504, 215 A. 2d 597 (1965).*

ordinance was attempting to limit growth for the express purpose of avoiding "future burdens, economic and otherwise" and, therefore, was exclusionary and not in furtherance of the general welfare.[8]

More recently, the Pennsylvania Court was again confronted with the problem of a community's unwillingness to accept population growth and the problems attendant to it in Appeal of Kit-Mar Builders' Inc.[9] There the community's technique of zoning for large lots (two and three acres) had the effect of maintaining present population levels, and the Court would not countenance such an objective on a communitywide basis.[10] Of particular importance in this opinion was the Supreme Court's ruling that local governments could not cordon themselves off from the existence of regional or areawide problems. In clarifying this issue, the Court stated:

> Planning considerations and other interests can justify reasonably varying minimum lot sizes in given areas of a community . . . (But) the implication of our decision in National Land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines while disregarding the interests of the entire area.[11]

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[8] *Id., 215 A. 2d at 612.*

[9] *439 Pa. 466, 268 A. 2d 765 (1970).*

[10] *In this opinion the Court did not expressly state another ramification of large lot zoning which it would in subsequent opinions; that is, the few individuals who could get into the community would be those who could afford the larger expense of the increased lot size. See notes 11-15 infra and text.*

[11] *Supra note 9, 215 A. 2d at 766, 768, 796. This emphasis on a regional perspective could also be found in another case decided in the same year as Kit-Mar. In that case, Appeal of Girsh, 437 Pa. 237, 263 A. 2d 395 (1970), a township's zoning restricted the construction of apartment or multifamily dwellings. Failing to provide for this type of dwelling obviously precluded a number of individuals who could not afford single family detached houses or who did not wish to make that type of investment and the Court therefore found the restriction to be unreasonable and therefore unconstitutional. Moreover, the Court stated that "a restriction does not become any the more reasonable because once in a while a developer may be able to show the hardship necessary to sustain a petition for a variance," id. at 263 A. 2d 397. It also was emphasized that the question involved was not whether the township must zone all of its land for apartments but whether the township could preclude them entirely, id.*

Similarly in Township of Williston v. Chesterdale Farms, Inc., the Pennsylvania Supreme Court again reviewed the exclusionary policies of a community.[12] In that case a private corporation had requested a building permit to construct apartments within the Township. That request was denied on the grounds that the land in question was zoned RA-1 Residential which did not permit apartments. But the Court, taking notice of the fact that of 11,589 acres in the Township only 80 acres were zoned for apartment construction, concluded that the Township zoning ordinance was exclusionary and did not provide an adequate amount of land for apartments. In addition, the Court noted that while these types of regulatory devices were not totally exclusionary to newcomers, they did have the effect of "selective admission." Or, in other words, they screened out individuals and families who could not afford or who did not wish to live in single family homes.[13] What was needed instead, the Court emphasized, was an affirmative program by the Township that provided a variety and choice of housing for all income levels and which would satisfy an equitable share of the regional or metropolitan areas' needs for housing.[14] Having found this need to exist and the Township of Williston's ordinance lacking in this respect, the Court went on to declare the ordinance unconstitutional and ordered that a permit be issued to construct the apartment dwellings.[15]

New Jersey Responds to the External Costs of Exclusionary Zoning

In 1975 the landmark decision of So. Burlington City N.A.A.C.P. v. Township of Mt. Laurel was handed down by the New Jersey Supreme Court.[16] The case involved a constitutional attack on Mt. Laurel's policy of maintaining a low-density development. The Township's objectives in employing the various restrictive measures was to encourage only those land uses which would be beneficial to the local tax rate. To effectuate those

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[12] *462 Pa. 445, 341 A. 2d 466 (1975).*

[13] *Id. at 468.*

[14] *In this portion of the opinion the Pennsylvania Supreme Court quoted with emphasis from its neighboring state of New Jersey's landmark case of So. Burlington City NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A. 2d 713, 724 (1975), which will be discussed infra, notes 16-29 and accompanying text.*

[15] *The Township had argued that, if the permit had been issued, its municipal services would be overburdened, but the Court was not convinced by this argument. However, the Court, in directing that the permit be issued for the construction of the apartments, did include as a requirement that the developer must comply "with the ordinance and other reasonable controls, including building, subdivision, and sewage regulations, which are consistent with this opinion," id. at 468 and 469.*

[16] *67 N.J. 151, 336 a. 2d 713 (1975).*

objectives it increased the lot sizes and lot frontage requirements. As a consequence, the ordinance precluded the construction of multifamily units or even smaller detached single family homes, thereby making it impossible for low and moderate income families to acquire living accommodations in the community.

The New Jersey Supreme Court, when confronted with these facts, made the observation that the source of local authority to zone lands for the general welfare emanates directly from the state and all police power enactments must conform to the basic state constitutional requirements of substantive due process and equal protection of the laws.[17] And where, as here, the local regulations have a "substantial external impact" on the welfare of state citizens residing outside of the particular community, then that welfare must be acknowledged and served.[18] From this reasoning the Court went on to invalidate those portions of the ordinance which did not take into account the welfare of these outlying citizens. And, in some of the strongest language by any jurisdiction on this matter, it concluded that Mt. Laurel, as well as all municipalities in New Jersey, must in the development of their land use regulations:

> . . . make realistically possible an appropriate variety and choice of housing. More specifically, presumptively it cannot foreclose the opportunity of the classes of people mentioned for low and moderate income housing and in its regulations must affirmatively afford that opportunity, at least to the extent of the municipality's fair share of the present and prospective regional need therefor.[19]

New York's Test for Consideration of Regional Needs

In the New York case of Berenson v. Town of New Castle, the plaintiff had sought to have a parcel of land rezoned in order to provide for the construction of a large condominium.[20] The Town of New Castle in an effort to preserve its "rustic" nature would not grant the rezoning and the zoning ordinance was challenged on the constitutional grounds of:

> . . . whether the need for multiple-family housing in New Castle "is so compelling as to amount to a deprivation of the constitutional rights of those people, who are presently, or would if economically feasible, become residents of the Town."[21]

In order to address this issue properly, the New York Court of Appeals noted that certain questions of fact would have to be resolved at the trial level. To assist the lower courts in considering those questions, the Court of Appeals set forth the following test:

First, the lower courts must consider whether there exists a properly balanced and well ordered plan for the community.[22] To answer that question, the lower courts must ascertain the type, quantity, and quality of present housing and whether it adequately meets the needs of the local community.[23] In addition, the courts must consider whether new housing must be developed and, if so, what form it should take.[24]

Having answered those questions, the next step involves consideration of "regional needs and requirments."[25] Specifically, the Court of Appeals ruled that "there must be

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[17] *The Court noted that Art. 1, Par. 1, of the New Jersey Constitution reads: "All persons are by nature free and independent, and have certain natural unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and hapiness," 336 A. 2d, at 713. The Wisconsin Constitution Art. 1, Sec. 1, has similar provisions.*

[18] *Supra note 16, 336 A. 2d, at 726.*

[19] *Supra note 16, 336 A. 2d, at 724. Most recently a New Jersey trial court with the benefit of the Mt. Laurel decision has forged a remedy for exclusionary zoning involving 23 of 25 municipalities of Middlesex County. In Urban League of Greater New Brunswick et al v. the Mayor and Council of the Bourough of Cateret et al, Sup. Ct. of N.S., Middlesex County, Pocket No. C-4122-73, May 4, 1976, the Court specifically identified a region and the fair share allocation of low and moderate income housing that must be supplied for that region. It went on to strike down 11 municipal ordinances for not supplying their fair share of low and moderate income housing and allocated the respective units among the municipalities to meet the regional needs. As part of its allocation process, it considered the available acreages in each municipality that were capable of sustaining this type of housing, the projected population growth figures, those lands which were environmentally sensitive, the amount of land already developed, the provision of sewer utilities, and the amount of presently overzoned land use categories.*

[20] *38 N.Y. 2d 102, 341 N.E. 2d 236 (1975).*

[21] *Id. 341 N.E. 2d at 239*

[22] *Id. 341 N.E. 2d at 242.*

[23] *Id.*

[24] *Id. The Court in its opinion reviewed many of its recent decisions on zoning. It specifically mentioned its approval of the programs for phased growth that it sanctioned in Golden v. Planning Board of Town of Ramapo, 334 N.Y.S. 2d 138, 285 N.E. 2d 291, App. dismissed, 409 U.S. 1003. This case was discussed in earlier chapters of this report VIII and IX), supra. However, the Court reemphasized that "'community efforts at immunization or exclusion' would not be countenanced," id. Ramapo, 285 N.E. 2d at 302 and supra note 19, Berenson, 341 N.E. 2d at 241.*

[25] *Supra note 19, 341 N.E. 2d at 242.*

a balancing of the local desire to maintain the status quo within the community and the greater public interest that regional needs be met."[26] At this point the New York Court indicated that it was fully aware of the fact that the traditional approach to zoning was that it operated only within the confines of the particular jurisdiction exercising the zoning powers, but it went on to say that it must be recognized that zoning often has impacts beyond the specific jurisdiction boundaries. Therefore, it ruled the lower courts must consider:

> . . . not only the general welfare of the residents of the zoning township, but should also consider the effect of the ordinance on the neighboring communities. [27]

In summarizing its ruling, the New York Court of Appeals pointed out that zoning was primarily a legislative tool and that ultimately the achievement of sound regional planning would find its greatest encouragement through programs initiated by the state legislature. But it emphasized that:

> . . . while the people of New Castle may fervently desire to be left alone by the forces of change, the ultimate determination is not solely theirs. . . . Until the day comes when regional, rather than local, governmental units can make such determinations, the courts must assess the reasonableness of what the locality has done. [28]

It is important to reemphasize that the Pennsylvania, New Jersey, and New York Courts recognized in their decisions that local governments have a right to promote and protect other interests of their citizens, such as their health and safety, but more importantly these decisions stand for the proposition that, while local governments may attempt to advance these other interests, they must also accommodate housing for all income levels. [29]

Denial of Federal Community Development Grants When Consideration Is Not Given to Low Income Housing

In an action involving the U. S. Department of Housing and Urban Development (HUD), City of Hartford v. Hills, a federal district court issued an injunction preventing seven towns which surround Hartford from receiving community development grants on the basis of their excluding low income housing.[30] The importance of this decision is that a federal court interpreted the federal statutes to condition federal grants upon local governments' consideration of low and moderate income housing needs. Specifically the court found that there was a clear congressional objective in "providing decent housing and a suitable living environment and (one which expanded) economic opportunities principally for persons of low and moderate income."[31] And further, that there were specific national priorities to govern the granting of community development monies and one of these was the reduction of:

> . . . the isolation of income groups within communities and geographical areas and the promotion of an increase in the diversity and vitality of neighborhoods through the spatial deconcentration of housing opportunities for persons of lower income.[32]

As the court pointed out, the method which Congress chose to achieve these national goals was by requiring the community applying for community development grants to complete a housing assistance plan which details the community's present housing stock, identifies its housing needs, and establishes goals for providing publicly assisted housing and the location of that housing.[33] In the Hartford case, the Federal District Court found that six of the seven communities surrounding Hartford had failed to estimate the number of low income persons expected to reside within their borders and the other

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[26] *Id.*

[27] *Id. However, the Court did say that "a town need not permit a use solely for the sake of the people of the region if regional needs are presently provided for in an adequate manner," id.*

[28] *Id. at 243.*

[29] *See supra note 15. In addition to the cases analyzed in the main text, a Michigan court in Bristow v. City of Woodhaven, 35 Mich. App. 205, 192 N.W. 2d 322 (1971), overturned the City's attempt to exclude mobile homes. That court stated: "the strictly local interests of a municipality must yield if such conflict with the overall state interests of the public at large. This is not meant to be a complete limitation on zoning powers but rather, where certain uses are concerned, a balancing must be reached between the effect of local considerations, concerns, and desires against the greater public interest," id. 1972 N.W. 2d at 328. In searching for that balance, the court said: "general policy considerations must be ascertained before determining whether local enactments adversely affect a wider interest. If such is affected, it remains necessary to weigh those interests against local concerns," id. at 329.*

[30] *408 F. Supp. 879 (D.C. Conn. 1976). The grants would have been available under the Housing and Community Development Act of 1974. P. L. No. 93-383; 88 Stat. 633; 42 U.S.C. sec. 5301 et seq.*

[31] *Id. 408 F. Supp. at 898, and 42 U.S.C. sec. 5301(c).*

[32] *Id. 408 F. Supp. at 898 and 42 U.S.C. sec. 5301(c)(6).*

[33] *The Court pointed out that Congress mandated that great importance be placed on the plan in determining who and for what federal community development monies may be granted: ". . . by excluding it from the list of application requirements which might be waived by the Secretary (of HUD)," id. 408 F. Supp. 898, and 42 U.S.C. sec. 5304(b)(3) and (4).*

had underestimated the need.[34] In addition, it was found that the U. S. Secretary of Housing and Urban Development had violated her legal duties of reviewing such applications by not requiring that realistic estimates of housing needs be made. Consequently, the seven towns were enjoined by the Federal District Court from drawing federal monies under the Housing and Community Development Act of 1974.[35]

The United States Supreme Court said, in the recent decision of Hills v. Gautreaux, that where racial segregation in housing has been established in violation of the United States Constitution and/or statutory laws, then the federal courts may fashion relief commensurate to the violation.[36] In Gautreaux the U. S. Department of Housing and Urban Development was found to have assisted and sanctioned the racially discriminatory housing program of the Chicago Housing Authority, which limited public housing projects to certain sections within the City of Chicago. And since, as the United States Supreme Court pointed out, the relevant housing options of both agencies encompassed the Chicago housing market which included the suburban areas, a metropolitan area remedy could be granted requiring the agencies to consider publicly subsidized housing for the Chicago suburbs.[37]

While all foregoing decisions struck down exclusionary policies as being unconstitutional, or in violation of statutory authority, this is not a complete picture of the law as it is now developing. Many legal opinions have upheld, for a variety of reasons, local ordinances which have as their effect the exclusion of certain groups from their midst. Some of these are now analyzed.

Judicial Decisions Upholding Exclusionary Practices on the Basis of Local Growth Management Reasoning, Strict Standing Requirements, and the Use of Referendums

In 1972 the Federal Court of Appeals in the Ninth Circuit issued the landmark decision involving Construction Industry Association v. Petaluma.[38] The circumstances of that case were that the City of Petaluma was beginning to feel substantial growth pressures as a result of being on the fringe of the San Francisco Metropolitan area. In an effort to protect its small town character, low-density population, and open space, it adopted a five-year housing and zoning plan which affixed quotas on the number of multiple dwelling units that could be built in any one year. This was done in the face of demands for that type of housing in the region which far exceeded the number allocated.[39] Even though this demand was present and the Petaluma plan failed to address a representative share of this need, the Federal Court of Appeals in dicta found that it could not force a local community to look beyond its immediate jurisdiction in providing adequate housing. Rather, it stated:

> If the present system of delegated zoning power does not effectively serve the state interest in furthering the general welfare of the region or entire state, it is the state legislatures' and not

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[34] *Six of the towns had submitted applications with a zero "expected to reside" figure, and this as the plaintiffs pointed out "was not an accurate estimate of the housing needs which existed among persons in this category," id. 408 F. Supp. at 899. The Court noted that, according to HUD regulations, 24 C.F.R. sec. 570, 303(b)(2), this estimate was to be determined from "lower income persons and families 'planning or expected to reside in the community as a result of planned or existing employment facilities,' " id. 408 F. Supp. at 898 n. 44.*

[35] *The Court added that ". . . the towns may seek to obtain a new approval of these grant applications from HUD. This injunction may be lifted upon the filing with the Court of such a new approval." id. 408 F. Supp. at 907.*

[36] *425 U. S. 284, 96 S. Ct. 1538, (1976).*

[37] *This decision also is noted for its clarification of its earlier rule in the famous school desegregation case of Milliken v. Bradley, 418 U. S. 717, 94 S. Ct. 3112, 41 L.Ed. 2d 1069 (1974) when it states, id. at 96 S. Ct. 1546: ". . . nothing in the Milliken decision suggests a per se rule that federal courts lack authority to order parties found to have violated the Constitution to undertake remedial efforts beyond the municipal boundaries of the city where the violation occurred." Then the Court noted that both HUD and the Chicago Housing Authority are empowered to operate outside the Chicago City limits, id. at 1550.*

[38] *522 F. 2d 897 (9th Cir. 1975), cert. den. 424 U. S. 934 (1976).*

[39] *Undisputed testimony at the trial indicated that if Petaluma's plan were to be adopted by municipalities throughout the San Francisco region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 percent of the units needed). Further, the aggregate effect of a proliferation of the plan throughout the San Francisco region would be a decline in regional housing stock quality, a loss of the mobility of current and prospective residents, and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less.*

the federal courts' role to intervene and adjust the system.[40]

Thus, the Court in Petaluma held to a traditional and narrow view concerning the power to zone the use of lands when exercised by local governments. This is in contrast to the Pennsylvania, New Jersey, and New York jurisdictions which feel that local communities must be cognizant of, and assume some of, the burden of growth which existed outside of their boundaries.

In the recently decided case of Arlington Heights v. Metropolitan Housing Development Corp.,[41] the United States Supreme Court was confronted with the issue of whether a local government's zoning ordinance which had the "ultimate effect" of disproportionately excluding minorities violated the Fourteenth Amendment of the United States Constitution. The Village of Arlington Heights, a northwest suburb of Chicago, has sustained a great deal of population growth during the period of 1960 to 1970. In the 1970 census the Village had a population of 64,000; however, only 170 residents were black. The evidence which had been presented at trial and reviewed by both the Court of Appeals and the Supreme Court indicated that the small number of blacks residing in Arlington Heights stood in sharp contrast to the percentages of blacks residing in the metropolitan area of Chicago. Figures from the most recent census revealed that the percentage of blacks in Chicago had increased during 1960-1970 from 14 to 18 percent of the total population. [42] In addition, the record indicated that Arlington Heights had initially adopted a zoning ordinance which zoned the village lands principally for single family detached housing. This zoning virtually eliminated any opportunity for constructing low and moderate income housing in the community.

In 1971 these zoning restrictions were questioned when an Illinois nonprofit corporation seeking to construct housing within the Village for lower income families had requested the Village to rezone a parcel of land for multifamily units.[43] That request for rezoning was denied, however, by the local board of trustees on the grounds of preserving the integrity of the zoning plan and protecting property values.[44] Subsequently, a decision was made to file a lawsuit challenging the denial of the request to rezone.[45] The issue which was ultimately raised before the Supreme Court was that the refusal to rezone the parcel of property affected a distinct class of individuals who would have been eligible to live in the low income housing and that 40 percent of that class was black.

The Court of Appeals, recognizing the possibility of racial discrimination, felt compelled to analyze the Village decision not to rezone and assess it "not only in its immediate objective, but its historical context and ultimate effect."[46] The Court of Appeals took judicial notice of the segregated racial housing in Chicago and the fact that Arlington Heights had not sponsored any low income housing development nor did it plan to do so. The Court of Appeals found that, because the Village had totally ignored its responsibility in the past and its present decision would have the "ultimate effect" of perpetuating this trend, the governmental decision was racially discriminatory and could only be upheld if there was a compelling state interest to support it.[47] The Court

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[40] Supra note 38, *at 908. Several other issues were raised in the litigation of this case concerning fundamental constitutional rights including: the right to travel, on which the Court found that individuals within the City have no standing to raise this issue on behalf of parties allegedly excluded from living in Petaluma and violation of due process on which the Court found that, since the exclusion did not affect a fundamental right or suspect class—here the exclusion affected only types of housing—the City need only show a rational relationship to a legitimate state interest. Advancement of the general welfare by promoting family values, quiet seclusion, and clean air was a legitimate state interest. Thus, the plan was neither arbitrary nor unreasonable, and the due process rights of the developers were not violated "merely because a local entity exercises in its own self-interest the police power lawfully delegated to it by the state," id. at 908. On discrimination against interstate commerce, the Court stated that the local regulation was "rationally related to the social and environmental welfare of the community and does not discriminate against interstate commerce or operate to disrupt its required uniformity," id. at 909.*

[41] *97 S.C. 555 (1977).*

[42] *Metropolitan H.D. Corp. v. Arlington Heights, 517 F. 2d 409, 414 (7th Cir. 1975).*

[43] *The corporation was seeking to construct sec. 236 housing, under authority of 12 U.S.C. sec. 1715z-1, which permits construction of housing at favorable interest rates. This in turn would allow the owner to charge rents at a reduced level, thereby encouraging low income renters.*

[44] *97 S. Ct. at 559.*

[45] *The nonprofit corporation and three black individuals filed the lawsuit seeking declaratory and injunctive relief. Another nonprofit corporation and an individual of Mexican-American descent intervened as plaintiffs. The plaintiffs had sought certification of the action as a class action under Fed. Rule Civ. Procedure 23 but the trial court had declined to certify. Id. at 560.*

[46] *517 F. 2d at 413. See also Kennedy Park Homes Ass'n v. City of Lackawanna, N.Y., 436 F. 2d 108, 114 (2nd Cir. 1970), cert. denied, 401 U. S. 1010 (1971); U. S. v. City of Black Jack, Missouri, 508 F. 2d 1179, 1184 (8th Cir. 1974), on Title VIII, the Federal Fair Housing Act, 42 U.S.C. sec. 3601 et seq.*

[47] *The suspect classification of race, here created by the zoning ordinance and its subsequent decision not to rezone, gave rise to the Court's invoking the compelling state interest test.*

of Appeals also found that preserving the integrity of the zoning plan and protecting property values did not meet the stricter scrutiny of the compelling state interest test. The Court of Appeals concluded, therefore, that the board's refusal to rezone violated the equal protection clause of the Fourteenth Amendment.[48]

In reversing the Court of Appeals decision, the United States Supreme Court reaffirmed its recent decision in Washington v. Davis,[49] holding that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact. 'Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination'."[50] Rather, the Court ruled it must be shown that the motivating factor of the official action was racial discrimination.

In order to ascertain whether an action such as the Village denial to rezone was motivated by discriminatory purposes, it would be necessary to conduct a broad inquiry of direct and circumstantial evidence to determine the official intent. Most importantly, this inquiry must be carried out by those persons challenging the official action and its effects. The Supreme Court noted that "the impact of the official action—whether it 'bears more heavily on one race than another' . . . may provide an important starting point . . . but impact alone is not determinative."[51] Consequently, the Court suggested other areas of inquiry which may shed light on whether the official action was taken for invidious discriminatory purposes. One was the historical background of the decision. Another was the sequence of events leading up to the challenged decision. And a third was the legislative or administrative history, especially where that history contained statements made by the decisionmakers, minutes of meetings, or reports.[52]

In the circumstances of the Arlington Heights case, the United States Supreme Court could find no evidence that showed improper discriminatory purposes had motivated the Village leaders in their decision to deny the rezoning. The officials had followed "usual procedures" and they had adhered to a zoning plan which had been developed years before the controversy. The Supreme Court held, therefore, that the Court of Appeals "finding that the Village's decision carried a discriminatory 'ultimate effect' is without independent constitutional significance."[53]

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[48] *The case was remanded for further consideration of claims of statutory violations.*

[49] *426 U.S. 229 (1976).*

[50] *97 S. Ct. at 563, citing Washington v. Davis, 426 U.S. at 242.*

[51] *Id.*

[52] *97 S. Ct. at 564-66.*

[53] *97 S. Ct. at 566.*

With the ruling in Arlington Heights, the present Supreme Court has made it extremely difficult to change the status quo, even though that may very well reinforce class overtones based on economic status and race. Those who are presently challenging the existence of segregated housing patterns must prove that the decisionmakers who created the segregated housing in the first place did so for racially discriminatory purposes. The Supreme Court provides some "subjects of proper inquiry" to determine such intent. But the Court itself graciously admits that it may be a very difficult burden to carry.

In further developments related to the constitutionality of excluding low and moderate income housing, the U. S. Supreme Court has handed down three important decisions. One involved a community's efforts to regulate through zoning the number of unrelated individuals who may live together, another addressed the question of whether voters of a city could decide by referendum to alter an existing zoning ordinance, and the third dealt with who may properly bring an action in the federal courts to challenge the constitutionality of a community's effort to control growth.

In the first of these cases, Village of Belle Terre v. Boraas, the Village of Belle Terre, which is located on Long Island, New York, restricted the use of land within its jurisdiction to one family dwellings.[54] The ordinance prohibited lodging houses, boarding houses, fraternity houses, or multiple dwelling houses. Furthermore, and the critical point raised by the parties challenging the ordinance, the Village ordinance excluded three or more unrelated persons from living within one household as a family.[55] One practical effect of this restriction was to prevent those individuals who ordinarily could afford to live in Belle Terre from grouping together to make it economically feasible to reside within the Village limits.

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[54] *416 U.S. 1 (1974).*

[55] *Family as defined in the ordinance means: "one (1) or more persons related by blood, adoption, or marriage, living and cooking together as a single housekeeping unit, exclusive of household servants. A number of persons but not exceeding two (2) living and cooking together as a single housekeeping unit though not related by blood, adoption, or marriage shall be deemed to constitute a family," id. at 1. In a case similar to the facts here, the Village of Shorewood, Wisconsin, adopted an ordinance which precluded four or more persons who were unrelated from occupying the same dwelling unit. In Timberlake v. Kenkel, 369 F. Supp. 456 (E.D. Wis. 1974), the Federal District Court found that the definition of family employed by the Village was not supported by any rational basis consistent with the traditional zoning objectives. Thus, it was found to violate the equal protection clause of the Fourteenth Amendment. However, with the decision handed down in the Belle Terre case by the U. S. Supreme Court, the Federal Court of Appeals vacated and remanded the Timberlake case, 519 F. 2d 976 (7th Cir. 1975).*

In this case, it was a group of students who attended a nearby state university and who were renting a house in the Village.

These student tenants, along with the owners of the residence, proceeded to challenge the ordinance on several grounds. To name a few:

> . . . that it interferes with a person's right to travel, that it interferes with the right to migrate to and settle within a state; . . . that social homogeneity is not a legitimate interest of government; that the restriction of those whom the neighbors do not like entrenches on the newcomer's rights of privacy.[56]

But the majority of the Supreme Court could find nothing in the record which would violate the right to travel nor did the ordinance, in the Court's opinion, affect any "fundamental" right guaranteed by the Constitution.[57] Lacking an infringement on the fundamental rights, the Court found that the ordinance need merely bear a "rational relationship to a (permissible) state objective."[58] Such a permissible state objective did exist, the Court said, by the fact that:

> . . . a quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs.[59]

In a strong dissent, Mr. Justice Marshall felt the "classification burdens the students' fundamental rights of association and privacy guaranteed by the First and Fourteenth Amendments."[60] Justice Marshall was not questioning the authority of local officials to zone the use of land in order to control, for example, the density of residential land use, the kind of dwellings, or even the number of persons who could reside in those dwellings. But he did feel that zoning authorities could not

> . . . validly consider who those persons are (who would reside together in one residence), what they believe, or how they choose to live, whether they are Negro, or White, Catholic or Jew, Republican or Democrat, married or unmarried."[61]

This, he felt, went beyond the constitutional sanctions of land use restrictions and "undertakes to regulate the way people choose to associate with each other within the privacy of their homes."[62] Consequently, he would have found the ordinance unconstitutional.[63]

The question of how far local governments may go in adopting ordinances which regulate the number of unrelated persons living in a household is not yet settled. A case now pending before the U. S. Supreme Court, Moore v. City of East Cleveland, Ohio, will review further this legal question.[64]

In another decision by the U. S. Supreme Court, City of Eastlake v. Forest City Enterprises, Inc., a real estate developer challenged a provision in the City charter that required land use changes to be ratified by 55 percent of the votes in a City election.[65] The developer had sought to have a parcel of land that the developer owned rezoned to permit multifamily, high rise apartment buildings. The City Planning Commission rejected the application on the basis that the request for rezoning had not been submitted to the voters for ratification. The developer then challenged the referendum process as it applied in

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[56] Supra, *note 54, 416 U.S., at 7.*

[57] *Specifically the Court found that the ordinance was not "aimed at transients . . . it involves no procedural disparity inflicted on some but not on others, such as was presented by Griffin v. Illinois . . . it involves no fundamental right guaranteed by the Constitution, such as voting. . . . the right of association. . . .the right of access to the courts. . . . or any rights of privacy" (citations omitted),* id.

[58] Id. *at 8.*

[59] Id. *at 9.*

[60] Id. *at 13.*

[61] Id. *at 15.*

[62] Id. *at 17.*

[63] *On the freedom of association, Mr. Justice Marshall argued that constitutional protection is extended not only to political associations but to social and economic ones as well, and that the right to privacy is secured by the Constitution in permitting an individual the freedom "to satisfy his intellectual and emotional needs in the privacy of his home . . . the right to be left alone" . . . (citations omitted)* id. *at 15 and 16. He further pointed out that the ordinance in question permitted persons related by blood or marriage, be it two or 20, to live in a single household but it limited to two the number of unrelated persons bound by profession, love, friendship, religions, or political affiliation, or mere economics,* id. *at 16.*

[64] *No. 75-6289. The ordinance in question attempts to limit the number of members of various generations that could be considered a family for purposes of one family per home zoning.*

[65] *426 U.S. 668; 96 S. Ct. 2358; (1976).*

this situation, arguing that, since the delegation of legislative power to the people lacked appropriate standards to guide the decision of the voters, it was unconstitutional.[66] This challenge had been successful when carried before the Ohio Supreme Court where that Court held that:

> . . . the Eastlake charter provision . . . blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational.[67]

But the U. S. Supreme Court reversed the Ohio Supreme Court.[68] It found that the reservation of such powers by the people through a referendum process did not violate the United States Constitution and it remanded the case to the State Court. The significance of this decision is that those residents of a particular community who are eligible to vote may limit by referendum who may reside within their community in the future and not be in violation of the Federal Constitution.[69]

In yet another important development in this area of law the U. S. Supreme Court raised some serious obstacles to prospective parties who wish to challenge the constitutionality of a zoning ordinance which creates residential patterns exclusive of low or moderate income housing. In Warth v. Seldin a group of petitioners claimed that the zoning ordinance of the Town of Penfield (a suburb of Rochester, New York) allocated 98 percent of the land to single family detached houses, effectively excluding persons of low and moderate incomes from living in the town.[70] This condition, the petitioners argued, was in contravention of the First, Ninth, and Fourteenth Amendments of the U. S. Constitution. In its opinion, however, the U. S. Supreme Court never reached the merits of the case, finding that each of the various petitioners lacked standing to litigate the questions and affirming the lower court's decisions to dismiss.[71]

Representative of those denied standing were individuals who were of low or moderate income and coincidentally were members of minority, racial, or ethnic groups who could not obtain housing within Penfield due to its zoning ordinance.[72] Another group represented taxpayers living in the City of Rochester. They argued that because of Penfield's exclusionary zoning policies, the City of Rochester must carry a greater burden of low and moderate income housing, which was reflected in higher taxes.[73] A third group of petitioners presented the argument that 9 percent of its members lived in the Town of Penfield and that, given the exclusionary zoning practices, their members were deprived of living in a racially and ethnically integrated community.[74] And finally, a fourth group of petitioners was made up of associations representing members who developed and constructed residential housing in the area. This group argued that the zoning policies prevented them from constructing housing for low and moderate income families.[75] To each of these four groups the U. S. Supreme Court denied standing to argue the merits of their positions.

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[66] *The developer argued that it was in violation of the due process rights of a landowner, id. at 2360.*

[67] *Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E. 2d 740 (1975), at 746.*

[68] *It is important to note that the Ohio Supreme Court's finding of unconstitutionality was based on the Constitution of the United States and not Ohio's Constitution.*

[69] *In a concurring opinion by Ohio Supreme Court Justice Stern, it was noted: ". . . there is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy, supra note 67, at 324 N.E. 2d 748.*

[70] *422 U.S. 490, 95 S.Ct. 2197, (1975).*

[71] *The Supreme Court, in reviewing the elements of standing, ruled that the Constitution requires that a plaintiff must allege "such a personal stake in the outcome of the controversy to warrant this invocation of federal court jurisdiction," id. at 2205. Moreover, petitioners must satisfy the prudential rules of standing; that is, the claim must be based on a constitutional or statutory provision which grants to persons in the plaintiff's position a right to judicial relief.*

[72] *The U. S. Supreme Court found that since petitioners did not show a specific denial of a permit to build housing for their needs, there was a failure to establish "an actionable causal relationship between Penfield's zoning practice and petitioners' asserted injury," id. at 2209.*

[73] *The U. S. Supreme Court denied standing to the taxpayers on the grounds that the line of causation between Penfield's action and the higher taxes in Rochester is not apparent.*

[74] *Here the court reasoned that there is no statutory right or entitlement to argue this deprivation since they are already members of the community (Penfield). Thus, they are arguing that they have been harmed indirectly by the exclusion of others and this is an attempt to raise putative rights of third parties and they, therefore, lacked standing.*

[75] *In reply to the argument, the U. S. Supreme Court said their complaint seeks prospective relief since the associations failed to show "the existence of any injury to its members of sufficient immediacy and ripeness to warrant judicial intervention," supra note 70, at 2214. In other words, the associations had to establish that a member had planned to develop and had been denied a permit to develop before sufficient injury would be present. Failing to establish this, the fourth group lacked standing to litigate the constitutionality of the ordinance.*

The effect of the U. S. Supreme Court's ruling in Warth v. Seldin is to severely limit the various groups or individuals who may seek to challenge a community's exclusionary policies by raising the threshold requirements of standing. Now petitioners such as those that represented the first and fourth groups above not only must allege that exclusionary zoning on its face is invalid, but also that they have been specifically denied permission to develop there.[76] Also left unanswered by the Court's refusal to hear the merits of the petitioners' arguments are the questions of whether such ordinances may infringe on the freedom of association rights as advanced by the third group since the Court found that they, already being members of the community, could not argue this point; or the question of the reasonableness of imposing external costs on taxpayers outside a community, as the second group argued.

In the final analysis, the opinion to dismiss this complaint in Warth v. Seldin raises some severe barriers to prospective petitioners who seek to challenge a community's exclusion of lower and middle income groups.[77] That does not mean that the issue will never be litigated; the Gautreaux and Hartford cases are examples of where it is, but it will be more difficult to gain entrance to the federal couourts on this matter.

SUMMARY OF CASE LAW

The present law in trying to balance community objectives which ostensibly promote the general health, safety, and welfare against their exclusionary impacts is in a very confused state. The recent decisions in the federal courts have sufficiently narrowed the base from which challenges may be raised to public actions which have exclusionary impacts. In Belle Terre, the community objectives were upheld as being valid over the challenges of unconstitutionality even though those objectives discriminated against certain peoples merely because of their status (i.e., their being unrelated). The Eastlake decision upheld the referendum process which permits residents of respective communities to maintain the status quo and exclude specific uses of land, such as multifamily housing units. And, with the decision in Warth v. Seldin, the U. S. Supreme Court has made it more difficult to gain access to the federal courts to litigate the constitutional questions which surround zoning ordinances that effectuate wealth discrimination. With the recent Arlington Heights decision, it is not enough that official action such as zoning has resulted in a disproportionate effect upon minorities. What is becoming increasingly evident from the federal decisions is that unless a challenge on exclusionary grounds is tied to a violation of federal statutes as in City of Hartford v. Hills, or blatant discriminatory actions, such as found in Gautreaux, it will not be successful. Perhaps this is best exemplified in the Petaluma decision where the court was fully cognizant of the arguments of meeting regional needs but, in dicta, responded by saying that only the state legislatures can require local governments to assume these burdens.

On the other hand, several decisions within the state courts indicate a more favorable reaction to granting broad types of relief from exclusionary practices. The Pennsylvania (e.g., Town of Williston), New Jersey (Mt. Laurel), and New York (Berenson) decisions are illustrative of state courts finding sufficient authority under their own laws to strike down exclusionary zoning ordinances.

A Perspective for Wisconsin

As of this date, the Wisconsin Supreme Court has not entertained arguments on the issue of exclusionary zoning and there is no assurance that the Court would fashion the broad relief as some other state courts have.[78]

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[76] *This places the burden on those groups who are similarly situated as the first petitioning group to show that a third party who had planned to build low or moderate income housing had been denied that opportunity and, furthermore, that the petitioners (assuming they find such a third party) would have lived in that housing had it been built.*

[77] *This opinion, as with Belle Terre, also met with a stinging dissent. Mr. Justice Brennan pointed out: "In effect, the court tells the low income—minority and building company plaintiffs—they will not be permitted to prove what they have alleged—that they could and would live in the town if changes were made in the zoning ordinances and its application—because they have not succeeded in breaching, before the suit was filed the very barriers which are the subject of the suit." Id., at 2217. That is, following Mr. Justice Brennan's opinion, the petitioners must prove their case before the trial commences.*

[78] *In Hobard v. Collier, 3 Wis. 2d 182, 87 N.W. 2d 868 (1958), the Court did strike down an ordinance which attempted to limit all uses within a town to residential. It stated: ". . . the purpose of zoning is to set aside areas for specific uses and to protect them from encroachments in the form of other uses inconsistent with the uses to which they are dedicated (citations omitted). In making the classifications necessary to facilitate that purpose, the municipality must recognize the natural reasons and differences suggested by necessity and circumstances existing in the area with which the ordinance deals," id. at 189. While the reference here to "areas" is to zoning districts, the Court did recognize that "natural reasons and differences suggested by necessity and circumstances" could justify different uses. And, by analogy, the Wisconsin Court could recognize that conditions outside a district or even a local jurisdiction could necessitate different uses even within a district, e.g., multifamily housing units interspersed with single family residences. Also of some importance to the issue of exclusionary zoning, Hobart reiterates the standards for classifying zoning districts found in State ex. rel. Ford Hopkins Co. v. Mayor 226 Wis. 215, 276 N.W. 311 (1937). One standard in particular is that "the classification must not be based upon existing circumstances only," id. at 3 Wis. 2d 189, and 226 Wis. at 222. That standard could arguably be raised against a community which attempts to preserve the status quo and preclude low and moderate income housing.*

(Footnote 78 Continued on Next Page)

Certainly the possibility exists for the Wisconsin Supreme Court to interpret the Wisconsin Constitution and statutory law as precluding exclusion of low and moderate income residential units by local government.[79] If it chose to make such an interpretation, the relief granted by the Wisconsin Supreme Court could vary enormously. It could issue a ruling that would affect all local zoning decisions of the State. Or it could take judicial notice of the unique circumstances of the Southeastern Region of Wisconsin, given its well documented urbanization trends, and order relief commensurate with specific conditions. Or it could narrowly limit its relief by finding that a particular land use regulation was unconstitutional in its application to a specific parcel of land rather than striking down the entire ordinance. This fashioning of narrow relief, however, is not without its own set of problems. It may in turn cause fragmentary developments without the benefit of a unified housing plan; that is, developments which sprawl all over the countryside or which actually create new enclaves of low income residents and/or minority groups within larger homogeneous population centers. And, of course, the Wisconsin Supreme Court could choose to ignore the problem altogether, thereby forcing the issue before the State Legislature.

In the event, that the issue of exclusionary practices in residential development is not brought before the Wisconsin Court, there would seem to be some alternative approaches that may adequately deal with the problem in southeastern Wisconsin. Unquestionably, the problem which does exist in the Region is a complicated one, with no easy planning and/or legal answers. Some potential solutions are presently available. SEWRPC, for example, has developed a regional housing plan which is designed to meet the Region's unique characteristics. It would require a strong intergovernmental commitment to plan and provide for a wide range of housing structures that would be cognizant of regional needs. Also, other states, notably Massachusetts, require by legislative mandate that local units of government provide a certain percentage of their residential development for low and moderate income households.

Attempts to deal with exclusionary practices involving residential developments from the regional level or even the state level are obviously being done on an aggregate basis. The problem, however, in its unique characteristics emanates from the local level where it is subject to dramatic changes even within the boundaries of one local jurisdiction. Thus, precise determinations of where a need actually exists are mandatory before specific solutions can properly be formulated and implemented at the local level. If this is not done, then strategies which have a regional perspective may add to the problem.[80]

Existing Wisconsin Legislature Dealing With the Problems of Low and Moderate Income Housing and Discrimination

SEWRPC's regional housing plan offers several possible solutions to residential exclusionary practices. The constituent communities of the Region, however, are not required to adopt any of the Commission's recommendations. Thus, another possibility—given the severity of the problem and assuming continued local community intransigence—is for the Wisconsin Legislature to act. The Wisconsin Legislature as early as 1935 made findings that:

> There exists in the State unsanitary or unsafe dwelling accommodations and that persons of low income are forced to reside in such unsanitary or unsafe accommodations; that within the State there is a shortage of safe or sanitary dwelling accommodations available at rents which persons of low income can afford and that such persons are forced to occupy overcrowded and congested dwelling accommodations; that the aforesaid conditions cause an increase in and spread of disease and crime and constitute a menace to the health, safety, morals, and welfare of the residents of the State and impair economic values; that these conditions necessitate excessive and disproportionate expenditures of public funds for crime prevention and punishment, public health, and safety, fire, and accident protection, and other public services and facilities . . . .[81]

In another case State ex. rel. Lake D. B. Church v. Bayside Village Board, 12 Wis. 2d 585, 108 N.W. 2d 288 (1961), the Court dealt with a village ordinance which attempted to exclude churches. While this decision is based upon the constitutional protection of freedom of religion, there is in the concurring opinion of Justice Hallows some reasoning which perhaps could have ramifications on the constitutionality of ordinances which exclude low and moderate income residences. Justice Hallows states: ". . . the various factors considered in excluding churches from a residential area or in determining the priority of granting or refusing a permit under those types of ordinances which permit churches in an area only by permit have been the subject matter of numerous cases. These factors, including traffic problems, traffic conditions, and effect of depreciating property values, loss of tax revenue, noise, and other inconveniences, and that churches are detrimental and do not further public morals, have been considered and rejected," id. at 609. And ". . . churches are not supermarkets, manufacturing plants, or commercial establishments and should not be restricted to such areas. How can the exclusion of churches from a residential area promote public morals or the general welfare?" id. at 609.

[79] *As pointed out earlier, supra, note 39, the Wisconsin constitutional provisions are similar to those of New Jersey and it was the latter's constitution which underpins the Mt. Laurel decision.*

[80] *See for example, Burchell, Listokin, and James, Exclusionary Zoning Pitfalls of the Regional Remedy, 7 Urban Lawyer 262 (1975).*

[81] *Sec. 66.40 Wis. Stats. In the initial enactment the statutory language was directed towards cities of the first class.*

Moreover, under the Wisconsin Bill of Human Rights, the Legislature has authorized that any municipality, including counties and school boards, may form or join in the formation of community relations-social development commissions.[82] One of the main functions of the commissions would be to recommend solutions to discrimination in housing. The commissions also are authorized to conduct studies on the "inciting or formenting of class race, or religions hatred and prejudice."[83]

Furthermore, under Section 101.22 Wis. Stats., the fair housing statute of Wisconsin, the Legislature explicitly stated the following policy:

> . . . it is the intent of this act to render unlawful discrimination in housing. It is the declared policy of this State that all persons shall have an equal opportunity for housing regardless of race, color, religion, national origin, or ancestry and it is the duty of the local units of government to assist in the orderly prevention or removal of all discrimination in housing through the powers granted under s. 66.433. . . . this section shall be deemed an exercise of the police powers of the State for the protection of the welfare, health, peace, dignity, and human rights of the people of this State.[84]

While it is clear from the above statutory language that the State Legislature has been aware of the housing problems in Wisconsin for almost half a century, particularly for low and moderate income families, the Legislature has not placed the State affirmatively behind the provision of low income housing by mandating their inclusion within local communities. And the Legislature has not done so even through the problems that it cites continue to mount. Of course, given these state policies and findings, the Wisconsin Supreme Court, as noted earlier, could interpret them in conjunction with the Wisconsin Constitution as mandating that local communities assume a greater responsibility in meeting the needs of citizens who comprise the lower end of the economic spectrum. But barring such a judicial finding, the Wisconsin Legislature could enact legislation which mandates the opening up of local communities to accommodate low and moderate income households. Some precedent already exists for this approach in other states.

Affirmative Legislative Action Against Exclusionary Zoning

The Massachusetts Experience: In the late 1960's the Massachusetts Legislature commissioned a study to be conducted on exclusionary zoning by local governments.[85] That report surveyed some 113 selected towns in the Commonwealth to analyze the use of zoning powers by local governments to ascertain whether restrictions were placed on residential development for lower income groups. The report found a substantial use of large lot zoning involving 30 percent or more of the local territory in at least 21 towns of those surveyed, almost all of which were suburban.[86] As a result of this study, the Massachusetts Legislature enacted into law the Low and Moderate Income Housing Act, more commonly known as the Anti-Snob Zoning Act.[87]

Requirements and Procedures of the Act: The Massachusetts Anti-Snob Zoning statute enables any public agency, nonprofit, or limited dividend organization which has had a proposal to build low or moderate income housing denied by a local zoning board of appeals to obtain review of that denial by a State Housing Appeals Committee.[88] The law establishes this Housing Appeals Committee within the Massachusetts State Department of Community Affairs.

Under the Act when a denial of a proposed development has occurred and review is sought, the Housing Appeals Committee will hold a hearing to determine:

a. In the case of a denial of application—whether the decision of the local board of appeals was reasonable and consistent with local needs;[89] or

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[82] *Sec. 66.433(1) and (2) Wis. Stats.*

[83] *Secs. 66.433(3) and (3)(b)1 and (2)(c)1 b, Wis. Stats.*

[84] *The Legislature also has recognized the need of housing facilities for the elderly; see sec. 66.395 Wis. Stats.*

[85] *Legislative Research Council, Commonwealth of Massachusetts, Report Relative to Restricting the Zoning Power to City and County Governments, Senate No. 1133 (June 1968).*

[86] *Id. at 98.*

[87] *M.G.L.A. C. 40B, sec. 20. et seq. c. 774, sec. 1, August 23, 1969.*

[88] *Id. sec. 22.*

[89] *The Act provides that requirements or regulations shall be consistent with local needs when imposed by a board of zoning appeals after it has conducted a comprehensive hearing in a city or town where:*

> *"(1) Low or moderate income housing exists which is in excess of 10 percent of the housing units reported in the latest decennial census of the city or town or on sites comprising 1½ percent or more of the total land area zoned for residential, commercial, or industrial use, or*
>
> *(2) The application before the board would result in the commencement of construction of such housing on sites comprising more than 0.3 of 1 percent of such land area or 10 acres, whichever is larger, in any one calendar year," id. at sec. 20.*

b. In the case of approval of an application with conditions—whether such conditions and requirements make the construction or operation of such housing uneconomic and whether they are consistent with local needs.[90]

The critical aspects of the Act contained within the foregoing statutory language is that, in order to be consistent with local needs, there must exist within each community enough low and moderate income housing to equal 10 percent of the total number of housing units reported in the latest decennial census. Or, alternatively, that the amount of low and moderate income housing present in a community exceeds a certain percentage of the local land base in the community.[91]

If the Housing Appeals Committee finds in the case of denial that the decision of the board was unreasonable and not consistent with local needs, it shall vacate such decision and shall direct the board to issue a comprehensive permit of approval to the applicant.[92] And if the Committee determines in the case of approval with conditions that those conditions are unreasonable, it shall order the board to modify or remove the conditions in order to make the project economical.[93]

Constitutional Challenge to the Anti-Snob Zoning Act
Board of Appeals of Hanover v. Housing Appeals Committee was the first constitutional challenge to the Act to reach the Massachusetts Supreme Judicial Court.[94] There the Court sustained the legislative enactment superseding local land use regulations for the purpose of promoting the development of low and moderate income housing, finding that it was "a constitutionally valid exercise of the legislature's zoning power.[95] In a subsequent decision, Mahoney v. Board of Appeals of Winchester, the Supreme Judicial Court reaffirmed its earlier position in Hanover.[96] The Court ruled that the delegation of this authority to the Housing Appeals Committee was proper and that the exercise of that authorization and the necessity of providing low and moderate income housing in this statutory manner did not constitute spot zoning.[97]

Since the passage of the Anti-Snob Zoning Act, however, it has not met with widespread success. Local intransigence has been successful in preventing the construction of large numbers of housing units under its provisions.[98] Local governments, in order to hinder the construction of low and moderate income housing within their midst, are utilizing a variety of procedural delays. And, when all else fails, they seek review of the administrative decision by the Housing Appeals Committee in the courts. The net result is that many potential developers, especially the private ones, see the possibility of large sums of money being tied up over an extended period of time which they can ill afford. At this time, therefore, there is a great hesitancy on their part to pursue projects for low and moderate income housing.

Another state which initially provided some affirmative action towards meeting the housing needs of low and moderate income households is New York. That state, however, has since backed away from its original strong position. The approach that New York took was to form a State Urban Development Corporation which was granted the authority to construct or rehabilitate housing accomodations for persons and families of low income.[99] If

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[90] *Uneconomic is defined in the Act to mean "any condition brought about by any single factor or combination of factors to the extent that it makes it impossible for a public agency or nonprofit organization to proceed in building or operating low or moderate income housing without financial loss, or for a limited dividend organization to proceed and still realize a reasonable return in building or operating such housing within the limitations set by the subsidizing agency of government on the size or character of the development or on the amount or nature of the subsidy or on the tenants, rentals and income permissible, and without substantially changing the rent levels and unit sizes proposed by the public nonprofit or limited dividend organization," id. at sec. 20.*

[91] *For the actual language and percentages, see note 89, supra. Also note the language which would permit a local unit of government to limit the amount of land that might be developed by an applicant in any one calendar year, id. Sub(2).*

[92] *Id. at sec. 23.*

[93] *Id. However, the Committee is barred from ordering the removal of a condition that would make the project unsafe under site plan requirements of either the Federal Housing Administration or the Massachusetts Housing Finance Agency, whichever is financially assisting the project.*

[94] *1973 Mass. Adv. Sh. No. 491, 294 N.E. 2d 393 (1973).*

[95] *Id. at 424.*

[96] *1974 Mass. Adv. No. 1419, 316 N.E. 2d 606 (1974).*

[97] *Spot zoning involves a single lot or area being granted privileges which are not granted or extended to other lands in the vicinity and in the same use district.*

[98] *As of late 1975, 27 decisions have been made by the Housing Appeals Committee; in 21 instances, local decisions were overruled and comprehensive permits granted. These decisions have involved 3,756 units for low and moderate income housing. However, only 216 units are completed and ready for occupancy; 1,553 are in the planning stage with no definite construction date; and well over half—1,987 units—are tied up in the appeal process of the courts. Information supplied in a letter from Mr. Maurice Corman, Chief Counsel, Massachusetts Department of Community Affairs, October 21, 1975.*

[99] *L. 1968 c. 174 sec. 1, eff. April 10, 1968; N.Y. McKinney's Unconsol., sec. 6252, the legislation was enacted pursuant to the state constitution, McKinney's Const. Art. 18, sec. 1.*

the Corporation found a need for such housing in a particular locality and found that private enterprise could not meet that need, then the Corporation was authorized to embark on projects which would. Moreover, if in the determination of the Corporation it found that it could not comply with local ordinances and regulations, then it could override these local regulations. In the ensuing years, this authority was challenged as being a violation of home rule powers, but it was upheld on several occasions.[100]

However, in 1973 the New York Legislature amended the original grant of authority to the Corporation.[101] Now the Corporation is prohibited from approving a residential project in a town or incorporated village as long as formal objections by the local government have been submitted to the Corporation. The amendment does not require the local units of government to offer any rationale for their objections, thereby permitting the local communities to exclude housing for low income persons and families. In this respect, the New York legislation now resembles that of Wisconsin's county housing authorities which may not undertake any project within a village or city without their permission, no matter how justified it may be.[102] Under this present situation, therefore, the New York and Wisconsin legislation clearly lacks the affirmative requirements of the Massachusetts anti-snob zoning enactment.

SUMMARY

Much of this report has been devoted to delineating the legal tools available for achieving well planned community development. These same tools when misused, however, often result in exclusion of population segments from communities or portions thereof. For the most part, this chapter has concentrated on those exclusionary practices which result in residential segregation on the basis of wealth. The primary vehicle by which these exclusionary policies are implemented represents a cross section of a number of the police powers available to local units of government. These powers include the authority to zone land for different uses, subdivision controls, building code ordinances, and taxing powers. Of these powers, zoning for low-density development, the exclusion of multifamily housing units, and inflated minimum footage requirements for residents have combined to foreclose adequate housing for a large number of individuals. Balanced against the immediate problems of the low and moderate income households are the legitimate goals of local governments. These goals are directed toward effectively shaping orderly growth and development according to local demands. The legal issues often put the fundamental rights of individuals against a local community's delegated right under the state's police power to regulate the use of land in furtherance of the health, safety, or general welfare of its residents. An analysis of the leading judicial discussions indicates a split among the courts in the disposition of these issues. With the most recent decision by the U. S. Supreme Court in the Arlington Heights case, it is not enough that official action such as zoning has resulted in a disproportionate effect upon minorities; a challenge on exclusionary grounds will now be successful only if the practice is tied to a violation of federal statutes as in City of Hartford v. Hills or blatant discriminatory actions, such as in Hills v. Gautreaux. For the most part, state court decisions have indicated that exclusionary zoning will not be accepted, as evidenced in the Town of Williston v. Chesterdale Farms, Inc. in Pennsylvania and the New Jersey decision of Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel.

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[100] *See Floyd v. N.Y. State Urban Development Corp., 41 A.D. 2d 395, 343 N.Y.S. 2d 493, affirmed, 33 N.Y. 2d 1, 347 N.Y.S. 2d 704 (1973); Peters v. N.Y. State Urban Development Corp. 21 A.D. 2d 1008, 344 N.Y.S. 2d 151 (1973). In the latter case it was found that the Corporation was not limited to blighted areas. In this instance it was acting in an area zoned for the highest residential use. The Court found the Corporation was exempt from local ordinances since it was performing a governmental function and not a proprietary one.*

[101] *L. 1973 c. 446 sec. 3, amends sec. 6266(5) supra, note 107.*

[102] *Sec. 59.075, Wis. Stats. Wisconsin law also provides that two or more municipalities may act jointly to control or operate housing for low and moderate income households, sec. 66.40 et seq. Also, the Wisconsin Department of Local Affairs and Development is permitted to make loans to sponsors of low and moderate income housing projects, sec. 22.13(3)(b), but only if the "Secretary may reasonably anticipate that a federally aided mortgage or grant may be obtained for permanent financing of the project."*

Chapter XIV

A SUMMARY AND RECOMMENDATIONS FOR COORDINATING LAND USE PLANNING AND GROWTH MANAGEMENT STRATEGIES

This chapter has the twofold purpose of summarizing the preceding material, and offering some possible solutions to a fundamental problem that emerges from the uncoordinated dispersion of authority to plan and implement plans in Wisconsin.

This report began with an analysis of the sovereign powers of the State of Wisconsin along with the primary constitutional provisions which underlie the authority to plan and regulate development. It moved then to the Federal Government's authority to influence development plans, which it derives from the United States Constitution, and some of the programs which reflect the exercise of that authority. Balanced against these powers, as was noted, were the constitutionally protected rights of the private property owners. In addition, the report pointed out the necessity of gathering data and establishing an accurate factual basis for the development of plans in order to sustain their eventual implementation through regulation. From there the report outlines the powers of state agencies and local governments to plan for community development along with the specific tools to implement those plans. Having provided this groundwork, the discussion then shifts to explaining how this authority and legal tools may effectively be used to manage growth according to location and time and then, more specifically, to meet the land use objectives of open space reservation, the reservation and protection of highways, and the effectuation of a coordinated urban mass transportation system. Finally, the focus of the report shifts to two other problems confronting the Southeastern Wisconsin Region, the specific issue of exclusionary residential policies now being enforced by local governments, which in turn forms a part of the second problem which this chapter centers on, strengthening the ability to solve areawide problems through coordinated planning that can offer areawide solutions.

The fact that problems do often extend beyond the political jurisdiction of local governments has been recognized for some time. It was because of this situation that the Wisconsin Legislature authorized the formation of regional planning commissions under Section 66.945 of the Wisconsin Statutes although, as has been pointed out, their powers have been sufficiently limited by making them strictly advisory bodies to the local governments. This limitation, as noted in the original SEWRPC Technical Report No. 6, which was published over 10 years ago, left the governmental system in a position unable to cope with areawide problems on a more effectual basis. Correspondingly, recommendations were made in that earlier report to alter the situation; on the whole, however, those recommendations were never carried to fruition. This edition of the report, therefore, finds itself reiterating that original theme, although in some instances it offers some different strategies for resolving the matter. Any such differences are due to the fact that the Region has changed dramatically in the past 10 years and, while considerable progress has been made by many communities of the Region in planning for wisely conceived development, such progress has been less than universal. SEWRPC, for example, has documented over these years the results of sprawling development and the loss of valuable wetlands, prime agricultural lands, open space, the decline in mass transportation systems, and the present housing need of so many residents of the Region. What this means is that some communities are assuming a share of the regional problems, while others are not and this unequal split permits deteriorating conditions to further worsen.

The present inability to eliminate or reduce many of the regional or areawide problems stems in large part from three major factors. One is that some local communities do not engage in planning for future growth—they tend instead to react to development pressures on an ad hoc basis. Secondly, much of the planning that does occur is done strictly on a functional basis with a narrow objective in mind: that is, planning for highways, or open space, or recreation, or the extension and development of sewer and water lines, without the benefit of interrelating the plan objectives of each. The third factor is that, if comprehensive planning is undertaken by local government, it is limited to its own jurisdiction; this it does not take into account the strong interdependencies among numerous jurisdictions which are closely and similarly situated.

Combined, all three factors form a very stiff barrier to resolving problems that transcend the local governments' domain but which are fused closely to one another because of strong social and economic interrelationships. If left unresolved, they promise over a period of time to have a lasting and devastating effect on the citizens of the Region. With that in mind, the following recommendations are made as alternatives to the existing situation. Any one or combination of these recommendations could provide some coordination and a broader view to planning for future development beyond that which presently exists. The majority of the recommendations contemplate some direct action by the Wisconsin Legislature in order to bolster the existing enabling legislation for implementing planned development.

One other point should be clarified prior to outlining the recommendations. The majority of decisions affecting land use and growth management are made at the local level. These suggestions for overcoming areawide problems recognize that the majority of decisions affecting growth policy will continue to be made at the local level; they act, therefore, as a supplement to the existing process.

1. Under Section 66.30 of the Wisconsin Statutes, intergovernmental cooperation is permitted which would enable the furnishing of services and the joint exercise of any power to eliminate certain problems of one or several communities. The existing statutory authority could be amended to require joint action by local governments in planning to eliminate identified problems which go beyond local jurisdictional boundaries. In that instance, the amendment could provide that SEWRPC be made a party to such joint action and resolution of areawide problems, with a further requirement that any adopted solution be in conformance with regional plans.

2. SEWRPC's role as mandated by the Wisconsin Legislature is advisory to local governments. By amending the existing legislation which defines the powers of regional planning commissions, the Wisconsin Legislature could instead require that regional plans be implemented by local governments. In the alternative, legislation could be fashioned that would be directed only at the Southeastern Wisconsin Region. Now pending before the Legislature is Senate Bill 54, which would establish a Metropolitan Council for the southeastern Region.[1] This Council would have the authority to prepare a comprehensive development guide for the orderly and economic development of the area. SEWRPC, as envisioned under this Act, would advise the Council and act at its direction.[2] The critical feature of this bill is that where local governments propose projects which have areawide effect, a multi-community effect, or ones that will have a substantial effect on metropolitan development, the proposals would be received by the Council. If it found that the proposed development is inconsistent with the regional development guide, then the Council could direct that it be indefinitely suspended. If a resolution cannot be reached between the local government and the Council, then the Wisconsin Legislature would dispose of the issue.

   Involving the Wisconsin Legislature directly in this process as envisioned under the present bill, however, might be unnecessary. For example, the State Planning Office of the Department of Administration or direct review by the courts might be provided in order to ascertain whether the Municipal Council was placing an unfair burden on the locally proposed development. This latter situation would not be unlike the present review process exhibited by the courts involving local regulations of private development.

3. In recent years there has been a growing movement across the United States for state governments to assert greater control over the local land use decisionmaking process. Heretofore, state legislatures had delegated almost total control over land development to local governments. Now, there is evidence of a growing recognition that not only must growth be preceded by adequate planning but that in some instances that growth must also be shaped to reduce the adverse external effects upon citizens of neighboring communities, of an entire region, or the state itself.[3] In order to achieve that result, state governments have begun to set standards for the types of development. One such standard involves development of certain magnitude, that is, development which will have impact that exceeds local boundaries, such as airports and major highways. The other is directed at development which will have an impact on areas designated as having critical environmental importance, e.g., wetlands, prime agricultural lands, groundwater recharge areas, and the like. The States of Massachusetts,[4] Vermont,[5] Minnesota,[6] and Florida,[7] for example, all have passed legislation incorporating one or both of these concepts.

   Precedent does exist in Wisconsin for the State to protect areas of critical concern through its legislation mandating the protection of shorelands and floodplains. A more ambitious program under the 1973 Assembly Bill 882 was defeated in the State Legislature. Clearly, however, statewide involvement is needed to deal more effectively with development where impact extends beyond local boundaries affecting regional and state interests. If such legislation were passed now, the parameters of review and the choice of location for that development could be more flexible. That flexibility will be greatly reduced, however,

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[1] *Senate Bill 54 was introduced January 21, 1975. It is patterned somewhat on the old metropolitan form of government in Minneapolis/St. Paul, Minn. Recently the Minnesota Legislature broadly increased the powers of the Metropolitan Council. That body now is authorized to formulate a development guide for future growth in the metropolitan region of Minneapolis/St. Paul and to ensure that it is implemented.*

[2] *Senate Amendment No. 1, April 29, 1975.*

[3] *Cf. Bosselman and Callies, The Quiet Revolution in Land Use Control (1971).*

[4] *Chapter 807 of the Acts of 1975, entitled An Act Providing for the Formulation of a Massachusetts Growth and Development Policy.*

[5] *10 V.S.A. sec. 6001 et seq., State Land Use and Development Plan.*

[6] *M.S.A. sec. 116 g. 01 et seq., Critical Areas Act.*

[7] *F.S.A. sec. 380.012 et seq., The Florida Environmental Land and Water Management Act.*

if the present uncoordinated decisionmaking process is allowed to continue. And, if the latter course is chosen by default, the costs to all citizens, social as well as economic, will be significantly higher.

4. Several other possibilities do exist for rectifying the present fragmentation in planning and growth management strategies. Some steps have already been initiated, for example, to coordinate the various state agencies' land use policies. The Governor of Wisconsin on April 18, 1975, issued a directive to the State Planning Office, Department of Administration, to coordinate land use management and planning programs at the state level. This executive directive requires the State Planning Office to review all state programs to ensure against duplicative efforts, or ones that will work at cross-purposes to one another. It requires the State Planning Office to examine state policies on public service extensions in support of new urban development to see whether these policies promote sound patterns of land use. Furthermore, it requires the consideration of the relationship between development patterns and the associated public service costs.

   This type of coordination is vitally needed at the state level and could supply positive effects upon regional and local planning efforts through the encouragement and/or discouragement of certain activities at the lower levels of government. Moreover, this type of state leadership should be increased significantly through better cohesion of the state's sovereign and constitutional powers. Specifically, the State of Wisconsin should:

   a. Coordinate its appropriations to encourage development either for state capital programs or local programs which will address and minimize adverse spillover effects from development.

   b. Under its eminent domain powers, the State should more carefully explore the long-range effects that acquisition of lands for public purposes may have, particularly on surrounding lands that are nonstate-owned. An example here is the acquisition of lands for highways and the positive or negative stimulus that public ownership can have on surrounding developments.

      In addition to the foregoing, the State may consider developing a land banking program in areas where expected growth would be greatest. Such a program could stimulate or discourage development where it was deemed most important. Furthermore, it could have the added advantage of timing development by releasing lands for development in stages, thereby controlling projects from mushrooming in an uncontrollable fashion and assuring that adequate public services will be furnished as they are needed.

   c. Through the taxing power, the State also could better allocate the critical resources of the State. A step already has been taken in Wisconsin to preserve agricultural lands by amending the State Constitution to permit preferential taxation of agricultural lands. However, much more could be done by using this power of the State. For example, the State could recoup excess profits from land development and thereby discourage quick speculative ventures and their associated costs. Precedent does exist for such tactics. For example, the State of Vermont has already initiated taxing programs with that objective.[8]

   d. The State should seek complete implementation of the recently enacted Farmland Preservation Act discussed earlier in this report. In rapidly urbanizing areas, the passage of local exclusive agricultural zoning ordinances and the preparation of agricultural preservation plans would encourage the preservation of prime agricultural lands now threatened by urbanization. The State should quickly assess the adequacy of tax incentives offered in the Farmland Preservation Act and increase such incentives if they are found to be inadequate. The preservation of prime agricultural lands is vital in any system of open space preservation and natural resource base protection.

   e. Finally, the State could better use its own police powers. An example of where it has done so is the legislation that requires the zoning of shorelands and all floodplains in the State and its present anticipated use of a similar feature to protect its valuable coastal zones.[9] In addition to these uses of the police power, the State could regulate lands to maintain and preserve areas of critical environmental importance. Such use of the police power would necessitate legislative action which could be patterned on the present state shoreland/floodland protection legislation. In anticipation that the regulation of such lands promises to place an excessive burden on some lands, the

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[8] *32 U.S.A. sec. 10001 et seq. And see Chapter II, note 3, supra, where some discussion also is made of another system advanced by Hagman for preventing the "wipe out" of land values rather than capturing "windfall" profits.*

[9] *See supra, Chapter 6, note 30 and accompanying text for reference to the Coastal Zone Management Program.*

State could initiate a Transfer of Development Right (TDR) program.[10] This would allow the severely restricted landowner to receive compensation indirectly from those landowners who have received permission to develop their lands more intensively. Initiating such a program would relieve the State of potentially heavy public expenditures.

5. At the regional level, SEWRPC should continue to reinforce its efforts to encourage the implementation of its regional plans. It already has extensive indirect leverage through its review powers that tie many federal and state grants-in-aid to local governments on the condition that the local government projects be in conformance with the regional plans. SEWRPC should continue to exercise its responsibilities as reviewer wisely, and it should spend increasing efforts in assisting local governments in meeting their commitments, thereby ensuring the implementation and viability of the regional plans.

[10] *See supra Chapter II, note 4 for a discussion of TDR.*

APPENDICES

Appendix A

PUBLICATIONS AND RELATED MATERIALS OF THE SOUTHEASTERN WISCONSIN REGIONAL PLANNING COMMISSION 1962-DECEMBER 1977

PROSPECTUSES

Regional Planning Program, April 1962
Root River Watershed Planning Program, March 1963
Fox River Watershed Planning Program, October 1964
Continuing Land Use-Transportation Study, October 1965
Milwaukee River Watershed Planning Program, September 1966
Comprehensive Library Planning Program, April 1968
Community Shelter Planning Program, August 1968
Racine Urban Planning District Comprehensive Planning Program, November 1968
Regional Sanitary Sewerage System Planning Program, December 1968
Menomonee River Watershed Planning Program, November 1969
Comprehensive Regional Airport Planning Program, December 1969
Regional Housing Study, December 1969
Deep Sandstone Aquifer Simulation Modeling Program, October 1972
Regional Park, Outdoor Recreation, and Related Open Space Planning Program, March 1973
Preliminary Engineering Study for the Abatement of Pollution from Combined Sewer Overflow in the Milwaukee-Metropolitan Area, July 1973
Kinnickinnic River Watershed Planning Program Prospectus, November 1974
Preliminary Engineering Study for the Abatement of Water Pollution in the Kenosha Urban Area, December 1975
Overall Work Program and Prospectus of the Southeastern Wisconsin Regional Planning Commission (1976-1980), December 1975
Overall Work Program of the Southeastern Wisconsin Regional Planning Commission (1977-1981), December 1976
Regional Air Quality Maintenance Planning Program Prospectus (7-74)

STUDY DESIGNS

Study Design for the Continuing Regional Land Use-Transportation Study, 1970-1974
Study Design for the Continuing Land Use-Transportation Study, 1972-1976
Study Design for the Areawide Water Quality Planning and Management Program for Southeastern Wisconsin: 1975-1977

PLANNING REPORTS

No. 1 - Regional Planning Systems Study, December 1962
No. 2 - Regional Base Mapping Program, July 1963
No. 3 - The Economy of Southeastern Wisconsin, June 1963
No. 4 - The Population of Southeastern Wisconsin, June 1963
No. 5 - The Natural Resources of Southeastern Wisconsin, June 1963
No. 6 - The Public Utilities of Southeastern Wisconsin, July 1963
No. 7 - The Land Use-Transportation Study
  Volume 1 - Inventory Findings—1963, May 1965
  Volume 2 - Forecasts and Alternative Plans—1990, June 1966
  Volume 3 - Recommended Regional Land Use and Transportation Plans—1990, November 1966
No. 8 - Soils of Southeastern Wisconsin, June 1966
No. 9 - A Comprehensive Plan for the Root River Watershed, July 1966
No. 10 - A Comprehensive Plan for the Kenosha Planning District
  Volume 1 - Inventory Findings, Forecasts, and Recommended Plans, February 1967
  Volume 2 - Implementation Devices, February 1967
No. 11 - A Jurisdictional Highway System Plan for Milwaukee County, March 1969
No. 12 - A Comprehensive Plan for the Fox River Watershed
  Volume 1 - Inventory Findings and Forecasts, April 1969
  Volume 2 - Alternative Plans and Recommended Plan, February 1970
No. 13 - A Comprehensive Plan for the Milwaukee River Watershed
  Volume 1 - Inventory Findings and Forecasts, December 1970
  Volume 2 - Alternative Plans and Recommended Plan, October 1971

No. 14 - A Comprehensive Plan for the Racine Urban Planning District
Volume 1 - Inventory Findings and Forecasts, December 1970
Volume 2 - The Recommended Comprehensive Plan, October 1972
Volume 3 - Model Plan Implementation Ordinances, September 1972
No. 15 - A Jurisdictional Highway System Plan for Walworth County, October 1972
No. 16 - A Regional Sanitary Sewerage System Plan for Southeastern Wisconsin, February 1974
No. 17 - A Jurisdictional Highway System Plan for Ozaukee County, December 1973
No. 18 - A Jurisdictional Highway System Plan for Waukesha County, January 1974
No. 19 - A Library Facilities and Services Plan for Southeastern Wisconsin, July 1974
No. 20 - A Regional Housing Plan for Southeastern Wisconsin, February 1975
No. 21 - A Regional Airport System Plan for Southeastern Wisconsin, December 1975
No. 22 - A Jurisdictional Highway System Plan for Racine County, February 1975
No. 23 - A Jurisdictional Highway System Plan for Washington County, October 1974
No. 24 - A Jurisdictional Highway System Plan for Kenosha County, April 1975
No. 25 - A Regional Land Use Plan and a Regional Transportation Plan for Southeastern Wisconsin—2000
Volume 1 - Inventory Findings, April 1975
No. 26 - A Comprehensive Plan for the Menomonee River Watershed
Volume 1 - Inventory Findings and Forecasts (10-76)
Volume 2 - Alternative Plans and Recommended Plan (10-76)

PLANNING GUIDES

No. 1 - Land Development, November 1963
No. 2 - Official Mapping, February 1964
No. 3 - Zoning, April 1964
No. 4 - Organization of Planning Agencies, June 1964
No. 5 - Floodland and Shoreland Development, November 1968
No. 6 - Soils Development, August 1969

TECHNICAL REPORTS

No. 1 - Potential Parks and Related Open Spaces, September 1965
No. 2 - Water Law in Southeastern Wisconsin (2nd Edition, 12-77)
No. 3 - A Mathematical Approach to Urban Design, January 1966
No. 4 - Water Quality and Flow of Streams in Southeastern Wisconsin, November 1966
No. 5 - Regional Economic Simulation Model, October 1966
No. 6 - Planning Law in Southeastern Wisconsin, October 1966
No. 7 - Horizontal and Vertical Survey Control in Southeastern Wisconsin, July 1968
No. 8 - A Land Use Design Model
Volume 1 - Model Development, January 1968
Volume 2 - Model Test, October 1969
Volume 3 - Final Report, April 1973
No. 9 - Residential Land Subdivision in Southeastern Wisconsin, September 1971
No. 10 - The Economy of Southeastern Wisconsin, December 1972
No. 11 - The Population of Southeastern Wisconsin, December 1972
No. 12 - A Short-Range Action Housing Program for Southeastern Wisconsin—1972 and 1973, June 1972
No. 13 - A Survey of Public Opinion in Southeastern Wisconsin, September 1974
No. 14 - An Industrial Park Cost-Revenue Analysis in Southeastern Wisconsin—1975, June 1975
No. 15 - Household Response to Motor Fuel Shortages and Higher Prices in Southeastern Wisconsin (8-76)
No. 16 - Digital Computer Model of the Sandstone Aquifer in Southeastern Wisconsin (4-76)
No. 18 - State of the Art of Water Pollution Control in Southeastern Wisconsin
Volume 1 - Point Sources (7-77)
Volume 2 - Sludge Management (8-77)
Volume 3 - Urban Storm Water Runoff (7-77)
Volume 4 - Rural Storm Water Runoff (12-76)
No. 20 - Carpooling in the Metropolitan Milwaukee Area (3-77)

COMMUNITY ASSISTANCE PLANNING REPORTS

No. 1 - Residential, Commercial, and Industrial Neighborhoods, City of Burlington and Environs, February 1973
No. 2 - Alternative Land Use and Sanitary Sewerage System Plans for the Town of Raymond—1990, January 1974
No. 3 - Racine Area Transit Development Program 1975-1979, June 1974

No. 4 - Floodland Information Report for the Rubicon River, City of Hartford, Washington County, Wisconsin, December 1974
No. 5 - Drainage and Water Level Control Plan for the Waterford-Rochester-Wind Lake Area of the Lower Fox River Watershed, May 1975
No. 6 - A Uniform Street Naming and Property Numbering System for Racine County, Wisconsin, November 1975
No. 7 - Kenosha Area Transit Development Program: 1976-1980 (3-76)
No. 8 - Analysis of the Deployment of Paramedic Emergency Medical Services in Milwaukee County (4-76)
No. 9 - Floodland Information Report for the Pewaukee River (10-76)
No. 10 - The Land Use and Arterial Street System Plans, Village of Jackson, Washington County
No. 11 - Floodland Information Report for Sussex Creek and Willow Springs Creek
No. 12 - Waukesha Area Transit Development Program 1977-1981 (1-77)
No. 13 - Flood Control Plan for Lincoln Creek (9-77)
No. 15 - Off-Airport Land Use Development Plan for General Mitchell Field and Environs—1977 (5-77)
No. 16 - A Plan for the Whittier Neighborhood (6-77)
No. 19 - Storm Water Storage Alternatives for the Crossway Bridge and Port Washington-Bayfield Drainage Areas in the Village of Fox Point (8-77)
No. 20 - A Rail Transit Service Plan for the East Troy Area (9-77)

TECHNICAL RECORDS

Volume 1 - Numbers 1-6
Volume 2 - Numbers 1-6
Volume 3 - Numbers 1, 2
Volume 3 - Number 3
Volume 3 - Number 4
Volume 3 - Number 5

LAKE USE REPORTS

ANNUAL REPORTS

1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, and 1975

CONFERENCE PROCEEDINGS

1st Regional Planning Conference, December 6, 1961
2nd Regional Planning Conference, November 14, 1962
3rd Regional Planning Conference, November 20, 1963
4th Regional Planning Conference, May 12, 1965
5th Regional Planning Conference, October 26, 1965
6th Regional Planning Conference, May 6, 1969
7th Regional Planning Conference, January 19, 1972
8th Regional Planning Conference, October 16, 1974
Regional Conference on Sanitary Sewerage System User and Industrial Waste Treatment Recovery Charges, July 18, 1975

COMMUNITY PROFILES

Volume 1
Volume 2
Volume 3

AERIAL PHOTOGRAPHS

1963 High-Flight
1963 Low-Flight
1967 Low-Flight
1970 High-Flight
1970 Low-Flight
1975 Low-Flight

MAPS AND RELATED MATERIALS

1963 Land Use
1990 Proposed Land Use and Freeway System
Regional and County Base Maps
SEWRPC Topographic Maps
Traffic Analysis Zone Maps
Soil Maps
School District Maps
Sanitary Sewerage System Maps
Regional Census Tract Maps
Street Index Maps
Control Survey Summary Diagrams
Metropolitan Map Series Maps
1990 Proposed Jurisdictional Highway System Plan for Milwaukee County
1990 Fox and Milwaukee River Watershed Plan Maps
Miscellaneous Maps
Flood Hazard Determinations

Appendix B

LAKE GEORGE PARK COMMISSION

Section 840. Legislative intent

The preservation and enhancement of natural beauty in the state, the preservation and conservation of pure water supplies and other natural resources, the preservation and development of natural resources and recreational facilities for the benefit of the public, the promotion of the study of history, natural science, and lore, the conservation and protection of state lands in the forest preserve and areas adjacent thereto, and the promotion and preservation of the health and welfare of the public residing, sojourning, or visiting therein being the concern of the state, the legislature hereby declares it to be in the public interest to preserve, protect, conserve and enhance the unique natural scenic beauty and to promote the study of the history, natural science, and lore of Lake George and the area near or adjacent thereto and to provide means whereby owners of real property near or adjacent to the lake, other interested individuals, corporations, associations, organizations, and municipalities bordering on the lake may preserve, protect and enhance the natural scenic beauty of the lake and its surrounding countryside and regulate the use of the lake and the area near or adjacent thereto for appropriate residential, conservation, health, recreational, and educational purposes. Added L.1961, c. 454, sec. 1; amended L. 1962, c. 794, sec. 1, eff. April 24, 1962.

L. 1962, c. 794, sec. 1, eff. April 24, 1962, among other changes, inserted "and regulate the use of the lake * * * educational purposes".

Library references

States ⚲ 88.

C.J.S. States sec. 105.

Section 841. Definitions

As used in this part:

1. "Lake George park" means the bed, waters, islands, and shore of Lake George and all land lying within one mile of high water mark on the shore of said lake.

2. "Zone" means any area of land within the Lake George park in which the use of land for commercial purposes is prohibited, restricted, or controlled pursuant to the provisions of this part, local law or ordinance, agreement, restrictive covenant, or otherwise.

3. "Commercial purposes" means use of lands, including structures thereon for any purpose from which a profit may be derived, other than a lease or rental of residential property for single, private family residential purposes.

4. "Commission" means Lake George park commission. Added L. 1961, c. 454, sec. 1; amended L. 1962, c. 794, sec. 1, eff. April 24, 1962.

L. 1962, c. 794, sec. 1, eff. April 24, 1962, added subd. 1, renumbered former subds. 1-3 to subds. 2-4, respectively, and as thus renumbered amended them.

Library references

States ⚲ 88.

C.J.S. States sec. 105.

Section 842. Lake George park commission

There is hereby created in the conservation department a commission to be known as "Lake George park commission." Such commission shall be a body corporate and politic. It shall consist of the commissioner of conservation, ex officio, and nine members to be appointed by the governor, by and with the advice and consent of the senate, at least two of whom shall reside in the county of Essex, two in the county of Warren and two in the county of Washington and at least three of whom shall be members of a civic, protective or service association in the Lake George area. In making appointments pursuant hereto the governor shall give consideration to nominations made by such associations in such area. The members shall be appointed for overlapping nine year terms of office running from April first of the year in which such terms shall, respectively, commence, provided, however, that of the members first appointed one shall be appointed for a one-year term of office beginning April first, nineteen hundred sixty-one, one for a two-year term of office, one for a three-year term of office, one for a four-year term of office, one for a five-year term of office, one for a six-year term of office, one for a seven-year term of office, one for an eight-year term of office and one for a nine-year term of office, each of which shall commence on such date. An appointment to fill a vacancy shall be made for the remainder of the affected term of office. The officers thereof shall consist of a chairman, vice-chairman and secretary-treasurer to be elected by the commission. The members of the commission shall receive no compensation but may be reimbursed for expenses necessarily incurred in the performance of their duties. Added L. 1961, c. 454, sec. 1, eff. April 1, 1961.

Library references

States ⚲ 45 et seq.

C.J.S. States sec. 52, 66.

Section 843. Powers of Commission

The commission shall have power to:

1. Encourage individuals, corporations, associations, and organizations to preserve and enhance the natural scenic beauty of Lake George and lands within the Lake George park.

2. Adopt, sponsor, and encourage the use of forms of deeds, agreements, covenants, and other legal documents by means of which owners of real property within the Lake George park may voluntarily prohibit, restrict, and control the use thereof for commercial purposes.

3. Encourage owners of real property within the Lake George park by written instruments to prohibit, restrict, or control voluntarily the use of such real property for commercial purposes.

4. Acquire interests or rights in real property within the Lake George park for the purpose of prohibiting, restricting, or controlling the use of such real property for commercial purposes.

5. Establish rules, regulations, and procedures by or pursuant to which the commission may authorize or permit a necessary or desirable use of land or prevent unnecessary hardship in an individual or particular instance by altering or modifying in whole or in part any restriction contained in any conveyance to or agreement with the commission or which the commission has power to alter or modify.

6. Encourage, cooperate with, aid, and assist municipalities lying wholly or partly within the Lake George park in the preparation and adoption of zoning laws or ordinances and other local legislation prohibiting, restricting, regulating, or controlling the uses of real property for commercial purposes within Lake George park.

7. Make maps and plans for proposed or permanent zones.

8. Establish as a proposed zone any area of land, exclusive of state or municipally owned land, lying within the Lake George park.

9. Alter, reduce, or extend any such proposed zone.

10. Establish as a permanent zone any area of land, exclusive of state or municipally owned land, lying within the Lake George park in which the use of all real property for commercial purposes is (a) prohibited, or (b) restricted or controlled.

11. Alter or extend a permanent zone under the procedure applicable to the original establishment of a permanent zone.

12. Enter upon any land, water, or premises within the Lake George park at reasonable times for the purpose of making surveys.

13. Cooperate with, aid, and assist municipalities and law enforcement agencies in enforcing laws affecting or applying to Lake George and the area lying within the Lake George park.

14. In cooperation with existing law enforcement agencies, arrange for the appointment of patrolmen who, within the Lake George park, shall have the powers of peace officers as defined by section one hundred fifty-four of the code of criminal procedure and shall have law enforcement responsibilities concurrent with the responsibilities of other peace officers in respect to the enforcement of all laws and local ordinances or laws pertaining to Lake George or the Lake George park. Pursuant to this subdivision, members and employees of the commission may be appointed patrolmen but if appointed shall serve without compensation. Such patrolmen shall have the right to use sirens, display flags, or other identifying insignia and wear badges while engaged in law enforcement activities within the Lake George park.

15. Promote the study of the history, historical significance, natural science, and lore of Lake George and the area within the Lake George park and in cooperation with the education department to preserve the historic relics found in or near Lake George.

16. Encourage individuals, corporations, associations, organizations, and municipalities to protect and preserve the purity of the waters of Lake George.

17. Establish advisory committees and enlist and accept the support and cooperation of organizations of property owners or others interested in promoting the purposes and objectives of this part.

18. Do all things necessary or convenient to carry out the powers expressly granted by this part. Added L. 1962, c. 794, sec. 2, eff. April 24, 1962.

Section derived from former section 843, as added by L. 1961, c. 454, and repealed by L.1962, c. 794, sec. 2, eff. April 24, 1962.

Library references
States 67, 88.
Zoning 7 et seq.
C.J.S. States sec. 58, 66, 105.
C.J.S. Zoning sec. 6, 27, 28.

Section 844. Commercial use in zones

On and after (a) the establishment, alteration, or extension of a permanent zone, (b) the filing of the order establishing, altering, or extending such zone, together with the map and description thereof, in the office of the clerk of each county in which such zone is located, (c) the recording in the appropriate county clerk's office of the written instruments by which the use for commercial purposes of all real property in such zone is prohibited, restricted, or controlled, and (d) notice of the establishment, alteration, or extension of such zone has been published four times in a newspaper having general circulation in the area in which such zone is located, no real property within such zone shall be used for commercial purposes except as authorized or permitted by the terms of the order establishing, altering, or extending such zone or as authorized or permitted pursuant to subdivision five of section eight hundred forty-three of this part. Added L. 1962, c. 794, sec. 3, eff. April 24, 1962.

Section derived from former section 844, as added by L. 1961, c. 454, and repealed by L.1962, c. 794, sec. 3, eff. April 24, 1962.

Library references
States 88.
Zoning 9 et seq.
C.J.S. States sec. 105.
C.J.S. Zoning sec. 6.

Section 845. Expenses of commission; employees

The commission may appoint employees and agents and fix their compensation within moneys available therefor. Such compensation and the other necessary expenses of the commission shall be paid from moneys received by the commission from appropriations from the state or one or more municipalities in the counties of Essex, Warren or Washington, gifts or contributions, which the commission is hereby authorized to accept. Moneys appropriated for use of the commission by the state shall be paid out of the state treasury on the audit and warrant of the comptroller on vouchers certified or approved by the chairman of the commission or by an officer or employee of the commission designated in writing by the chairman. Added L. 1962, c. 794, sec. 4, eff. April 24, 1962.

L. 1962, c. 794, sec. 4, eff. April 24, 1962, inserted sentence beginning "Moneys".

Library references
States 53.
C.J.S. States sec. 49, 53, 55, 56, 70, 77, 79.