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PLANNING LAW IN SOUTHEASTERN WISCONSIN

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NUMBER 6

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PLANNING LAW
IN SOUTHEASTERN WISCONSIN

Prepared by the
Southeastern Wisconsin Regional Planning Commission

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STATEMENT OF THE EXECUTIVE DIRECTOR

This report presents the results of a study of planning law conducted by the Commission as an important element of the regional land use and transportation planning program for the seven-county Southeastern Wisconsin Region. 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 efficient and meaningful implementation.

More specifically, this report presents the results of an inventory and evaluation of the various physical planning and plan implementation powers available to the federal, state, areawide, and local levels of government in southeastern Wisconsin. This report also gives careful attention to private property rights and the limitations which these rights properly impose on governmental powers. Special attention has been given in this report to the difficult problem of placing development, in both time and space on an areawide basis, and to the problems of open-space reservation and highway right-of-way protection in rapidly urbanizing areas.

This report provides the basis for the specific regional land use and transportation plan implementation recommendations made in Volume 3 of SEWRPC Planning Report No. 7, Recommended Regional Land Use and Transportation Plans—1990. This report should also serve well the purpose of a manual of planning law, which may be utilized by the local units of government within the Region. In using this report, however, it should be remembered that the law is not a static quantity but is in a constant state of flux due to statutory amendments and court action and that, consequently, careful attention will have to be given to any changes in state and federal legislation and to the effects of court action as these changes and actions may subsequently modify the information presented herein.

Respectfully submitted,



K. W. Bauer
Executive Director



THE UNIVERSITY OF WISCONSIN

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MADISON, WISCONSIN 53706

July 7, 1966

Mr. K. W. Bauer, Executive Director
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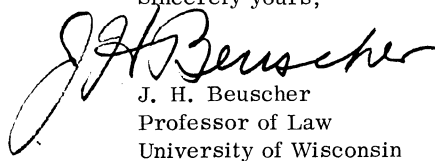
Dear Mr. Bauer:

It is our pleasure to present to you this report, entitled Planning Law in Southeastern Wisconsin, prepared by us using funds made available through your Commission and the State of Wisconsin. This is a part of the regional land use-transportation study being conducted by your agency for the Southeastern Wisconsin Region.

Special acknowledgment is due to Mr. Orlando E. Delogu, Principal Researcher, who compiled much of the information presented in this report and who shared in its authorship. Acknowledgment should also go to Jeffrey Wheeler and Gerritt Van Wagenen, law students at the University of Wisconsin, for their work on aspects of the report.

We believe that the report offers both an understanding of basic planning and plan implementation law as it operates in Wisconsin and also some concrete proposals for more effective implementation of areawide planning objectives. It does not, however, dispense with the need for continuing legal research in this rapidly changing area of law.

Sincerely yours,


J. H. Beuscher
Professor of Law
University of Wisconsin



PREFACE

In January 1963 the Southeastern Wisconsin Regional Planning Commission initiated its first major planning efforts actually directed at the preparation of a comprehensive development plan for the Southeastern Wisconsin Region by undertaking a three and one-half year regional land use-transportation study. This study is intended to produce two of the key elements of a comprehensive plan for the physical development of the Region: a land use plan and a transportation plan, and in so doing is intended to meet requirements of the 1962 Federal Aid Highway Act.

One of the basic studies undertaken as a part of this total planning effort was a planning law study intended to provide a basic inventory of planning and plan implementation legislation within the Region and to suggest legal means for areawide land use and transportation plan implementation. This report presents the findings of that study. Throughout, an attempt has been made to keep apart such plan implementation measures as are now possible under existing Wisconsin enabling legislation and measures which would require enabling legislation not now in effect. The report also attempts to deal in a realistic way with the problems of areawide plan implementation in urban regions comprised of a multiplicity of levels and units of government. The coordination of a number of plan implementation measures to achieve a development objective becomes far more difficult when each measure must be enacted by a separate independent level, agency, or unit of government.

It was not deemed necessary for the purposes of this report to indulge in a comprehensive analysis of the entire planning function at state, regional, and local levels of government. It is sufficient to note that state, regional, and local governmental units are actively engaged in the planning function and that development objectives are set through the application of many now well-established planning techniques.

The development objectives with which this report is concerned are typically set by comprehensive areawide planning efforts which attempt to guide and shape physical development in the public interest and which seek to influence private as well as public development decisions. It must, however, be recognized that several other kinds of planning activity which can set development objectives normally coexist with comprehensive areawide planning. These include long-range planning efforts for particular line functions, such as highway, park, school, water supply, and sewerage system facilities; fiscal planning for budgetary purposes; and resources planning for the conservation, wise use, and development of resources, such as soils, water, woodlands, wetlands, and air. Comprehensive areawide planning should establish the framework within which the other types of functional planning are conducted and should seek to coordinate the more detailed and specialized functional planning efforts, directing all to the maximum extent possible to common, agreed-upon development objectives.



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Chapter I

STATE AND LOCAL POWER TO IMPLEMENT COMMUNITY DEVELOPMENT OBJECTIVES

INTRODUCTION

This chapter includes some general observations about the state's sovereign power to accomplish community development objectives expressed in physical development plans. These observations are intended to emphasize that the state is the basic reservoir of governmental power in the United States, 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 and is often enunciated by the state court system.

Inherent sovereign powers to act in the public interest 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. There are, of course, limitations imposed upon the exercise of this reserved sovereign power by both the Federal and the Wisconsin constitutions, as 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 we wish merely 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, not 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 when undertaking the implementation phase of a broad planning program is to compartmentalize the pertinent powers of the state into four categories: power of eminent domain, power of taxation, power of appropriation,¹ and police power. 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 and prevent an imaginative approach to plan implementation. Thus, for example, the familiar list of the four powers of government leaves out of account the ability of the state to

¹ 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 sewage, 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.

persuade, educate, communicate, and mold public opinion. The state 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:²

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.

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 of 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 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?
- 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

² Commons, *Institutional Economics* (1934), p. 280.

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 coordinate the work of the land use regulator and of the tax administrator to achieve community development objectives?

Is it possible to achieve integration between the capital budgeting and regulatory controls or between public improvements programing and such 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 the shibboleths that cloak outmoded categorizations of governmental powers. This report is intended as a response to these questions.

One further point should be made with respect to an integrated and coordinated approach to plan implementation. Individualization of controls has been encouraged by the historic approach taken in Wisconsin to 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. There is in Wisconsin a separate enabling act for 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. Official mapping is clearly authorized for cities and villages; town and county authorization, in quite 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. If Wisconsin were a monolith that spoke on all matters of planning and resource utilization through a single official mouth, integration would be far easier to achieve, although at a terrible cost in terms of the democratic values which we cherish. But, of course, government is not organized in this monolithic way. Put aside for the moment the powers of the Federal Government, and consider how in Wisconsin the Legislature has allocated various powers over state waters to numerous state level line agencies; for example, levels and flows to the Public Service Commission and water quality to the State Board of Health, the Committee on Water Pollution, and the Conservation Commission. Important powers with respect to subdivision plat review are exercised by the Department of Resource Development, State Board of Health, and State Highway Commission. The basic powers of judicial review are vested in the various levels of our state courts. The planning powers of the state are dispersed in large part among the Department of Resource Development, the Department of Public Instruction, the Highway Commission, and the Conservation Commission; and there are land purchase and management powers in the Agriculture Department, the Conservation Department, and the University systems.

This is but a partial list. It suffices to suggest 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 crisscrossed 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 parcel of power needed for a total regional 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;³ and outside corporate limits county

³ Art. XI, Sec. 3, Wis. Const. 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. *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 just noted bar the county from exercising such regulatory authority within villages or cities. 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, 1963.

zoning is subject to town approval. Soil and water conservation districts, which in Wisconsin are coextensive with county boundaries, are tied by their enabling statute to primarily agricultural improvement. Their legal authority is simply not broad enough for full scale resource plan implementation. Their boards of supervisors are the members of the Agricultural Committee of the respective County Board.⁴

The Wisconsin Legislature has never seen fit to authorize the creation of regional units with broad, multiple-purpose plan implementing powers. A proposed bill to authorize the creation of multiple-purpose conservancy districts was defeated in the 1961 Session.⁵

So, in general, 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.

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, with the approval of the county board, believes has a relation to the development of the municipality.⁶
- 2) Extraterritorial control powers in unincorporated areas lying within one and one-half miles of a village or fourth class city or three miles of first, second, or third class city limits for purposes of subdivision plat approval,⁷ official mapping of future streets,⁸ and zoning, the latter only if certain procedures involving town representation on the municipal plan commission are fulfilled.⁹
- 3) Slight and by no means thoroughgoing liberalization of annexation laws.¹⁰
- 4) Broad permission to local units to band together by contract to do jointly whatever they could do separately.¹¹

These are all piecemeal and partial measures. They recognize the problem but are not 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. Wisconsin is already noteworthy in the degree to which state agencies are involved in planning and plan implementation. For example, the State Highway Commission may purchase scenic easements. In addition, they have important authority to limit access

⁴ Wis. Stats. 92.06.

⁵ See Bill 20A, 1961 Session.

⁶ Wis. Stats. 62.23(2).

⁷ Wis. Stats. 236.45.

⁸ Wis. Stats. 62.23(6).

⁹ Wis. Stats. 62.23(7a).

¹⁰ Wis. Stats. 66.021.

¹¹ Wis. Stats. 66.30.

to state trunk highways and thereby to accomplish at least some restrictions on the use of land along these arteries.¹² Closely related is the Highway Commission's authority under Chapter 236 of the Wisconsin Statutes to review and, if necessary, prevent the filing of plats and, therefore, the sale of lots abutting state trunk highways which have been created by subdivisions. The State Highway Commission has issued carefully worked out regulations to accomplish the highway protection objectives of this review. Finally, the State Highway Commission has been granted limited official mapping powers by Wis. Stats. 84.295(10).

The State Board of Health reviews all subdivision plats not to be served by public sewer and determines minimum lot size and other requirements. The State Department of Resource Development reviews all subdivision plats for completeness in mapping and for certain minimum layout requirements involving lot size, street widths, and access to navigable waters. The Department also reviews and must approve all proposed municipal incorporations and may advise the court on questions of annexation. Through the exercise of these powers, the Department can, to a major extent, prevent excessive Balkanization of local governments in metropolitan regions; but it can do little to assemble the pieces already splintered off. Proposed flood plain regulation,¹³ highway interchange,¹⁴ and lake shore control legislation¹⁵ all point in the direction of increased state authority, at least over the special categories of land covered in the proposed laws cited below.

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

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. Chapter 238 of the 1965 Wisconsin Session Laws, authorizing joint bond issues by commissions created by contract between local units of government pursuant to Wis. Stats. 66.30, suggests that further efforts to find regional solutions through joint action may be made. The lack of a regional constituency, however, together with the non-existence of regional legislative or executive bodies, constitutes major hurdles to significant progress along these lines.

Possibly, especially in view of recent county board reapportionment, a broadening of county powers may offer an additional alternative approach for more effective areawide plan implementation. The county in Wisconsin does have a constituency and a legislative framework but, unfortunately, rarely has a strong executive body.

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 is concluded 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 of developing regional plan implementation tools to solve areawide development problems.

¹² Wis. Stats. 84.25.

¹³ Bills 328A and 753A, 1965 Session.

¹⁴ Bills 360A and 361A, 1963 Session.

¹⁵ Bill 753A, 1965 Session.

Chapter II

FEDERAL POWERS TO IMPLEMENT COMMUNITY DEVELOPMENT PLANS IN SOUTHEASTERN WISCONSIN

The influence and programs of agencies of the Federal Government have spread so widely and deeply into the fabric of land and resource use that it has become difficult to continue to convince people that our Federal Government is actually a government of limited, that is, of 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 land and resource 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 ordinance by a grant-in-aid or of a subdivision control ordinance by FHA mortgage insurance instructions, a federal zoning or subdivision control law which attempted to regulate land uses directly in all, or a part of, the Southeastern Wisconsin Region 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 complete, however, since such an effort would expand this chapter into a stout volume. It is hoped, that this summary sketch will bring to the reader an improved understanding of the present and potential role of the Federal Government as may concern plan implementation in the Southeastern Wisconsin Region.

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 grants for slum clearance and urban renewal are all important illustrations of the exercise of this power to encourage plan implementation. Of major significance have been the federal highway aid programs, especially as administered under the 1962 Federal Highway Act. Involvement of regional planning commissions in the advisory review of applications for federal grants, pursuant to federal law and administrative regulations, will become an increasingly important vehicle for regional plan implementation. The regional agency will be able

¹ In *U.S. v. Certain Lands in City of Louisville*, 78 F. 2d 684 (6th Cir. 1935), the court held that the state and federal governments are distinct sovereignties, each independent of the other and each restricted to its own sphere; and neither can invade or usurp the rightful powers or authority of the other. Furthermore, the court stated that in the exercise of its police power a state may do those things which benefit the health, morals, and welfare of its people; but the Federal Government has no such power within the states.

² Art. 1, Sec. 8, U.S. Const.

in this way to induce local units of government to consider broader regional plans and objectives when applying for federal funds under these programs.

Closely related to federal money grants-in-aid are the technical services of federally employed personnel, which are available for regional planning and plan implementation purposes. Soil surveys by Soil Conservation Service personnel; U. S. Geological Service topographical and ground water surveys; and educational services of county agents, who are partly on the federal payroll, are illustrations of this important source of assistance, which is premised fundamentally in the Congressional power to tax and thus to provide for the general welfare.

In addition to making money or services available, 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 in slum areas. Land use planning is traditionally and properly a local activity. However, the FHA mortgage insurance program, the federal public housing program, and the slum clearance and urban redevelopment programs have heavily involved the Federal Government in the actual location and construction of structures, particularly residential housing. This frequently presents troubling issues of how best to integrate such federally induced construction with local or regional plans.

FHA mortgage insurance is an example in illustration of the point. FHA instructions to field personnel for the rating of mortgage insurance applications contain what is in effect a minimum building code for the entire country. The instructions on rating neighborhoods have blossomed into a subdivision layout and site planning service. Included are detailed suggestions for restrictive covenants for subdivisions and proposed regulations for planned unit developments. Developers have frequently been content to meet the minimum FHA rating requirements. There is no doubt that this largest of all insurance enterprises has left indelible marks in the form of housing types and subdivision patterns on the local landscape of every major metropolitan center in the country, and certainly this is true of southeastern Wisconsin.

Exercising its power to tax and to spend for the general welfare, the Federal Government can institute major resource development projects big enough that they can be said to be in the general welfare. The great Central Valley projects in California are an illustration.³ These federal projects if not properly coordinated with state and local government units may be disruptive, not only to state-granted private rights, but also to state, regional, or local resource planning.⁴

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, however, we can expect additional federal programs, as yet not enacted into law, premised on this power, with major impact on state, regional, and local resource planning and plan implementation. A good example is federal expenditures for transportation and highway-related purposes. Already long established are major federal aid highway programs which initially contributed to the construction of the existing system of

³ *In U.S. v. Gerlach Livestock Co.*, 339 U.S. 725 (1950), the court said: "Congress has a substantive power to tax and appropriate for the general welfare limited only by the requirement that it may be exercised for the common benefit as distinguished from some more local purpose."

⁴ *U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913) and *Oklahoma v. Guy F. Atkinson Co.*, 313 U.S. 508 (1941). A state sought unsuccessfully to enjoin construction of a federal dam which would inundate 100,000 acres of land and displace 8,000 persons. The cases cited in this footnote involved the commerce power. But in view of the approval of the Central Valley project on general welfare grounds (see footnote 3), no reason is perceived why they are not pertinent authority for the statements in the text.

U. S. roads and more recently have been instrumental in the rapid development of the interstate system. Indeed, the various federal and highway systems actually constitute long-range plans insofar as they tend to coordinate the expenditure of federal aids for highway development. Federally financed regional transportation planning programs, like the one presently being undertaken in the Southeastern Wisconsin Region, are becoming more numerous, and on the immediate horizon are the highway beautification and scenic road programs. Indications are that the federal role to tax and appropriate funds for the general welfare is an expansive one.

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 States⁵

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, enclaves of federal land 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.⁶

The third major source of federal power capable of influencing and, if used in an uncoordinated manner, of 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"⁷ This simple statement has spawned an enormous number of, and widely different, 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 culled from 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 discuss herein this rapidly expanding source of federal regulation in toto. Instead, an outline of how the commerce power has developed (expanded might be a better word) in the water field is included. Statements made in relation to water resources are intended to give the reader some feel for the expansion of federal power over time, so far as concerns regulation of so-called interstate commerce generally, and at the same time alert him to 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 asserts dominant regulatory authority over navigable waters of the United States. The reasoning here is that commerce includes transport, which includes navigation; and, therefore, a dominant federal navigational servitude exists, if the Congress chooses to assert it. However, this servitude applies only to waters which are navigable in fact under a federal definition of navigation. This definition

⁵ Art. IV, Sec. 3, U.S. Const.

⁶ Ashwander v. TVA, 297 U.S. 288 (1936).

⁷ Art. 1, Sec. 8, U.S. Const.

states that the waterway must have been used or is susceptible of being used as a highway of commerce over which trade and travel may be conducted in the customary modes on inland waters. A river historically navigable by virtue of actual use for commercial purposes continues to be navigable water of the United States even though artificial structures or natural obstructions or changed economic conditions no longer make such commercial use feasible.⁸ In one leading case,⁹ the Supreme Court said that a river which in its natural state could not be used for commerce was, nevertheless, navigable water of the United States if it is feasible on the basis of the balancing of cost and benefit to install artificial aids to make it navigable in fact.

By application of these various tests, the Milwaukee, Menomonee, Kinnickinnic, Fox-Illinois, and Root rivers and possibly the Des Plaines River would all be navigable for varying distances upstream from their mouths and thus subject to the overriding power of the Federal Government. For example, suppose that the Congress approves an improvement, let us say a dam; and this is opposed by the Regional Planning Commission and the local units of government concerned. If the water is navigable water of the United States, or if the dam is to be on a non-navigable tributary so as to affect the navigability of the commercially usable mainstream, the federal power would prevail in spite of local plans to the contrary.

Acting presumably under its commerce power, the Federal Government has recently in the Water Quality Act of 1965 moved further into the water pollution control field. The Water Quality Act of 1965 applies to interstate waters, not to navigable waters of the United States, so that possibly it does not include all water to which the federal servitude of navigation applies. Interstate waters are defined as waters forming state boundaries or watercourses which flow across such boundaries. Pollution flowing from tributaries into interstate waters may, however, also be regulated. Hence, the Milwaukee, Fox-Illinois, Root, and other major streams within the Region may all be subject to federal pollution control. This is because the Milwaukee, Root, and other streams which flow directly into Lake Michigan affect quality of this interstate water; and the Fox-Illinois is itself an interstate stream which flows across the Wisconsin-Illinois boundary. If the state or the SEWRPC acting on behalf of the state fails to establish for these rivers water quality standards acceptable to the U. S. Secretary of Health, Education and Welfare, the Secretary, after July 1, 1967, can do so himself.¹⁰ Whatever standards are fixed, whether by the state or by the Secretary, such standards are enforceable by federal authorities after certain preliminary conferences with state officials and polluters have first been held.

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 in 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 FHA 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.

⁸ *Gibbons v. Ogden*, 9 Wheat. U.S. 1 (1824); *The Montello*, 20 Wall. U.S. 430 (1874); *Economy Light Co. v. U.S.*, 256 U.S. 113 (1924); *U.S. v. Cress*, 243 U.S. 316 (1917).

⁹ *U.S. v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

¹⁰ This brief account does not discuss the possibility that standards set by the Secretary may be changed by a Joint Board set up by the Secretary at the request of the Governor of the state.

Chapter III

SPECIFIC PLANNING AND PLAN IMPLEMENTATING POWERS IN WISCONSIN

INTRODUCTION

In this chapter a more specific background is laid for the functional analyses that follow in chapters VI through IX. This is done by presenting an overview of state, regional, and local governmental authority for land and water planning and for plan implementation in Wisconsin. The Wisconsin Legislature has retained some and parceled out other of its powers in these fields to various agencies and levels of government. To gain a complete picture, it is necessary to examine numerous 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 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. No one has ever attempted to draw the whole together into a coordinated, integrated pattern. This report makes no claim to have discovered and identified every legislative delegation of authority or statutory nuance. However, the principal ones are examined for their value in describing Wisconsin's legal tools for planning and plan implementation. It is important to know what presently exists before change can intelligently be proposed. In addition, as already indicated, the overview is essential for an understanding of the chapters that follow.

STATE LEVEL AGENCIES, PROGRAMS, AND POWERS

State Department of Resource Development

The State Department of Resource Development is headed by a Director appointed by the Governor and is advised by an advisory committee in matters concerning natural resources.¹ This committee consists of 15 citizens who have demonstrated an abiding interest in the development, use, and conservation of the state's natural resources. Members are appointed by the Governor and serve at his pleasure. Each of the following 8 fields of interest shall be represented: commercial fishing, forestry, game control, land use, minerals, planning and zoning, sport fishing, and water resources.² The task of preparing a comprehensive plan for the State of Wisconsin was assigned by the 1959 Legislature to the then newly created Department of Resource Development.³

Using both state funds and 701 grant funds from the U. S. Housing and Home Finance Agency, the Department initially produced preliminary planning studies consisting largely of factual inventories. Under a second phase, more intensive studies and analyses are now virtually completed with preliminary planning goals and recommendations shortly to be published. Funds for a third phase have been provided by the state, and the Department is again requesting matching funds from HHFA to enable refining and updating of the plans produced in the second phase of the state's planning

¹ *Wis. Stats. 109.02 and 109.07.*

² *Wis. Stats. 109.07(a).*

³ *C. 442, L. 1959, now sec. 109.01 et. seq. Wis. Stats., 1963.*

program. It is anticipated that the Department's planning division will become increasingly active in working with its own industrial development division and with departments and agencies of state government toward the implementation and achievement of planning goals set in the second phase.

The Department is not granted all of the powers needed to carry out the plans it produces. This is not to say, however, that its function is exclusively the production of plans. It has on hand certain direct and indirect tools for implementation. These include industrial promotion, subdivision plat review, and review of proposed municipal incorporations, consolidations, and annexations.

For every proposed incorporation, the Department of Resource Development makes an investigation, conducts a hearing, and makes a determination of whether or not statutory standards (Wis. Stats. 66.016) on incorporation are being met. These standards relate to the characteristics of the territory; that is, tax base, level of services, and impact on surrounding area. The determination of the Department is not advisory but is binding on the court. If appealed from, it is entitled to the same respect and weight customarily accorded administrative determinations reviewed under Wis. Stats. Chapter 227.

Consolidations of two villages, two cities, or a city and a village may be accomplished by ordinance and referendum, Wis. Stats. 66.02. But consolidation of a city or village with a town requires that a determination be made by the Department of Resource Development, as outlined above, that the proposed consolidation is in the public interest. Review of all proposed annexations by the Department is made mandatory by Wis. Stats. 66.021(11). However, the determination in this case is advisory only. For annexations of one square mile or less, the Department's advisory report is sent to the clerk of the annexing municipality. For annexation of a territory larger than one square mile, the advisory report is mailed to the circuit court handling the proceeding.

The Department also has certain functions as broker in the allocation of various federal and state grants-in-aid.⁴ It can presumably use this authority for plan implementation purposes.

In addition, the Department's relations with state line agencies are such that it has effective influence on the programs of some of these agencies so far as concerns state planning goals. The Department's working relationships with the several regional planning agencies in the state and with counties, towns, villages, and cities in the implementation of state planning goals are in the process of development and will become increasingly important as these goals become more familiar to the communities of the state.

A special word should be added with respect to the Department's water resource planning authority. Wis. Stats. 109.05(1) generally authorizes the Department to prepare coordinated plans for resource development and to that end to correlate information relating to watersheds, waterways, waterfront and harbor developments, river basins, flood prevention, river valleys, drainage and sanitary systems, waste disposal, water works, and water supplies. The Department is also directed to cooperate with fed-

⁴ For example, 701 planning funds and rural development funds. Previously, it was the broker for Federal Land and Water Conservation funds; but Governor Knowles early in 1965 re-assigned this function to the Conservation Commission. The Department of Resource Development directly administers a small grant program of Outdoor Recreation Act Program funds to counties for local parks.

eral, state, regional, and local public and private agencies in the making of plans for flood control; the use, conservation, and allocation for use of existing water supplies; and the development of new water resources. The Department has done some water-related planning, particularly in connection with the ports and navigation aspects of its transportation planning and water-oriented activities in connection with its recreation planning activities. However, budget limitations have prevented the Department from doing a comprehensive job of correlating information relating to Wisconsin waters; and it has not participated with other agencies in water resource planning as such.

In general, then, this Department has gone far toward fulfilling the mandate that it prepare a state plan "to promote the maximum and wise use of the natural and human resources of the state." Its planning has tended to be relatively land based. Lack of funds has prevented it from weaving into the state plan a broad range of goals and recommendations relating to state waters. It has no power of purchase and condemnation and no powers of management over state-owned resources as aids to plan implementation. However, it does have review powers over land subdivision and substantial powers to control the creation of new cities and villages and annexations to existing cities and villages.

State Highway Commission

Prior to the amendment of Article VIII, Section 10, of the State Constitution in 1900, the state was barred by the so-called "Internal Improvements" clause from establishing, constructing, or maintaining a state highway system. That amendment enabled the creation of the State Highway Commission of Wisconsin. This full-time Commission consists of three members appointed by the Governor for staggered terms of six years. There is to be one member 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."⁵

Under this grant of authority, the Commission has established a Planning and Research Division to make "plans for developing highways and highway systems on a long-range basis."⁶ This division works in cooperation with the Department of Resource Development and is evolving a highway plan for the state as a part of the overall state plan. It also works closely with regional planning commissions and with local planning agencies in order to coordinate state, regional, and local highway planning.

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.⁷

⁵ Wis. Stats. 84.01(4).

⁶ It is worth noting that there is no specific grant of planning enabling authority to the State Highway Commission. However, it seems safe to assume that a court would sustain the activities of the Planning and Research Division as reasonably implied within the broad grant of authority to the Commission and, in fact, very necessary in light of the complexities of modern highway design, construction, layout, and the high costs attendant to same. To put planning and research activities of the Commission on a sounder footing though and to more clearly authorize less direct but nonetheless important highway-related research endeavors, the Legislature at some future date may want to spell out in a specific grant of planning authority to the Commission what is now only implicit.

⁷ Wis. Stats. 32.05.

It, of course, has power to: construct the planned highways, regulate billboards where an Interstate System Highway is involved,⁸ establish roadside park areas, protect roadside amenities by roadside beautification activities,⁹ purchase scenic easements,¹⁰ and participate in a historic markers and sites program.¹¹ Funds have been made available to the Commission under the State Outdoor Recreation Act Program for the purchase of scenic easements, overlooks, roadside parks, and development of historic markers.

Under Wis. Stats. 84.295(10) the Commission may establish "the approximate location and widths of rights of way" for freeways and expressways by holding a public hearing and preparing a map to be filed with the register of deeds for the county in which the mapped land is located. Once the map is approved and filed, construction or alteration of structures in the mapped strip is regulated. A person desiring to erect or alter a structure, or to move one onto the mapped strip, must give 60 days' notice by registered mail to the Commission. Emergency repairs are exempted. The purpose is to give the Commission 60 days within which to buy the mapped strip or permit construction to proceed. A person who builds without complying with the notice and waiting requirement will not be paid for his structure upon ultimate taking.

The Commission has important powers to regulate the use of land along state trunk highways through subdivision plat review under Wis. Stats. 236.13, and it has issued detailed regulations to implement this power.¹² In addition, the Commission has the power under Wis. Stats. 84.25 to designate up to 1,500 miles of state trunk road as "controlled-access highway" and to regulate abutting land uses in the interest of public safety, convenience, and welfare to the extent of prohibiting "entrance upon and departure from the highway ... except at places specially designated and provided for such purposes"

An able staff is hard at work developing the state highway plan as a basis for coordinated statewide policy decisions. The implementing powers previously described will play an important role in accomplishing goals set by the state highway plan. In addition, goals set by regional and local plans will more nearly be achieved by coordination and cooperation with state highway planning and implementing powers. The latter expectation is realistic because of the close liaison that has been built up between the Commission's planning and research staff and regional and local units.

State Recreation Advisory Committee

Just as the State Highway Commission has important powers to implement the highway transportation portion of the state plan, so the State Recreation Advisory Committee through allocation of funds to various line agencies has a major role in the implementation of both state and local recreational planning.

This interdepartmental committee is composed of the Governor, the Director of the Conservation Department, the Chairman of the State Highway Commission, the Director of Public Welfare, the Chairman of the State Soil and Water Conservation Committee, and the Recreation Specialist in the Department of Resource Development.¹³

⁸ Wis. Stats. 84.30.

⁹ Wis. Stats. 84.04.

¹⁰ Wis. Stats. 84.105, 15.60(6)(i), and 20.703(41).

¹¹ Wis. Stats. 44.15.

¹² See Chapter Hy 33, Wisconsin Administrative Code.

¹³ Wis. Stats. 15.60(2).

The Outdoor Recreation Act passed by the 1961 Legislature anticipates the spending of \$50 million in state funds, raised from a one cent per pack tax on cigarettes, over the next ten years, to be allotted approximately as follows:¹⁴

1) State park and forest recreation areas	\$ 33,000,000
2) Youth conservation camps	2,500,000
3) Fish and game habitat	9,000,000
4) Protect scenic resources along highways	2,000,000
5) Creation of new lakes under the federal Small Watershed Program	1,500,000
6) State aid to help metropolitan areas acquire rural recreational lands	1,000,000
7) State aid to help counties owning lands entered under Forest Crop Law develop recreational facilities	500,000
8) Tourist information centers	\$ 392,000
9) Planning of future projects and priorities	270,000
10) Lake Superior region recreational potential study and survey	50,000

Specifically, the Committee powers and functions are to:¹⁵

- 1) Recommend to each successive legislature, from the funds available, the appropriations necessary to accomplish the priorities established for the next biennium.
- 2) Coordinate the development by its member agencies of a long-range plan for the acquisition and capital improvement of areas necessary for a state-wide system of recreational facilities to be recommended to the legislature.
- 3) Develop and disseminate a long-range plan for the fullest utilization of all the recreational assets of the state.
- 4) Negotiate cooperative agreements among the agencies concerned to eliminate overlapping of authority or responsibility.
- 5) Reimburse cooperating state agencies for necessary services.
- 6) Retain necessary consulting services.

¹⁴Wis. Stats. 15.60(1)(b). These expenditures enable the purchase of fee or less than fee interests, protection, maintenance, administrative, and improvement outlays. The amounts to be spent each biennium for purchases, as opposed to improvements and maintenance, is legislatively determined. For the 1961-1963 biennium, see Wis. Stats. 20.70.

¹⁵Wis. Stats. 15.60.

- 7) Receive gifts or grants of money, property, or services as are made for the fulfillment of the Committee's purposes and expend them for the purpose of the gift or grant.
- 8) Reduce, supplement, or transfer allocations to agencies participating in the recreation program.

Because of their very broad purposes, the State Department of Resource Development and the Outdoor Recreation Act affect a number of state agencies and departments. The State Recreation Advisory Committee acts as a coordinator of recreational plans prepared not only by the Department of Resource Development but also by the State Conservation Commission, State Highway Commission, and the State Soil and Water Conservation Committee. To ensure implementation of coordinated planning goals, monies appropriated for recreation development purposes to these agencies each biennium are allocated by the Committee.

State Conservation Commission

Broad powers are vested in the State Conservation Commission for the carrying out of legislatively declared policies in the field of natural resources. The Commission is composed of six members, three from the northern and three from the southern portion of the state, who serve for six-year terms. The terms are staggered so that two new members are appointed every two years. The Commission is a policy-making body only. The actual work is carried on by the State Conservation Department, the Director of which is hired by the Commission, Wis. Stats. 23.09(2)(6).

The legislative charge to the State Conservation Commission is no less than the provision of an adequate and flexible system for the protection, development, and use of forests, fish and game, lakes, streams, plant life, flowers, and other outdoor resources.¹⁶ The Commission is empowered to establish long-range plans, projects, and priorities for conservation. It has charge of state forests, state parks, public shooting, fishing and trapping grounds or waters, fish hatcheries and game farms, and forest nurseries and experimental stations. The Commission is empowered to designate game and fish refuges, encourage propagation of fish and game, and regulate the taking of fish and game. In addition, the Commission is empowered to conduct research and promote the tourist industry through publicity.¹⁷

Of particular interest here are the functions of the Commission's Research and Planning Division established in 1961. This division consolidates the previously separate fish, game, and forestry research programs. It is charged with the responsibility for integrating research findings into coordinated programs through interdepartmental and interagency committees.

Under the Outdoor Recreation Act Program, up to \$33 million will become available to the State Conservation Commission for acquisition of fee simple and less than fee simple interests in land for state park and for conservation purposes, as well as for capital improvements in state park and forest recreation areas. The express authorization to acquire less than fee interests (easements) is new. Two general types of easements were contemplated, scenic easements to protect views from state-owned parks and recreation areas and so-called conservation easements. The latter might include a wide variety of interests in privately owned land, for example: access rights

¹⁶ Wis. Stats. 23.09(1).

¹⁷ See Wis. Stats. 23.09(7), 29.51, and 29.54.

to lakes or streams, rights to manage headwaters of streams, permanent hunting rights, rights to insist that stream shorelands remain undeveloped, and rights to insist that game habitat cover along fence rows not be removed.

The Commission also administers a matching grant-in-aid fund for counties willing to pay half the cost of recreational facilities on county forest lands. The total Outdoor Recreation Act Program expenditures for this purpose are anticipated to be \$500,000 for the ten-year period. Although small, this part of the program might be significant in helping forested counties implement recreational planning goals.

The Governor has designated the State Conservation Department to represent the state in carrying out the provisions of the federal Land and Water Conservation Act (16 USC Sec. 460L). It has the responsibility of preparing the state-wide outdoor recreation plan required by the Secretary of the Interior as a condition to state receipt of federal funds under the Act. In addition, the Department already accepts and disposes of substantial federal aid funds made available to the state under other federal conservation legislation. See Wis. Stats. 25.29 and 29.174(13).

In summary, the State Conservation Commission has the legal power and funds not only to participate in planning for the wise use of outdoor resources but also in a significant way to help implement state, regional, and local plans. In addition, it provides an invaluable source of accumulated data and knowledge to planners at these three levels of government.

State Soil and Water Conservation Committee

The State Soil and Water Conservation Committee consists of seven members, of whom three are ex officio, namely: the Director of Agricultural Extension, the Director of the Agricultural Experiment Station, and the Director of the Conservation Department. (Alternates may be designated by any of these three.) The four remaining members of the Committee must be "practical farmers" and are appointed by the Governor for three-year terms.

The principal role of the State Soil and Water Conservation Committee is to guide county-wide Soil and Water Conservation Districts in the carrying out of two programs both intimately tied to agriculture: 1) a program involving good soil and water conservation management measures on individual farms, like terracing, contour plowing, and strip planting and 2) a federally stimulated and, in main part, financed program of small watershed projects, involving the construction of water control structures for watersheds of up to 250,000 acres in areal extent.¹⁸ Through its staff it aids in the planning of such watershed projects; and it reviews project proposals before they are submitted to the Soil Conservation Service of the United States Department of Agriculture, which actually does the detailed planning and engineering for such projects. Public Law 566, as amended, authorizes the Small Watershed Program to permit projects which couple one or more additional purposes with flood control. For example, ponds behind impoundment structures can be made permanent for recreational purposes. The Federal Government will pay 100 percent of the cost of the flood control portion of the project but only 50 percent of the recreational or other multi-purpose features.

The Outdoor Recreation Act in Wisconsin makes up to \$1,500,000 available over its ten-year life for local matching money so as to make possible the creation of recreational ponds or lakes behind Public Law 566 structures, and the State Soil and Water

¹⁸ Wis. Stats. Chapter 92.

Conservation Committee has the responsibility of overseeing the accomplishment of this program.

The Committee is also participating with the Soil Conservation Service and local soil and water conservation districts in comprehensive county-wide planning and can play a major role in bringing about an integration of this planning with state and regional planning.

State Geological and Natural History Survey

An invaluable source of basic physical data and information about the state and its regions is the State Geological and Natural History Survey. Pursuant to Wis. Stats. 36.23, the Board of Regents of the University of Wisconsin has charge of the State 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.¹⁹ Two programs of this agency are of special significance, and both are aided by the United States Geological Survey on a matching fund basis: 1) the topographic mapping program of the state and 2) the ground water investigation program.

The State Geologist also participates with the Soils Department of the University of Wisconsin and the Soil Conservation Service of the United States Department of Agriculture 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 with respect to mineral content, especially so far as concerns lands in northern Wisconsin. In general, it plays its role as a source of basic physical data for planning and development.

State Board of Health and State Committee on Water Pollution

The State Board of Health is a board of seven members appointed by the Governor for seven-year terms.²⁰ The five administrative sections of the board suggest the importance of its statutory responsibilities. The sections are: General Administration, Preventable Diseases, Maternal and Child Health, General Services, and Sanitary Engineering. It is the work of the Sanitary Engineering Section which relates most directly to land and water planning and plan implementation. This section is, in turn, divided into five divisions as follows:

- 1) The Public Water Supplies Division which reviews plans for, and supervises the installation and operation of, public water works, public swimming pools, and beaches.
- 2) The Public Sewerage Division which reviews plans for, and supervises the installation of, public sewerage works. This division also reviews subdivision plats not served by public sewer.
- 3) The Sanitation Services Division which in addition to regulating well drilling and pump installations also administers a permit system for so-called high-capacity wells or well fields, those with a capacity in excess of 100,000 gallons per day.²¹ It has a variety of other duties relating to milk sanitation, migrant labor camps, tourist and trailer camps, garbage and refuse disposal, and insect and rodent control.

¹⁹ Wis. Stats. 36.24 through 36.30.

²⁰ Wis. Stats. 140.01 et. seq.

²¹ Wis. Stats. 144.03(6), (7), and (8).

- 4) The Plumbing Division which licenses plumbers and persons who install or service septic tanks. It promulgates and administers a variety of state plumbing codes, including one which deals with private sewage disposal systems.
- 5) The Water Pollution Control Division which is to municipal sewage disposal what the Committee on Water Pollution is to industrial waste disposal. It conducts water pollution surveys, and it studies and supervises pollution and aquatic nuisance abatement procedures.

As already implied, the most important of these functions in terms of planning and plan implementation are the controls over subdivision platting, private sewage disposal, municipal water and sewerage services, and high-capacity well drilling.

The State Board of Health has no subdivision plat review authority where a public sewer is in existence or is to be installed. The platting controls apply only where the subdivision is not to be served by public sewer. Pursuant to enabling authority spelled out in Wisconsin's subdivision control chapter,²² the Board has promulgated Chapter H65 of the Wisconsin Administrative Code. Copies of all plats go to the Department of Resource Development for review. Where the plat involves land not to be served by public sewer, the Department sends copies to the Board of Health. There the plat is reviewed in the light of H65, the key requirements of which involve ability of the soil to absorb sewage effluent and minimum lot size 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 ground water zone.

In addition, this review can serve as a limited state level regulation to protect flood plains from structures which will be periodically flooded. The State Board of Health has promulgated controls for the location and construction of private sewage disposal systems which apply throughout the state even though the land involved is not technically subject to the subdivision control laws of the state.²³ They apply, for example, where the parcel involved is larger than one and one-half acres in area or where four or less parcels have been created. They are of importance particularly to the healthful development of rural lands and shorelands.

Control over the details of construction of municipal water plants and sewage disposal plants is of obvious importance to public health. These requirements and procedures are well established and efficiently operating.

Also of importance, particularly in the development of outlying areas, is the Board's regulatory powers over well drillers and pump installers. Not only do these controls help safeguard public health by protecting private water supplies from surface pollutants, but the well log reports supplied by well drillers under this law are an important source of data with respect to the underground geology of areas proposed for residential, commercial, or industrial development. Unfortunately, limitations of budget and staff have prevented the State Board of Health from policing these reports and organizing them so as to realize the full potential of their value for such planning purposes.

The present high-capacity well law protects only "the availability of water to any public utility," and the Board may deny or condition the permit for a high-capacity

²² Wis. Stats. 236.13.

²³ Sec. H 62.20, Wisconsin Administrative Code.

well only where a public supply is threatened. It has no power to act to protect a private well from a proposed new high-capacity well. Thus, for example, a new industrial well might, with legal immunity, adversely affect existing private residential commercial, or industrial water supplies.²⁴

The State Board of Health shares the important task of water pollution control with the State Committee on Water Pollution, which consists of the State Sanitary Engineer and the heads of the Public Service Commission, Conservation Department, Department of Administration, and Board of Health. The staff of the Committee is housed with that of the Sanitary Engineering Section of the Board of Health. The Committee exercises control over industrial pollution of surface waters; and the Board, over municipal sewage disposal and ground water pollution. It is the Committee, however, that reviews and establishes priority ratings for federal grants for municipal sewage treatment facilities. Actually, the two agencies coordinate their work closely and in many instances conduct joint surveys and issue joint pollution control orders.²⁵

State Department of Administration

The State Department of Administration was created in 1959 when the Legislature abolished the former Bureaus of Engineering, Personnel and Purchases; the Department of Budget and Accounts; and the Division of Departmental Research in the Executive Office.²⁶ The Department is headed by a single, full-time Commissioner appointed by the Governor. Many of the new Department's functions relative to land use are performed in conjunction with other state agencies; for example, the long-range building programs of various state agencies and institutions which the Department ultimately submits to the State Building Commission for approval. The Department has architectural responsibilities for state buildings and, in addition, provides fiscal analysis and management services for the State Legislature and to the state administrative agencies. It can serve a vital capital budgeting role for state land acquisition and development important to state, regional, and local planning and plan implementation.

The State Building Commission

The State Building Commission consists of three members of each legislative house, the Governor, and a citizen member. As its name suggests, it is concerned with a long-range public building program for state facilities and with the adequacy of state facilities. It coordinates the state building programs. The Department of Administration provides the needed staff work for the Commission, the decision and policies of which can have obvious impact on state, regional, and local plan implementation.

State Aeronautics Commission

Created in 1945, this part-time five-member commission appointed by the Governor is principally concerned with the location, construction, and financing of local airports.²⁷ It is currently attempting to prepare a state-wide airport plan which should become an important part of the state's overall transportation plan. In addition, the Aeronautics Commission is concerned with the protection of airports and has power to condemn land and purchase easements toward this end. It administers federal aids and assistance to local units of government for airports. The federal Civil Aeronau-

²⁴ See *Huber v. Merkel*, 117 Wis. 355, 94 N.W. 354 (1903); *Fond du Lac v. Town of Empire*, 273 Wis. 333, 77 N.W. 2d 699 (1956); and *Menne v. Fond du Lac*, 273 Wis. 341, 77 N.W. 2d 703 (1956).

²⁵ See *SEWRPC Technical Report No. 2, Water Law in Southeastern Wisconsin*, January 1966.

²⁶ Wis. Laws 1959, Chapter 228. See also Wis. Stats. Chapter 16.

²⁷ Wis. Laws, Chapter 513. See also Wis. Stats. 114.30.

tics Administration, working through the State Aeronautics Commission, is anxious to hasten completion of the airport plan and to develop adequate and safe airport protection policies.

State Industrial Commission

It may come as a surprise to some people to learn that this agency, which is principally concerned with industrial accidents and unemployment compensation, has important building and safety code promulgation and enforcement powers. These powers can be important to structural rehabilitation, as well as to new construction aspects of state, regional, and local plan implementation.

The Industrial Commission consists of three full-time members appointed by the Governor for six-year terms.²⁸ Its code powers are derived from three sections of the statutes. The first is the so-called "safe place" statute requiring that places be made safe for employees and frequenters.²⁹ Second, the Commission is given such powers 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.³⁰ Public includes not only publicly owned buildings but a great many that are privately owned but which are used by tenants, employees, frequenters, or other members of the public. The only exceptions appear to be one- and two-family residences and farm buildings.³¹ The third law empowers the Commission to fix reasonable standards, rules, or regulations for the construction, repair, and maintenance of places of employment and public buildings.³² Plans for structures that fall within these statutory bounds must be submitted to the Commission to assure compliance with state level building codes. In addition, employees of the Commission inspect existing public buildings to check for compliance with Commission safety codes.

State Public Service Commission

The Public Service Commission consists of three full-time members appointed by the Governor for six-year terms,³³ and its important functions include the regulation of motor carriers and public utility rates and service. The Commission, because of its extensive regulatory powers over navigable waters, can exercise an important influence on state, regional, and local planning and plan implementation. For example, it has powers with respect to the establishment of bulkhead and pierhead lines, encroachments in navigable water, lake levels, removal of materials from lake beds, irrigation permits, diversion of water from one watershed to another, construction and abandonment of dams, and bridges to be built across navigable waters.³⁴ In addition, land developers must apply to the Public Service Commission for 1) stream straightening permits; 2) permission to dredge and construct lagoon developments near, or to be connected to, navigable water; and 3) permits for shoreland grading involving more than 10,000 square feet.³⁵

²⁸ Wis. Stats. 101.02.

²⁹ Wis. Stats. 101.06.

³⁰ Wis. Stats. 101.09.

³¹ Wis. Stats. 101.01(12) defines public buildings to include any structure, including exterior parts of such buildings, such as a porch, exterior platform, or steps providing means of ingress and egress used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, or occupancy or use by the public or by three or more tenants.

³² Wis. Stats. 101.10.

³³ Wis. Stats. 195.01.

³⁴ Wis. Stats. 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.

³⁵ Wis. Stats. 30.195(1) and 30.19.

Because of these important regulatory responsibilities, the Commission has accumulated a considerable body of data about Wisconsin waters which have value in resource planning.

Miscellaneous State Agencies

There are a number of additional state agencies which have relatively minor roles in planning and plan implementation.

Among these is the State Board for Preservation of Scientific Areas.³⁶ This agency, for which the State Conservation Commission provides the staff work, 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 the State Conservation Commission.

The Commissioners of Public Lands are a valuable repository of original U. S. Public Land Survey field notes and records.³⁷

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

The Natural Resources Committee of State Agencies is primarily a coordinating instrumentality through which representatives of state agencies mesh programs involving natural resources.³⁸ Through its subcommittees it sometimes 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.³⁹ 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 library in Madison is a federal repository and thus a valuable source of records, data, and information.

The Historical Markers Commission is an interagency group, consisting of the Director of the State Historical Society, the State Superintendent of Public Instruction, the Chairman of the State Highway Commission, the Conservation Director, and the Director of the Planning Function of the State Department of Resource Development. It has done an outstanding job of identifying, selecting, and marking historic sites in the state.

The state participates in the work of the Great Lakes Commission,⁴⁰ an interstate agency in which Illinois, Indiana, Michigan, Minnesota, New York, and Pennsylvania, as well as Wisconsin, are represented. This agency is strictly an advisory group. The Commission is mentioned here largely because its role may conceivably be greatly expanded under the Federal Water Quality Control Act of 1965, and this expanded work could have a marked effect on planning and plan implementation in some sections of Wisconsin bordering on the Great Lakes, including southeastern Wisconsin.

³⁶ Wis. Stats. 23.27.

³⁷ Wis. Const. Art. X, sec. 7, and Wis. Stats. 23.01.

³⁸ Wis. Stats. 23.26(1).

³⁹ Wis. Stats. 44.01.

⁴⁰ Wis. Stats. 30.22(3).

The Wisconsin Federal Surplus Property Development Commission was created by the 1961 Legislature to integrate the abandoned 5,549-acre Bong Air Base back into the economy of southeastern Wisconsin and, thus, to enhance the tax base and assure effective land use development.⁴¹ Technically, the Commission has power to redevelop lands of other abandoned federal projects; but to date only the Bong Air Base has been assigned to it. The Commission has evolved a multi-purpose plan which involves keeping almost 3,000 acres at the Bong site in open-space use and developing the remaining land for industrial, commercial, housing, and small airport purposes. Through a nonstock corporation,⁴² it has contracted with private developers for the accomplishment of these goals.

MULTI-UNIT REGIONAL AGENCIES

The Wisconsin Statutes authorize the creation of five types of regional agencies which can be conceived as occupying a position between the state and the local units of government. These 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";⁴³ 2) metropolitan sewerage districts or commissions which include lands in more than one municipality;⁴⁴ 3) regional planning commissions created under Wis. Stats. 66.945; 4) flood control boards organized pursuant to Wis. Stats. 87.12; and 5) transit authorities.

Notice that Wisconsin, unlike many other states, has no enabling legislation authorizing the creation of Conservancy Districts or comparable agencies⁴⁵ with broad powers for the implementation of resource plans and policies. An attempt to pass such legislation in the 1961 Legislature failed.⁴⁶

Regional Action by Contract

It may be that some implementation of regional land and water use plans can be accomplished through the creation of commissions by contract between local units under Wis. Stats. 66.30.⁴⁷ Contracts under Wis. Stats. 66.30 can grant important plan implementing responsibilities only if the contracting units are willing to assign them to the contractually created agency. Recent 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.⁴⁸ 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 an implementing commission and authorize joint bonding to finance the projects deemed most necessary and desirable.

⁴¹ Wis. Laws 1961, Chapter 671. See also Wis. Stats. 15.995.

⁴² Wis. Stats. 182.60.

⁴³ Wis. Stats. 66.30. Wis. Stats. 92.13 provides that County Soil and Water Conservation Districts may jointly exercise their powers. Wis. Stats. 43.26(4) provides for joint library boards, and Wis. Stats. 140.09 enables multiple county and city-county health departments.

⁴⁴ Wis. Stats. 66.20 to 66.209.

⁴⁵ County-wide Soil and Water Conservation Districts created under Wis. Stats. Chapter 92 have far narrower powers.

⁴⁶ Bill 20A, 1961 Legislature.

⁴⁷ 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 their individual plan implementation powers.

⁴⁸ Wis. Laws 1965, Chapter 238.

Attached as Appendix A is an illustrative contract for plan implementation that may be entered into by local units in an urbanizing region.

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 2) 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 more recently outside Milwaukee County as well.⁴⁹ Its powers over sewage collection and treatment and over surface water drainage and pollution are outlined in SEWRPC Technical Report No. 2, Water Law in South-eastern Wisconsin (1966).

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.

Regional Planning Commissions

The 1955 Legislature authorized the creation of areawide regional planning commissions;⁵⁰ and since that time such commissions have been created for five counties in northwestern Wisconsin, eight counties in the Wolf River Basin, seven counties along the Mississippi River in western Wisconsin, and seven counties in southeastern Wisconsin. 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.⁵¹ They are also 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. With the consent of a local unit or a state agency, they 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.

⁴⁹ Wis. Stats. 59.96.

⁵⁰ Wis. Stats. 66.945; Wis. Laws 1955, Chapter 466.

⁵¹ Wis. Stats. 66.945(12)(b).

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 powers are in HHFA requirements that local park and open-space programs be coordinated with regional park and open-space plans before federal aid grants are approved; 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 possible 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 via FHA subdivision guide manuals influences housing projects which receive federal financial support. 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, would have a shaping effect on private decision-making. The idea that it is good business (economically sensible) to follow the regional plan could be engendered. Any number of devices, other than the few suggested here, can be imagined which combine the decision-making 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.

In spite of these devices, in the years immediately ahead as more and more regional master plans are adopted by these commissions, there may be serious frustrations as one or more local units stand in the way of the accomplishment of a planned objective desired by the great majority of the people of the total region.

Flood Control Boards

Chapter 87 of the Wisconsin Statutes makes provision for property owners living in a single drainage area, which may well involve more than just a single municipal governmental unit, to form a flood control board for the sole purpose of effecting flood control measures. These may include the "straightening, widening, altering, deepening, changing or the removing of obstructions from the course of any river, water-course, pond, lake, creek or natural stream, ditch, drain or sewer, and the concentration, diversion or division of the flow of water therein;..."⁵²

Application for the creation of such a board must be made through the Public Service Commission, which initially determines the need and engineering feasibility of the proposed project. "If the Commission directs the work of constructing the improvement to proceed ... it shall certify the fact of the making of such order to the governor The governor shall thereupon appoint a board to take charge of the construction and the maintenance and operation of the improvement"⁵³ Boards created under this provision of the Statutes are empowered to raise monies by the levy of a special assessment against the benefited property owners.

⁵² Wis. Stats. 87.02(1)(2).

⁵³ Wis. Stats. 87.12.

⁵⁴ The statute speaks of electors of "one or more cities, villages, and towns" having a population of "more than 100,000 within the district." The City of Milwaukee is the only unit that meets these criteria.

Little use has been made of this device historically largely because the entire cost of improvements was to be borne by the benefited property owners and projects of this type are generally expensive. Chapter 305 of the Laws of Wisconsin enacted in 1963 provided that these boards could now assess costs directly to local units of government and enter into contracts with the Federal Government and receive federal flood control assistance funds. This may serve to breathe new life into what is now a relatively unused tool of regional plan implementation.

Metropolitan Transit Authority

The Metropolitan Transit Authority is created by Wis. Stats. 66.94 for Milwaukee County. Its "district" includes all of Milwaukee County and all territory in adjacent counties through or into which a transportation system extends from Milwaukee County. But the Transit Authority may not exercise any of its powers until the electors and the City Council of the City of Milwaukee approve.⁵⁴ Once these approvals occur, the Transit Authority has full powers within the district to acquire lands by purchase or condemnation and to finance, construct, maintain, and operate transportation facilities. To date, this authority has remained unused.

Transit Right-of-Way Authority

The Transit Right-of-Way Authority has very limited powers and was created in connection with the abandonment of the North Shore Electric Railway. It may acquire and hold title to parcels of land comprising right-of-way which can be used for mass transit operation, and it may make plans for the use of such right-of-way. It is, however, expressly forbidden to operate any transit system (see Wis. Stats. 66.941). Under the law as it presently stands, the Authority, having acquired a right-of-way, would need to find another agency or firm to operate a transit line.

DISPERSION OF PLANNING AND PLAN IMPLEMENTING POWERS AMONG LOCAL UNITS OF GOVERNMENT⁵⁵

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,⁵⁶ except those in conflict with express town statutes. 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. 62.23.⁵⁷ 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. 62.23.⁵⁸

⁵⁵For a further discussion of local planning power, see SEWRPC Planning Guide No. 4, *Organization of Local Planning Agencies*, June 1964.

⁵⁶Wis. Stats. 60.18(12).

⁵⁷Wis. Stats. 61.35.

⁵⁸Questions can be raised as to whether planning powers of towns which adopt village powers will in every respect be identical to those of cities under Wis. Stats. 62.23. A town cannot have a plan commission identical in membership qualifications to that of a city simply because a town has no mayor, no city engineer, and no aldermen to serve *ex officio*. Probably instead, it must use the town planning commission described above, but with powers broadened by Wis. Stats. 62.23. Again, it is doubtful that a court would hold that a town has extra-territorial planning powers, even though both cities and villages have such powers under Wis. Stats. 62.23. It is also doubtful that a town could use a city type board of park commissioners constituted under Wis. Stats. 27.09 to do its master planning as is possible in a city. See Wis. Stats. 27.08(4). But for towns with village powers, agencies specified in town statutes probably do have the non-extraterritorial planning powers delegated by Wis. Stats. 62.23.

Before these powers are discussed as a unity, it is well to first summarize the limited powers for planning that adhere to towns which do not assume village powers.⁵⁹ 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.⁶⁰ 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.⁶¹ 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.⁶² 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. Again, the statutory assumption 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 committees.⁶³ These committees have limited planning powers. They may plan for 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.⁶⁴ Where a county has a park board or commission, the county may not have a rural planning committee.⁶⁵ 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 so far as concerns 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.⁶⁶

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 familiar apparatus for comprehensive planning is authorized and described.

Wisconsin cities have been authorized to have plan commissions since 1909,⁶⁷ and Wis. Stats. 62.23 still contemplates the creation of a plan commission comprised

⁵⁹In 1963 out of a total of 66 towns in the seven counties within the SEWRPC, only 13 had not assumed village powers.

⁶⁰Wis. Stats. 60.181 and 60.74(2).

⁶¹Wis. Stats. 60.183.

⁶²Wis. Stats. 60.74(2).

⁶³Wis. Stats. 60.29(43) and Wis. Laws 1957, Chapter 23.

⁶⁴Wis. Stats. 27.015.

⁶⁵Wis. Stats. 27.015(13).

⁶⁶Wis. Stats. 60.29(41).

⁶⁷Wis. Stats. 959-17e(1909).

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.⁶⁸

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 extra-territorial scope of a master plan, however, differ 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;⁶⁹ one adopted by a park board must be approved by the governing body.⁷⁰

A park board's master plan may have extraterritorial reach only with respect to streets, parks, parkways, boulevards, and pleasure drives.⁷¹ But a plan commission's master plan may have extraterritorial reach so far as concerns these matters, other public facilities and services, and land uses generally. The park board's extra-territorial 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.⁷²

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.⁷³ Therefore, villages and such towns are spared not only the choice but also the differences in planning powers just outlined. Each will presumably 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.

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

⁶⁸ Wis. Stats. 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. 62.23(3), be approved by the city plan commission.

⁶⁹ Wis. Stats. 62.23(3).

⁷⁰ Wis. Stats. 27.08(4).

⁷¹ *Ibid.*

⁷² If there is a county planning department, the county board must consent to the extra-territorial reach of the master plan. See Wis. Stats. 62.23(2).

⁷³ Wis. Stats. 61.23 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.

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 acceptance, widening, narrowing, extension, relocation, removal, vacation, abandonment or change of use of any of the foregoing public ways, grounds, places, spaces, buildings, properties, utilities, routes or terminals, 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 land use control?"

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 informal 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 the matter has first been referred to the plan commission and until the commission after consideration has reported.⁷⁴

In rewriting Wis. Stats. Chapter 236, the 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;...⁷⁵

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

⁷⁴ Wis. Stats. 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.*

⁷⁵ Wis. Stats. 236.13(c) and Wis. Laws 1955, Chapter 570.

a legislative and a regulatory function so far as concerns master plans. If the Legislature had this intention, was the delegation valid under the 14th Amendment of 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 14th 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 owner of this 20-acre parcel submits a plat for the subdivision of the tract. If the plan commission stands pat and 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 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 along 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 apparently be given direct regulatory and legal effect so far as concerns 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.⁷⁶ 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.⁷⁷

Legal Bases for County Planning

Although relatively few counties in Wisconsin have professional planning staffs, a great many have zoning ordinances. Some counties have gone beyond preliminary sketch planning to the preparation of more comprehensive plans. In view of this county plan-

⁷⁶ *Beuscher and Kucirek, "Wisconsin's Official Map Law," 1957 Wis. L. Rev. 176, 187.*

⁷⁷ *See Kozesnik v. Montgomery Township, 24 N.J. 154, 131 A 2d 1 (1957).*

ning activity, it may come as a surprise to learn that legal authority for county planning in Wisconsin must be squeezed out of bits and narrow pieces of legislation plucked here and there from various chapters of the statutes. There is no overall county planning enabling act.

In considering the planning powers delegated by the Wisconsin Legislature to Wisconsin counties, it is necessary to consider first of all the powers granted to rural planning committees and county park commissions. A law enacted in 1919 and still in force requires that each county have a rural planning committee.⁷⁸ Actually, the mandatory language is qualified in two respects. First, if a county park commission is created, it shall be a substitute for a rural planning committee and have all of the committee's powers. Second, under Wis. Stats. 59.15(2)(b), county boards have been given authority to abolish any commission or committee and transfer its functions to another agency, including a committee of the county board. Apparently, then, the board could designate its zoning committee, highway committee, or any other committee to exercise all of the planning powers conferred upon rural planning committees and county park commissions.

In fact, there seem to be very few counties in which rural planning committees exist. Many more have park commissions. Some have neither; and if they carry on a planning function, it must be under Wis. Stats. 59.15(2)(b) described above. Counties that have not acted in any manner to establish a planning program are in the minority and hold the rural planning committee, county park commission, and Wis. Stats. 59.15(2)(b) powers in reserve. In the Southeastern Wisconsin Region, six counties have created county park commissions, while the seventh has elected to designate the county highway commission as the agency to administer the county park program.

The planning powers delegated by the Legislature to counties through the rural planning committee and county park commission are relatively narrow and do not expressly contemplate comprehensive physical planning in all its aspects. The rural planning committee statute belies its friends-of-our-national-landscape origin when it authorizes the committee to: advise with respect to the planting of trees, shrubs, and flowers along highways; provide for the establishment and operation of community parks and woodlands; propose the setting aside of places of historic interest and the protection of unique and picturesque scenery along rivers, lakes, and streams; and report on architectural design and geographical location of public facilities. By reference county park commissions acquire these powers in addition to their delegated powers, which are confined to the laying out, improvement, and operation of parks and parkways and the making available of lands for airports, fairs, and exhibitions.⁷⁹

In this maze of specific delegation, a general delegation of power to rural planning committees and hence to county park commissions may be of major significance in the search for adequate planning powers for counties. Wis. Stats. 27.015(8) provides:

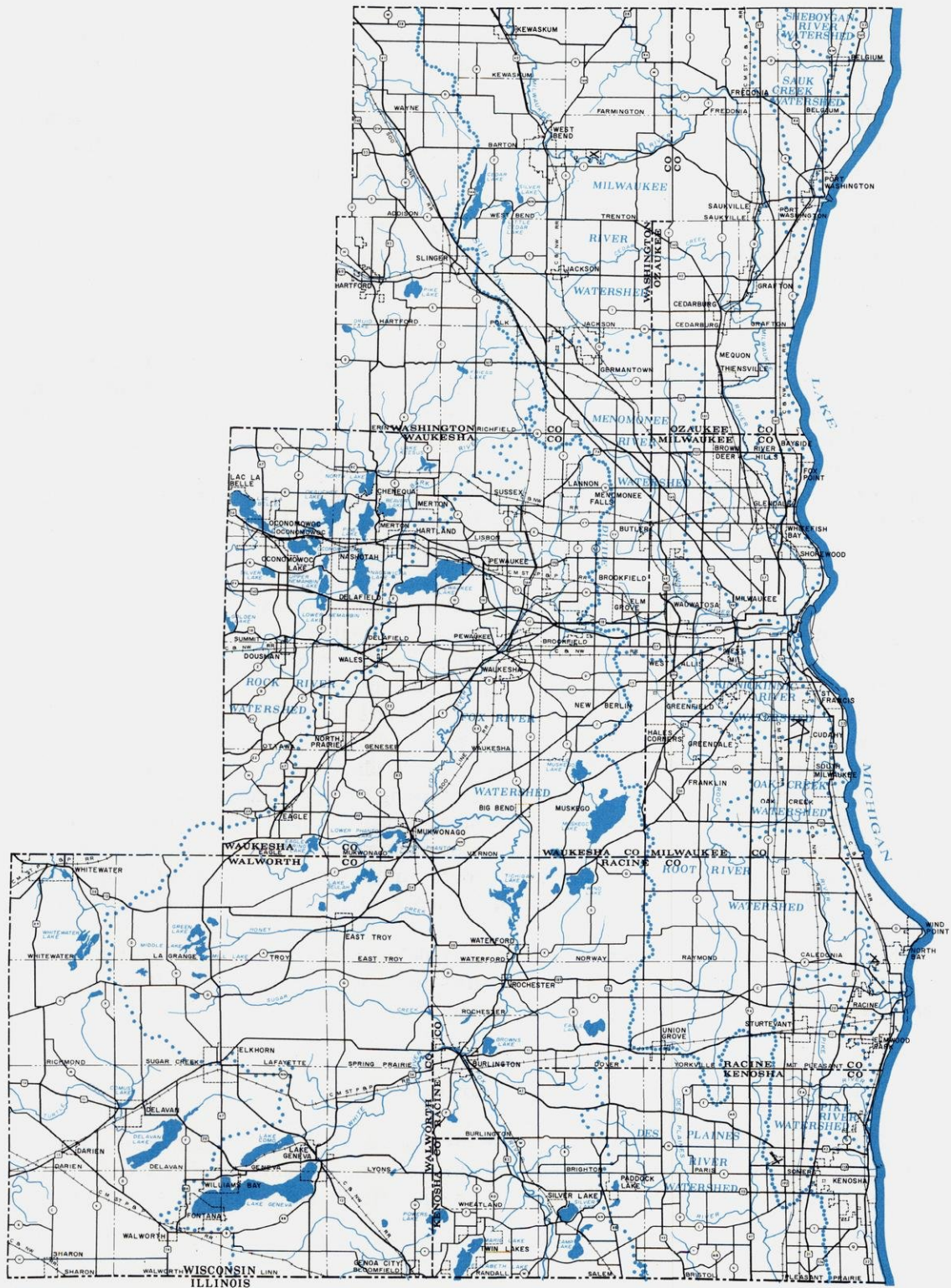
The county board may call upon such committee to report with recommendations upon any matter relating to rural planning

It may be that, in a taxpayer's court action testing the degree to which a county agency can legally spend money for planning, the phrase rural planning in this statute would be read to be limited by the narrower, more specific planning functions specified in

⁷⁸ Wis. Stats. 27.015 and Wis. Laws 1919, Chapter 693.

⁷⁹ Wis. Stats. 27.05.

Map I
THE SOUTHEASTERN WISCONSIN REGION



Wis. Stats. 27.015(2). Even if the court gave the phrase its widest possible meaning, it could hardly be said to encompass planning for public facilities and circulatory systems which are primarily needed for urban populations or for commercial, industrial, or urban land uses.

There are other bits and pieces of legislative authority to which counties can turn in their search for broader powers to plan. The County Zoning Enabling Act, Wis. Stats. 59.97(2)(a), provides that when the county zoning agency "shall be directed... to draft a proposed zoning ordinance ... the agency shall do all things necessary to comply with such direction, including the collection and analysis of pertinent data ... and the layout of tentative districts" This delegation can probably be said to apply both to the preparation of initial zoning ordinances and to amendatory ordinances. Whether full scale comprehensive planning is authorized by this language is problematical, and in any event such planning as is done under this authority must be done as a precondition to zoning.

In the subdivision code, Wis. Stats. 236.02, the county planning agency is defined as the rural planning committee, the park commission, the zoning agency, or any other agency created by the county board and authorized by statute to plan land use. Though this statute does not grant additional planning powers, its reference to alternative county planning agencies implicitly establishes the planning function as a legitimate undertaking of county governments.

Another section of the subdivision code starts off very hopefully by providing that "the county planning agency may prepare regional plans"⁸⁰ Unfortunately, however, it goes on to say that these regional plans should be "for the future platting of lands within the county, but without the limits of any municipality, or for the future creation of streets" In addition, this statute establishes a hearing and town approval procedure leading to the enactment of an ordinance which freezes plans for future platting or street, highway, or parkway location; and this may not be desired.

It is clear that, in the absence of a carefully drawn grant to counties of broad comprehensive planning powers, counties which desire to carry out meaningful comprehensive planning programs not subject to taxpayer attacks and possible HHFA objections in connection with the allocation of federal "701" money would do well to follow the lead of the seven counties in southeastern Wisconsin and band together in a regional planning commission organized under Wis. Stats. 66.945, which delegates ample planning powers.

Measures by Which Local Plans May Be Implemented

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. Actually, local units can act to effectuate physical planning goals in numerous other ways. Public improvement programs of street, sewer, and water extension; 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 or inactive industrial development program; the use or nonuse of a capital budget; strict or lax enforcement of building, safety, and housing codes; and the presence or absence of an urban renewal program—these and other measures may be utilized along with zoning subdivision control and official mapping to implement planning goals.

⁸⁰ Wis. Stats. 236.46.

By Article XI, Section 3, of the Wisconsin Constitution, cities and villages are empowered to "determine their local affairs and government, subject only to (the constitution) and to such enactments of the legislature of state-wide concern as shall with uniformity affect every city or every village." Because this discussion focuses on zoning, subdivision, and official map enabling acts of general state-wide application, it will not involve the reader in the somewhat beclouded meaning of this home rule clause.⁸¹ 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. It will be assumed instead that these statutes contain the full reservoir of power available to cities and villages in these fields of regulation. 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 counties do not have home rule powers. All four units of local government—cities, villages, towns, and counties—it will be assumed, have no more power in these regulatory fields than the Legislature has specifically delegated in the respective enabling acts.

Zoning Powers:⁸² There are three separate and distinct general zoning enabling acts in Wisconsin:⁸³ one for towns (without village powers),⁸⁴ one for counties,⁸⁵ and one for cities and villages (and towns with village powers).⁸⁶

The zoning situation of the towns is by far the most complicated. There are literally five different procedures whereby 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.
- 2) If there is a county ordinance, the town may elect to have the county ordinance apply in the town.⁸⁷
- 3) The town may take on village powers and, by the double reference process previously discussed, exercise city zoning powers granted by Wis. Stats. 62.23(7).⁸⁸ But it may not do the latter if there is a county zoning ordinance in existence, unless approved by referendum.
- 4) A town may act jointly with other municipalities to establish and maintain a regional planning program.⁸⁹ Thereupon the town acquires city zoning

⁸¹ See *Van Gilder v. City of Madison*, 222 Wis. 58, 267 N.W. 25, 267 N.W. 108 (1936).

⁸² For a further discussion of zoning as a plan implementation device, see *SEWRPC Planning Guide No. 3, Zoning Guide, April 1964*.

⁸³ There are two additional more specific grants of zoning enabling authority in the Wisconsin Statutes. Wis. Stats. 114.136 provides for airport zoning and Wis. Stats. 92.09 enables soil and water conservation districts to zone. The latter is relatively unused in Wisconsin.

⁸⁴ Wis. Stats. 60.74.

⁸⁵ Wis. Stats. 59.97.

⁸⁶ Wis. Stats. 62.23(7).

⁸⁷ Wis. Stats. 59.57.

⁸⁸ Wis. Stats. 60.18(12) and 61.35.

⁸⁹ Wis. Stats. 60.29(41) and 60.74(8).

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 extraterritorially by a city or village under Wis. Stats. 62.23(7a).

As an illustration, towns in Ozaukee County have, in the absence of county zoning, enacted their own town ordinances. Walworth County's 15 towns have elected to have the county ordinance apply. In Waukesha County only five towns have elected the county ordinance; others enacted their own zoning before there was a county ordinance, and this earlier town zoning remains in force.

Enough has already been said to make it doubly 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 so far as concerns amendments to county zoning ordinances.⁹⁰ First of all, approval of amendments by non-action 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 has caused difficulty where an existing county zoning ordinance is being supplanted by a completely new and reconstituted ordinance. To repeal the old ordinance and then reenact the new under initial ordinance procedures would legalize, as non-conforming, illegal uses established in violation of the old ordinance. To adopt the new ordinance as an amendment of the old, required, according to the Attorney General, preparation of two separate ordinances, one a map ordinance setting district lines, the other a substantive, regulatory ordinance. This was confusing, and the 1965 Legislature has 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.⁹¹

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.⁹² 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:⁹³

⁹⁰ Wis. Stats. 59.97(3).

⁹¹ Wis. Laws 1965, Chapter 343.

⁹² McQuillan, *Municipal Corporations*, sec. 25.07 (1957).

⁹³ *Kozesnik v. Township of Montgomery*, 24 N.J. 154, 131 A 2d 1 (1957).

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 piecemeal approach

Suppose a county planning agency studies land use problems of the county as a whole and recommends an ordinance based on such studies. This presumably satisfies the constitutional requirement (if there be one) for a comprehensive plan. But suppose that only a patchwork of towns approve 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.

While a master plan is not a legally required precondition to valid zoning, increasingly villages and cities are in practice using master plans as a basis for zoning.

Various applications of town, county, village, and city zoning will be dealt with in later chapters of this report. A final reference of value is Appendix Table K in SEWRPC Planning Guide No. 3, Zoning Guide, showing the similarities and contrasts between the various Wisconsin zoning enabling statutes in terms of their key provisions.

The dissimilarities brought out by this table have an important technical effect which may not be apparent to non-lawyers. It enables lawyers to use one act against another when problems of construction arise. Thus, suppose that a county has enacted a quick-freeze, interim zoning ordinance in order to halt the creation of nonconforming uses during the long period required for the preparation of an adequate permanent ordinance. The county argues that it has the implied power to do this in order to make its ultimate zoning more effective. Counsel for objecting landowners will be quick to point out that interim zoning has been expressly authorized by Wis. Stats. 62.23(7)(da) for cities. "Why," he will ask, "if the Legislature intended that counties also have this power, didn't it amend Wis. Stats. 59.97 to correspond to the city enabling provision?" Courts often accept this reasoning and in circumstances as depicted might strike down the county ordinance based on implied powers.

Subdivision Control Enabling Authority:⁹⁴ 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.⁹⁵ 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 Wis. Stats. 236 with respect to lot size, street width, street and other improvements, and access to lakes can be applied by each type of local unit.

⁹⁴ Wis. Stats. 236.45.

⁹⁵ For a further discussion of subdivision control as a plan implementation device, see SEWRPC Planning Guide No. 1, Land Development Guide, November 1963.

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, only that unit and certain state agencies have approval authority.⁹⁶ 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 full-time 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. Where conflict occurs within this complex, 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 and 236.12 and SEWRPC Planning Guide No. 1, Land Development Guide.

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.

Official Map Enabling Powers:⁹⁷ The relative uniformity which exists among local units of government so far as concerns subdivision plat approval 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 clear official mapping powers expressed in great detail in Wis. Stats. 62.23(6).⁹⁸ Towns with 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 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 with respect to 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

⁹⁶State level review of all plats is conducted by the Director of Planning within the Department of Resource Development. The State Board of Health reviews all plats not served by public sewers, and the State Highway Commission reviews plats which abut a state trunk highway. All of these state agencies have objecting authority. Some counties under the provisions of Wis. Stats. 236.12(b) have limited objecting authority.

⁹⁷For a further discussion of official mapping as a plan implementation device, see SEWRPC Planning Guide No. 2, Official Mapping Guide, February 1964.

⁹⁸In addition, Wis. Stats. 62.23(10)(11) authorizes cities, and therefore villages under Wis. Stats. 61.35, to set lines as a preliminary to street widening. This relatively narrow setback statute is not discussed further here because most of its objectives can be better accomplished through official mapping and the inclusion of setback controls in zoning ordinances.

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 reserved the right to declare invalid specific applications of it to particular landowners.⁹⁹

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, in the ordinary case, the land will be available at bare land prices without buildings on it when needed for its public purpose. 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.¹⁰⁰

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 building, 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 located within a municipality, and the governing body of the municipality must consent. The map showing the highway lines and also property lines and owners¹⁰¹ 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

⁹⁹ *Miller v. Manders*, 2 Wis. 2d 365, 86 N.W. 2d 469 (1957).

¹⁰⁰ 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. 66.32.

¹⁰¹ The stipulation with respect to property lines and owners does not apply to Milwaukee County.

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 that: "Municipality includes cities and villages; it may be construed to include towns."¹⁰² 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, 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. It is true that this sentence by its terms applies only to Milwaukee County.

In addition to all of this, there 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 intention in a second limbo. 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;¹⁰³ 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 his building when the street is ultimately opened or widened. If this is the legislative intent, then the absence in the statute of an escape hatch 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, especially 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.

¹⁰² Wis. Stats. 990.01(22).

¹⁰³ In re Furman Street, 17 Wend. 649 (N.Y. 1836).

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. Entitled ambitiously County Regional Plans, Wis. Stats. 236.46 contemplates that, in addition to maps for future highways and the widening of existing highways, the county board 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, wiping out unnecessary differentiations in power as between cities and villages, towns and counties.

Chapter IV

THE PRIVATE PROPERTY OWNER AND LIMITATIONS ON STATE AND FEDERAL POWER

On one hand are the great regulatory and other powers of federal, state, and local governments which can be brought to bear in plan implementation. On the other hand is the decision-making dominion of the private landowner which must be considered in such implementation. If decentralized, largely private decision-making 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 this property. Consideration is also given to the evolutionary character of court-made case law, which is constantly molding and reshaping both the interpretations to be placed on constitutional safeguards and upon the nature of the private property interest as such.

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 non-lawyer 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.

When 115 years ago 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 one thing, 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:¹

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 unquali-

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

fied 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.

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, as changing needs require, the substantive content of private property in land. 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:²

As a people we were too much committed to faith in the beneficent 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 function.

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; it is not tangible; it cannot be hefted or plowed. 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:³ 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. 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 provision is substantially the same. It provides:

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

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

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

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 purpose"? and 3) Assuming a taking for a public purpose, 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 reject confiscation as a measure of justice. 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 purpose," and "just compensation." They have developed the familiar public health, safety, morals, and general welfare formula and have sustained without compensation, regulatory action by government on one or more of these grounds.

The goal has been to strike a balance between the needed public programs and regulations on one hand and private interests on the other. It is not possible, however, to distill out of this case law infallible guides. It is difficult to predict whether a court will be struck by 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 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 say 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, whereas in another a relatively slight reduction is declared invalid.

The layman may persist, "How can this be? The Constitution says if private property is taken, just compensation must be paid. Why shouldn't the government be required to pay for every action which adversely affects the value of private land?" The lawyer's reply, as mentioned, 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 where private owner stands matched against his government, than where 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 cable of interests. One or more of these interests (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, land use regulations and other governmental programs which deprive landowners of some alternative use privileges and accordingly of dollar values fall into this definitional framework.

In other words, in order to arrive at the meaning of property in the owner versus government cases, it is necessary to recognize that certain interferences by government are to be excepted 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. More case law flesh will be put on this analytical skeleton in Chapters VI through IX where legal measures for major functional planning goals are discussed.

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, where 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 question was the validity of Oregon's ten-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 and are using it. It was a notable invention, widely acclaimed, and has since been called the "Brandeis Brief Approach."

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 so far as concerns 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 is an illustration of a case where 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 brief approach will avail the county little or nothing. The court will probably 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. 59.93(7), expressly grants interim zoning authority; the county act, Wis. Stats. 59.97, does not. In any event, the case

¹ 208 U.S. 412 (1908).

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

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 respecting interim zoning in general and this interim ordinance in particular might not only be accepted by the court but it probably will be controlling so far as concerns the outcome of the case. If the meaning of a zoning or other land use regulation is in 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 60 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 a relatively simple one 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 in the land use field that the regulatory measure 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 or 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 achieve the general welfare as a distinct and separate objective from the preservation of the public health, safety, or morals is admissible. Protection of the property tax base, of aesthetics, and of the character of the neighborhood are some other community development objectives which

have been held by state courts reasonably to be within the general welfare concept. In such cases, the skill and imagination of attorney and cooperating planner must be directed towards 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, as we have seen, are 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 formally in court evidence 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 fact. Men 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. 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.³ 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 or will not 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 photographed. It implies care and integrity in carrying out data collection 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

³Currie, "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).

good work of which there is no provable record, may be struck down, unnecessarily, on the basis of unconstitutionality.

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. On appeal such materials may be invaluable in acquainting the appellate judges with the planning and engineering issues of the case.⁴

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 proposes is actually better planning than that accomplished by the official planning agency. One of the country's most competent 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.)⁵

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 analyses, base mapping programs, and land use inventories 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.⁶ 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 be aware of is that pertinent detail, documentation, and solid empirical and analytical evidence will likely carry the day. Generali-

⁴ See Babcock, "Preparing a Zoning Case," *Planning 1958* (ASPO) 38 at 43.

⁵ *Ibid.*

⁶ 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; inventory of recreational facilities; watershed studies; pollution, water quality, and ground water studies; inventory of existing planning legislation; legal means of plan implementation studies; development of forecast techniques; design and/or refinement of planning standards; and methodology studies are all among such studies.

zations, 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 or aesthetically pleasing. The planner must understand and utilize modern statistical techniques and sound engineering practices. Benefit-cost analyses should be used when applicable. Comparisons of data are also 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. The passage of time makes new data available. A continual updating of the statistical relationships and of the analyses, conclusions, and plans they helped produce must take place. A court may invalidate an important part of the most elaborate and well-thought-out planning program on the ground that its factual underpinning is uncertain because it is outdated, not wrong, just old 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 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 our community?

Statements in recognized planning treatises are usable as are reports in journals with solid reputations of experience elsewhere. 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.

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; and 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, whatever data and analysis he has prepared will be found insufficient.

Chapter VI

PLACEMENT OF DEVELOPMENT IN SPACE

The placement (spatial location) of various types of development within a large urban region is of the utmost importance if a wide range of 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 prevented? 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? 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, recreation, 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 of 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 resource base. Thus, economic considerations alone justify placing regional development in such a manner that the per unit 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 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 ground water 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 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.

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."

Lastly, 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. Extremely high population densities breed slums and crime. Streets and highways become prematurely obsolete. Parking problems multiply. The quality of education declines. Commercial and industrial activities can be stifled by the very congestion they generate. If these conditions are to be avoided, the standards being developed, which attempt to take into account the relationships which exist between people, spatial needs, and minimal quality requirements, must be implemented. This can only be accomplished by appropriately placing development within an entire region.

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 better 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, analysis, or line of reasoning will impress a court. Certainly, the comprehensiveness of the planning effort will be given great 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 load-bearing capacity of certain soils, 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 optimal utilization of existing and planned street, highway, and transportation facilities can only be achieved by controlled placement of develop-

ment. 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 multi-family 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.

TECHNIQUES FOR ACCOMPLISHING 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.¹ 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 a 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 then 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. So have the conditions attached to 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

¹In many western states, original federal landholdings are still large. In these states the placement of development is perhaps more directly affected by changes in the disposition of this land than by federal expenditures within the state.

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 (highways, for example), 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) more permanently or 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. Or, again, only after a metropolitan transportation plan has been prepared by an areawide planning agency will federal highway aid funds be paid.

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 placing of development through the cooperative efforts of federal, state, regional, and local officials will increase.

One potential source of federal influence on the placement of housing development is the FHA mortgage insurance program—"the largest insurance business in the world." A clear directive that FHA will refuse to insure mortgages for housing developments at places not certified as being in accordance with an areawide development plan would be a major sanction in a total regional placement program.

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, implemented² in working federal programs, the more widespread will be their development placing effects.

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.³ Article VIII, Section 10, bars the state from being a 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. So the construction of a capitol, of a state office building, or of university buildings is clearly authorized. It has, however, been necessary repeatedly to amend the state constitution to put the

²Implementation 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 non-financial 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.

³See *State ex Rel Owen v. Donald*, 160 Wis. 21, 151 N.W. 331 (1903).

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.

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 very 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, providing funds for county parks, are indicative of what may be a trend of increasing importance as more and more state-local aid programs are conditioned.⁴ Bill 753 A currently in the Legislature, in which grants are offered to counties if they will but zone lake or stream shorelands to meet specified standards, is indicative of this possible trend.

Certainly, the state can also play an important role through policy and goal formulation, persuasion, and executive leadership. The Outdoor Recreation Act Program with its extensive purchase of lands for public recreation and of scenic easements is illustrative of what can be accomplished.

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 the exercise by the state of its police (regulatory) powers. A wide range of such regulation is in evidence: 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; and water use regulations.

These regulatory devices used on a state-wide basis have obvious development placing effects.⁵ 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 least cost.⁶

Regional and Local

Major responsibility for the placement of development has traditionally been left to units of government below the state level. Local school districts select their sites and build. County and metropolitan park planning boards do likewise. Metropolitan sewerage districts may plan, lay out, and eventually construct main and interceptor sewerage lines, including treatment facilities, and improve major storm water drainage channels. Cities, towns, and villages lay out their streets, approve plats, provide water and sewerage facilities and any number of other services, and perform a wide range of regulatory functions, all of which directly affect the placing of development.⁷

⁴ See Wis. Stats. 66.36.

⁵ 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.

⁶ 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.

⁷ Authority for all of these activities is found in respective 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 Chapter III of this report.

So much responsibility and real power to place development has been delegated to regional and 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, regional, and local development placing activities. All too often, in fact, there is incomplete planning and development placing coordination among competing and overlapping regional and local units of government. These coordination lapses have proven costly.

Regional and local units of government obviously make direct money 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; a sewage treatment plant there; parking ramps at sites A, B, and C; regional parks and libraries—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 place the development activity involved.

Inasmuch as the largest number of development placing devices are actually put into effect by regional and 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 the public purpose is that of eminent domain. Put quite simply, this power enables private property to be taken without regard to its present use or the wishes or desires of the present private owner upon payment of reasonable compensation. 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. 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."⁸ This device has been adapted as a tool 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 do the latest ones of the State Highway Commission of Wisconsin, 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 easement is said to have

⁸ *Colson v. Salzman*, 272 Wis. 397, 75 N.W. 2d 421 (1956).

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.⁹

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 land. 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.¹⁰

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 probably will not be "appurtenant" to public land. 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. More will be said on the timing or "pacing" of development in the next chapter.

The primary advantages 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.¹¹

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

⁹ Land burdened with an easement is called the "servient tenement."

¹⁰ 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 a 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.

¹¹ For a more exhausting 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.

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 most widely used today in urban renewal projects.¹² 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.¹³ 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.¹⁴

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 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, schools, 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 particularly so far as concerns federal and state income taxes is not easy. 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. Government officials have an instinctive preference for out and out fee simple purchase and retention. The experience with conservation easements under the Wisconsin Outdoor Recreation Act Program is instructive in this respect. The original 10-year program contemplated the expenditure of \$7,500,000 over 10 years for conservation easements. After the expiration of 3 1/2 years of the program, the Wisconsin Conservation Commission had actually spent for such easements only \$230,663.¹⁵ Official mistrust of the device was largely responsible for this virtual failure of the program. In the biennial budget of the Wisconsin Conservation Commission for 1965-67, the Commission is given the option to use the money either for easements or for fee simple purchases. It seems safe to predict that even fewer easements will be bought than previously.

The third difficulty relates to deficient enabling authority. Under the Outdoor Recreation Act, delegation for easement purchases is almost entirely confined to the

¹²*Berman v. Parker*, 348 U.S. 26 (1954).

¹³Forfeitures 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 (1928).

¹⁴See *Melli*, "Subdivision Control in Wisconsin," 1953 *Wis. L. Rev.* 389; *Restatement, Property* (1944) Sec. 531; *Boyd v. Roberts*, 131 Wis. 659, 111 N.W. 701 (1907); *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 469 (1925); *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913).

¹⁵*Olson*, "Progress and Problems in Wisconsin's Scenic and Conservation Easement Program," 1965 *Wis. L. Rev.* 352.

Wisconsin Conservation Commission and to the State Highway Commission of Wisconsin. There is, however, an authorization to county park commissions in counties of 90,000 to 500,000 in population to use the Outdoor Recreation Act grants-in-aid to acquire easements over:

... recreation lands which are essentially open in nature and which are located in areas which are not intensively developed ... including agricultural land, wetlands, flood plains, forest and wood lots in and around urban areas which because of scenic, historic or aesthetic factors have outdoor recreation values¹⁶

Presumably, the counties are authorized by this statute also to expend their own matching dollars for these purposes. The Outdoor Recreation Act funds available for these grants would have to be substantially expanded to make this program meaningful for development placement purposes.¹⁷ Even then there will be instances when the less-than-fee interests desired for placement reasons involve land that has no outdoor recreational value. Use of the Outdoor Recreation Act funds and purchase by the county of such interests with its own funds would then be unauthorized, as would, for that matter, purchase of the fee interest itself.¹⁸

Cities and villages, under recent enabling legislation, Chapter 105, Laws of Wisconsin 1965, have legal authority to condemn less-than-fee interests. Even under this legislation, if the sole purpose is to control the placement of development, the question of whether or not this is a sufficient public purpose might arise.¹⁹ Certainly, it can be definitely asserted that towns have no such easement purchase power.

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 activity and restricting all future development to an appropriate district, has been greatly expanded in more recent years. Zoning has become a device for excluding nuisances;²⁰ for arranging land uses that are not nuisances; and for establishing height, lot size, floor space, and bulk standards.²¹ It has been applied in rural areas to protect flood plains,

¹⁶ Wis. Stats. 66.36(3).

¹⁷ Currently the total biennial Outdoor Recreation Act appropriation for both county park and recreation land purchases is only \$200,000. To date (December 1965), no county has yet used these funds for the purchase of easements for recreation lands.

¹⁸ The problem in this case would be that the expenditure by the county of money solely for the purpose of placing development might not be held to be enough of a "public purpose" to justify the expenditure.

¹⁹ In *New Lisbon v. Harebo*, 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 purpose authorized by statute or constitution." The language of Chapter 105, Laws of Wisconsin 1965, 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.

²⁰ *Hadacheck v. Los Angeles*, 239 U.S. 394 (1915). *State Ex Rel Carter v. Harper*, 182 Wis. 148, 196 N.W. 451 (1923).

²¹ *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).

forests, and steep slopes and to preserve historical sites, marshes, and wetlands.²² It is being used to preserve 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.²³

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"?²⁴ 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 majority of alternative 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 remain, in other words, as long as the taking is not complete, the ordinance will usually be sustained.²⁵

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 plains; accurate measurement and reasonable forecasts of the space requirements of major categories of alternative land uses, for example, commercial, residential, industrial; reasonable standards of density, lot size, and floor area; thorough economic and population analysis; and benefit-cost studies are almost certain to be sustained. If solidly

²²Vartelas v. Water Resources Commission, 146 Conn. 650 153 A. 2d 822 (1959); Mang v. County of Santa Barbara, 182 Cal. App. 2d 93, 5 Cal. Rptr. 724 (1960).

²³Cutler, 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).

²⁴Euclid v. Ambler Realty Co., 272 U.S. 366 (1926).

²⁵The 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. An unjustified 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 reductions 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; and, 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 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 are 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 rule now is 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.

founded, courts seem willing to sustain what at first glance might appear to be highly restrictive ordinances. Some examples are: agricultural only zoning, Mang case, supra, where agricultural activity was, in fact, a meaningful alternative; large lot zoning²⁶ 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;²⁷ 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.

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 the 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 whereby the landowner may know within reasonable limits what is expected of him before the conditional use permit will be granted, will often invalidate the ordinance.²⁸ This is also true of conditions for fixing a zone where 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 any plan or of a comprehensive plan 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-run

²⁶Fischer v. Bedminster Township, 11 N.J. 194, 93 A. 2d 378 (1952); Senior v. Zoning Commission, 147 Conn. 531, 153 A. 2d 415 (1959).

²⁷Rodger v. Tarrytown, 302 N.Y. 115, 96 N.E. 2d 731 (1951).

²⁸Hamrich v. Storvs, 372 Mich. 532, 127 N.W. 2d 329 (1964) and Osius v. City of St. Clair Shores, 344 Mich. 700, 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 Alr. 2d 1079 (1956) for two lengthy recent articles on this subject. A wide range of cases and court comments are cited in both pieces. Quoting briefly from ALR "... 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.

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 development 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 is not 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,²⁹ cost determination can become a very speculative process. 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.

The placing of structures within the subdivision will, of course, be effected in conformity with the community's desires by provisions dealing with street layout; lot size; dedication (or reservation or first right of purchase) of land for park, playground, school,³⁰ police or fire station sites; and dedication of widening strips along existing boundary streets.

²⁹The 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 his subdivision, see Wis. Stats. 236.13(2)(a).

³⁰A recent Wisconsin case, Jordan v. Village of Menomonee Falls, 137 N.W. 2d 442 (1965), upheld the principle that a fee in lieu of dedication for school and park site needs is a valid police power subdivision regulation.

The most beneficial placing of subdivisions in an urbanizing area is obtained by using the powers of zoning and subdivision control in conjunction. A recent lower court holding in Kentucky ³¹ sanctioned the limitation of subdivision development to an urban services district. 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 placing within a subdivision or the whole subdivision in relation to the community may be more stringently regulated where unique factors exist. For example, a subdivision located wholly or partially within a flood plain may have to conform to special anchorage, design, or placing requirements; 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; ³² 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. See Sylvania Electric Products, Inc. ³³ There should, however, be a local ordinance or master plan establishing the criteria for approval or disapproval of subdivision plats as placement proceeds.³⁴

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 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 ³⁵ 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

³¹ Provencial Dev. Co. v. Webb, Circuit Court No. 7973, Fayette County, Ky. (1960).

³² *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.*

³³ 344 Mass. 428, 183 N.E. 2d 118 (1962).

³⁴ *Compliance with such an ordinance or master plan becomes then a condition to plat approval under Wis. Stats. 236.13(1).*

³⁵ See Brous v. Smith, 304 N.Y. 164, 106 N.E. 2d 503 (1952).

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. See Wis. Stats. 70.32. 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 valuations simply force raw land to be subdivided—land which both the owner and planner might have preferred to keep open.³⁶ It seems entirely consistent with reason and the law that the market value of comprehensively zoned land and thus its assessment value should reflect only those alternative uses permitted under the 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. California has enacted legislation specifically aimed at achieving this end.³⁷ It provides that in assessing land zoned and used exclusively for agriculture, airport, or recreation purposes the assessor shall consider only those factors relevant to such use. A rebuttable presumption is established in favor of the permanency of the zoning ordinance. A Florida statute³⁸ which simply directs that the valuation of land used for agricultural purposes is to be limited to its value for that use only was recently upheld in Tyson v. Lanier.³⁹

The Wisconsin Legislature has not yet addressed itself to the inconsistencies between taxing and open-space reservation policies just described. However, there does not appear to be anything in Wis. Stats. 70.32 or in the so-called "uniformity clause," Art. VIII, Sec. 1, of the Wisconsin Constitution which would prevent the courts from affirming the decision of a local assessor who decided to base his assessment of valuation only on those land uses which are permitted under a modern, comprehensively designed, and validly enacted zoning ordinance. The rationale would simply be that lands zoned differently are not, in fact, uniform and that prohibited land use alternatives cannot be computed into the market or assessment valuation of the land because under the circumstances there is little likelihood of a zoning change. Without such a zoning ordinance, informal cooperative arrangements between assessor and planner which undervalue raw land as an incentive to the present owner to hold out against the pressures to subdivide seem subject to attack.⁴⁰

Another approach to this problem might simply be the partial or complete deferral of property taxes as long as the land is kept open. Technical problems under Wisconsin's tax uniformity clause present substantial hurdles, but it may be possible to overcome them through carefully designed partial or total tax "exemption" enabling acts. Subdivision by the owner or sale of the land for purposes of subdivision would cause all past deferrals to be due and owing. Problems of assessment or rate differentials are avoided. Not only are present tax pressures to subdivide reduced, but as time passes the amount of accumulated taxes may grow to be so large that subdivision of the land is effectively forestalled indefinitely. It simply would not be economical.⁴¹

³⁶ *The disappearance of many rich agricultural and scenic wooded areas adjacent to growing urban and suburban areas has been and is noticeable in the Southeastern Wisconsin Region.*

³⁷ *Section 402.5, California Revenue and Taxation Code.*

³⁸ *Florida Statutes 193.11.*

³⁹ *156 So. 2d 833 (1963).*

⁴⁰ *However, many such arrangements do, in fact, exist, often for long periods of time. Of more interest, though, are the numerous occasions where the exact opposite takes place. Assessors, perhaps under the prodding of local real estate interests, overvalue raw land, thus bringing all the more pressure on the owner to subdivide.*

⁴¹ *The coercive effect of what might well be an extremely large accrual of back taxes is softened in some states by provisions that completely forgive the taxes assessed more than a certain number of years earlier. See New Jersey Laws 1964, Chapter 48.*

SUMMARY

It seems clear that the placing of development in space is desirable from an 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, though 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 exist to effectuate development placing goals. There are nuances and modern applications of each which the lawyer and planner should understand and 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.

Chapter VII

PLACING OF DEVELOPMENT IN TIME

To an even greater degree than is the case in the placement of development in space, placement in time is a matter of economics. Community growth entails public expenditures, but too rapid growth may outstrip the community's ability to generate the revenues necessary to meet the necessary expenditures. Even if development is placed most ideally in space, the question of how fast it should proceed is an important one. In many communities timing of development may present no serious problem. Growth is slow and more or less 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 many other communities, however, especially those within rapidly developing urban regions, 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 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, 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 is at the very heart of comprehensive planning efforts aimed at maintaining a high level of health, safety, and general welfare, while at the same time preserving the wholesomeness and identity of the community. This chapter will examine some of the legal tools by which the pacing of development can be accomplished.

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, the particular local unit is trying to limit growth strictly for the selfish interests of present residents who want simply to "preserve the character of the community" and to 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 the case 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 or another piece of empirical or analytical evidence, as for example, a shortage of public school facilities, the unavailability of additional bonding power, the present impossibility 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.

A third 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 and to the detriment of the health, safety, and general welfare of the community. The point to be reemphasized in the presentation of evidence relating to the pacing of development is that it is not the intention of the community to frustrate growth, to prevent it altogether, to remain a peaceful city of some predetermined size,¹ but rather to accommodate growth in an efficient and orderly manner to the benefit of both the community and those newly arriving.

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 the 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 non-monetary example of federal pacing of development is the frequency and the degree to which the persuasive forces of federal policy-making, whether by Congress, the Office of the President, or by administrative agencies, are brought to bear on a

¹ *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. The tools of the planner do not seem sufficiently refined at this time to be able to determine with accuracy the optimal size of communities. At some future date this may be possible. Until then the more traditional concepts (many would argue the constitutionally protected rights) of free movement among states and between cities and community growth which reflects free market decisions will probably continue to be judicially protected. For additional information on this subject, see Am. Jur. 2d Vol. 16 Constitutional Law Sec. 478 and *U.S. v. Wheeler*, 254 U.S. 281 (1920).

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 conclusion on 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,² 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 public 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 policy-making pressures.

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,³ and is able to muster a measure of persuasive force to further or retard the rate at which particular development projects proceed. It decides whether to build highways and where to build highways. In addition, the state has direct 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.

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 developmental 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.

Regional and Local

The need to pace development has clearly been recognized by many regional and local units of government. However, attempts to accomplish this end have more often been characterized by the misuse of plan implementing tools than by their careful and legitimate use. For example, unnecessarily large lot size and floor space requirements have been imposed simply to deter construction; needlessly stringent building, inspection, and safety codes have been adopted for similar reasons; unusually large

² *McCulloch v. Maryland*, 4 Wheaton 316 (1819).

³ 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.

building permit fees have been requested; 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 zoning or single-purpose zoning, which bears no relation to real zoning needs or underlying matters of fact, has often been used as a means of retarding development. 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 on a completely random basis, 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 sought to be accomplished by any of these forms of misuse of governmental power, the courts have usually come to the rescue of the private litigant.⁴ 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 revenue. 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. For example, density zoning based on sound standards expressing minimal or acceptable norms of people to space relationships will be given serious consideration by the courts.⁵ 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.

Wisconsin has a similar provision in Wis. Stats. 236.45(1). The New York statute was upheld in Josephs v. Town of Clarkstown,⁶ where the court said:

The 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

⁴Albrecht Realty Co. v. Town of New Castle, 167 N.Y.S. 2d 843 (1957); Corthouts v. Town of Newington, 140 Conn. 284, 99 A. 2d 112 (1953); Medinger v. Zoning Board, Springfield Township, 377 Pa. 217, 118 2d 118 (1954); City of Moline Acres v. Heidbreder, 367 S.W. 2d 568 (1963). Also, the dissent of Justice Hall in Vickers v. Township of Gloucester, 118 A. 2d 129 (1962).

⁵Young v. Town Planning and Zoning Commission, Town of Wallingford, 196 A. 2d 427 (1963); Lapkus Builders Inc. v. City of Chicago, 196 N.E. 2d 682 (1964).

⁶198 N.Y.S. 2d 695 (1960).

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.

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.⁷

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, 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 fees in lieu of land dedications for these purposes. A recent Wisconsin case upheld the application of such a fee as a valid exercise of the police power contemplated in the provisions of Wis. Stats. 236.45.⁸
- 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 become restrictions on the landowner's range of alternative uses (things he may not do), the easement is said to be negative. A continuation of present uses or expansion into

⁷Cutler, "Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe," 1961 Wis. L. Rev. 370.

⁸*Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965).

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.⁹ 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 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 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. 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 would approximate the cost of the full fee. Recent enabling legislation, Chapter 105, Laws of Wisconsin 1965, 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 Chapter 105.

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 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.¹⁰ 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.¹¹ Accompanying the official map with an ordinance control prohibiting home construction on streets not mapped might be particularly effective.¹²

⁹ 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.

¹⁰ Town of Windsor v. Whitney, 95 Conn. 357, 111 A. 354 (1920).

¹¹ See Kucirek and Beuscher, "Wisconsin's Official Map Law," 1957 Wis. L. Rev. 176.

¹² Boons v. Smith, 304 N.Y. 164, 106 N.E. 2d 503 (1952). It would be well to amend local enabling legislation clearly to authorize such ordinances in Wisconsin.

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 which will pace development providing 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 extra legal 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.

Chapter VIII

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 man, 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 poses 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 many 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 years were more like voices crying in the wilderness, 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. This is unavoidable. It is part of our political

¹Minimization of property loss, anguish, personal injury, and death in flood plains; 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 ground water recharge areas and storage areas for floodwaters; protection of wildlife habitat; open corridors to control air pollution—to name just a few.

²Quoting 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."

makeup. 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. The future portends an even greater commitment to open-space reservation programs than is now evident. More money will be spent. More techniques developed. More lands affected. This chapter will attempt to point out some of the devices now being considered and used to reserve open space.

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 being 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 on the outer edge of a flood plain and the device sought to be used is a fairly restrictive zoning ordinance, then a great deal more data and preparation will be necessary. 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 flood plain, 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 flood plains, coupled with carefully compiled flood damage data; thorough soils analysis, slope analysis, and topographic identification, 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 natural features of the land; data relating to the profitability of those 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.

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 lumber reserves; preservation of unique or disappearing land forms as is the case with the proposed 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.

An increasingly large role is being played by the Federal Government under the Land and Water Conservation Fund Act of 1965 and Title VII of the 1961 Housing Act since expanded. Grant-in-aid monies, technical assistance, and a great deal of persuasive force and momentum are being generated at the federal level to induce comprehensive planning for open space and in accordance with such plans to:

... help provide necessary recreational, conservation, and scenic areas by assisting state and local governments in taking prompt action to preserve open spaceland which is essential to the proper long range development and welfare of the nation's urban areas,....³

The Bureau of Outdoor Recreation of the Department of the Interior and those agencies administering the soil bank and the farm recreation programs in the Department of Agriculture are forces for open-space reservation and increased recreational use of these lands. Of even more recent origin is the shaping of federal policies, particularly highway policies, to accomplish amenity and open-space reservation goals. Beautification programs, screening of unsightly roadside activities and areas, provision for scenic turnoffs and roadside rest and recreation areas, and the whole concept of an integrated system of scenic highways, which is still in a developmental stage, evidences the federal intent and will largely be accomplished by direct federal spending.

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. The big impetus to this program in Wisconsin was, of course, the Outdoor Recreation Act program initiated in 1961, which anticipated an expenditure of \$50 million over a ten-year period in major part for the reservation, maintenance, and development of open-space areas. See pages 15-18 and 58-59 for additional comments on the Outdoor Recreation Act.

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 increas-

³Housing Act 1961, Title VII, Sec. 701A.

ingly larger role in the future preservation of open space.⁴ With strengthened enabling legislation, the State Department of Resource Development and the State Board of Health could, for example, in accordance with state developed standards concerning the suitability of land for subdivision, 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.⁵ The State Highway Commission can now regulate access along some state trunk highways, thus promoting safety and preserving the amenity features of the highways. 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 the state's waters can regulate their use to promote safety as 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.⁶ Admittedly, greater coordination among state agencies to achieve these goals is needed. The growing number of legislative proposals and increased support for state level control over all stream and lakeshore lands, flood plains, and highway interchanges⁷ leads irresistibly to the conclusion that lands so situated will in the near future be subject to some form of state level regulation designed to maximize safety, welfare, and the inherent amenity features of these lands.

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 land areas usually in the direction of maintaining or improving their value as agricultural, open-space, or recreation land.⁸

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 regional and local units of government.⁹ 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—

⁴In 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. These planning efforts are currently being carried out by the Wisconsin Conservation Commission and coordinated through the State Department of Resource Development as part of the overall state planning program currently underway in Wisconsin. See the preface and Chapter III of this report; also Wis. Stats. 109.01.

⁵The rationale for such standards might be developed around the conditions relating to soils, slope, vegetation, rock outcroppings, and availability of sewers. To some extent, this is already taking place.

⁶See Conservation Department Memorandum No. 545, attached as Appendix B, and Massachusetts Inland Waters Act, Chapter 131, Laws of Mass. 1965.

⁷Bills 328A and 753A, 1965 Leg. Sess. Bills 360A and 361A, 1963 Leg. Sess.

⁸Wis. Stats. Chapters 26, 28, 29, 30, 88, 89, and 92.

⁹No further discussion of fee or less-than-fee purchases of open-space lands will be undertaken. The reader is referred to Chapter VI on placing 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.

police power measures in general. To effectively reserve open space, however, the emphasis must be on the careful application or perhaps a slightly new application of these seemingly well-known tools. The word seemingly is appropriate because, though apparently familiar, these devices are all too often misused, under used, 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 in the most dangerous portions of a flood plain¹⁰ in an almost natural state. To do this, these dangerous zones 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 minimal return) to the private owner must be conceived. Less dangerous portions of the flood plain¹¹ can also be retained in a fairly open and natural state, but the range of permitted alternative uses should be expanded to accommodate the decreased possibility of flooding. Here again there is a challenge to creativity and imagination. An area back from the normal or 100-year flood plain 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 flood plain, and the overall comprehensiveness of the zoning program.¹² 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 not 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 Hills¹³ 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.

¹⁰ This area might be designated the primary flood plain district. See SEWRPC Technical Report No. 2, Water Law in Southeastern Wisconsin, January 1966.

¹¹ This area might be designated the secondary flood plain district.

¹² 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 dominant 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.

¹³ 40 N.J. 539, 193 A. 2d 233 (1963).

Justice Hall also cited an oft quoted passage of former Chief Justice Holmes, who in Pennsylvania Coal Co. v. Mahon said:¹⁴

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.

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.

To summarize then: A court may approve of the broad community goal; for example, open-space reservation. Furthermore, a court may approve of the principle 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 by means of zoning may be applied in areas other than a flood plain or its corridor. For example, 1) land near airports may be kept in as open a condition as possible; 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;¹⁵ and 3) particularly steep slopes; thickly wooded areas; wet, low-lying, or marshy ground; and extremely poor soil areas may all be kept open for a combination of reasons ranging from aesthetic considerations to their unsuitability for most types of development.¹⁶

Subdivision control ordinances offer another means of reserving land in open space. Not only are dedications for park purposes¹⁷ seemingly acceptable but fees in lieu of dedication have, as previously mentioned, been found acceptable in Wisconsin.¹⁸ Open space for safety, street widening, and amenity purposes may be reserved by provisions requiring setbacks, well-planted buffer areas which screen out the unsightly or effectively separate adjoining but divergent land uses, and dedication of street widening strips along the boundaries of the subdivision and quite possibly within the subdivision itself.¹⁹

An imaginative subdivision control device which offers large returns in the form of open-space reservations is the planned unit development, including the much dis-

¹⁴ 260 U.S. 393 (1922).

¹⁵ See Appendix B.

¹⁶ Buffalo County recently (1965) adopted a zoning ordinance, which by means of overlays restricts uses according to soils and slope.

¹⁷ In re Lake Secor Dev. Co., 252 N.Y.S. 809 (1931).

¹⁸ Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965).

¹⁹ Ayers v. Los Angeles, 34 Cal. 2d 31, 207 P. 2d 1 (1949).

cussed cluster housing.²⁰ 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;²¹ 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. 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 creation of a private homeowners association and agreement. The provisions of Wis. Stats. 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 city, 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 is usually formed with each lot owner in the development having an aliquot voice 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 a semi-annual or 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. In some rural areas it has, in fact, been the forerunner to more substantial forms of local government.

The main difficulty with planned unit developments is enforcement of the covenants regarding 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

²⁰ A thorough presentation of all aspects of Planned Unit Development is found in the *Urban Land Institute Technical Bulletin No. 50, October 1964*.

²¹ 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.

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 city 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 city. Provisions for accepting such a belated dedication should be clear in advance.²²

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 the Lake George, New York, situation 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, they 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 "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 sue 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 municipal body can be made a party to the covenant at the outset with specific enforcement rights or, as was recently 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.²³ This latter approach, though new and as yet untested in the courts, 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 so much as an experimental trial is some form of compensated regulation.²⁴ 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

²²A 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 at 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 C, which reproduces the pertinent sections (840-845) of New York State's Conservation Law.

²³Laws of Texas H.B. 105 (1965).

²⁴Controls and Incentives for Open Space, Ann Louise Strong, Univ. of Penn. Law School, November 1964.

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 in a scheme of compensated regulation be acceptable 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 25 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 25 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 75 percent, the public agency would be expected to buy the fee at the original appraised value. Between the range of 25 percent to 75 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 which stands ready to compensate the owner for any actual loss he suffers because of the stringency.²⁵

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

²⁵ *Budgeting for a program of compensated regulation in any one 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.*

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 end desired must accompany any imposition of police power regulation. Zoning and subdivision controls will undoubtedly 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 alternative means of saving and regulating land for the open-space needs of the future.

Chapter IX

RESERVATION AND PROTECTION OF HIGHWAYS

This chapter focuses on: 1) regulatory controls to reserve land for highway widening and for future highway construction, 2) the protection of the highway from interfering land uses located on abutting lands, and 3) legal devices to achieve scenic corridors along highways.

At the outset, it is important to note that the public highway has long had a special status in the law.¹ As long ago as 1285 A.D., Edward the First of England and his Parliament were restricting the use of land for 200 feet back from each side of market town roads to prevent highwaymen from lurking. 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 were often 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 was 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 construction of the highway.

Actually, as Ross Netherton has stated:²

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

¹For 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.

²Netherton, *Control of Highway Access* (1963), pp. 58-59.

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."³ 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 is.⁴ 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 of purchase or regulation of a general statement alleging future need, unsupported by any definite implementing plan, is doubtful.⁵ 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.⁶

The Wisconsin Statutes⁷ 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 indicating with some definiteness the need for particular parcels of land exists. 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

³Art. I, sec. 13.

⁴*State v. 0.62033 Acres of Land*, 112 A. 2d 857 (Del. 1955); *Port of Everett v. Everett Imp. Co.*, 124 Wash. 486, 214 Pac. 1064 (1923).

⁵*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.

⁶See *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).

⁷Wis. 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.

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.⁸ Where zoning is used in this way, it is important to make clear through planning studies and otherwise (see Chapter IV) 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.⁹ 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 and 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; 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; and prevention of ribbon-like development along the route of the proposed highway at least until adequate services (sewer, water, and highway) are available.

The reservation of highway construction corridors by zoning may be subject to attack on constitutional grounds where 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 might also provide that upon such a showing the board of adjustment, instead of recommending purchase, may work out an agreement with the landowner authorizing a mutually satisfactory type of development for a specified period of years 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. Provisions of this type are included in a proposed highway reservation law prepared by Professor Mandelker and reprinted as Appendix D to this report.¹⁰

As a condition to subdivision plat approval, dedication of widening strips along existing highways bordering on the subdivision may be required.¹¹ In addition, of course, the subdivider will be required to dedicate land needed for an internal street system within the subdivision.¹² 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 gen-

⁸The 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.

⁹*State ex rel. Tingley v. Gurda*, 209 Wis. 63, 243 N.W. 317 (1932).

¹⁰See 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.

¹¹See *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).

¹²*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), *Trends in Land Acquisition* (1955).

erated 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 case¹³ the city's master plan marked a street bordering a proposed subdivision as a main thoroughfare 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.¹⁴ Again in a California case¹⁵ involving a rather small 13-acre tract, the city required as a condition of plat approval dedications of 1) a sharp 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 cases¹⁶ suggest that a subdivider should not be made to dedicate land beyond the needs of his subdivision.

The oldest and principal regulatory device for the advance reservation of needed street and highway rights-of-way is the official map.¹⁷ There have been several comprehensive studies of this tool so that the analysis here may be brief.¹⁸ 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 enable safe 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 can also be provided by a systematically designed street system.

As indicated in Chapter III, 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. 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."¹⁹ An expressway is a divided arterial highway for through traffic with full or partial control of access and generally with grade separations at intersections.²⁰ Of the total state trunk mileage in the state, no

¹³*Ridgefield Land Co. v. Detroit*, 241 Mich. 468, 217 N.W. 58 (1928).

¹⁴The Plan Commission originally demanded 27 feet but later reduced it to 17 feet.

¹⁵*Ayres v. Los Angeles*, 34 Cal. 2d 31, 207 P. 2d 1 (1949).

¹⁶*Pioneer Trust and Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E. 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.

¹⁷See Kucirek and Beuscher, "Wisconsin's Official Map Law," 1957 *Wis. L. Rev.* 195.

¹⁸*Ibid.*, p. 176; and SEWRPC Planning Guide No. 2, *Official Mapping Guide* (1964).

¹⁹Wis. Stats. 990.01(9a).

²⁰Wis. Stats. 990.01(7a).

more than 300 miles may at this time (1966) be given the freeway or expressway designation by the State Highway Commission.²¹

Thus, 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 volume²² and in this sense is important. 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 he (the owner) desires to build in, or move a structure onto, the mapped land or 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 is ultimately acquired by the state, "no damages shall be allowed (him) for any construction, alterations or additions" ²³

As was pointed out in Chapter III, Wisconsin counties have highway mapping powers under two statutes, Wis. Stats. 84.64 and 236.46. There is no need to repeat here what was said about each of these statutes in Chapter III. 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

²¹ Other sections of the state highway system may be built to freeway or expressway standards; but without official designation as expressways or freeways, the benefits of the official mapping authority of Wis. Stats. 84.295 would not apply to these sections of highway.

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).

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 where 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 III. It suffices here to make the following points with respect to 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.
- 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 highway construction corridors. 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

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) does expressly provide for the contingency.

²⁶ See Kucirek and Beuscher, "Wisconsin's Official Map Law," 1957 *Wis. L. Rev.* 176, 194.

restrictive covenants, the now virtually obsolete eminent domain purchase of setback easements, and setback ordinances under Wis. Stats. 80.64 and 62.23(10)(11) as such.

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. Zetley²⁸ upheld the validity of an urban setback included in a zoning ordinance.

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, however, been willing to accept a rural 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 their 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 rather fully discussed. Zoning, which includes or is coupled with setback provisions, can also be important in restricting abutting land to uses that generate little traffic and require only infrequent access to the highway. Under the recently enacted Highway Beautification Act of

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 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) is not usually included in a setback ordinance.

³¹ Highway 100 Auto Wreckers, Inc. v. City of West Allis, 61 Wis. 2d 637, 96 N.W. 2d 85 (1959).

1965, local zoning of lands along federal aid highways takes on a new significance. If the lands are zoned for commercial or industrial uses, the Secretary of Commerce 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. Existing junkyards in these noncommercial or nonindustrial districts must by July 1, 1970, either be screened or removed; existing billboards must be removed. These things must be done on pain of having the state's federal highway aids reduced by 10 percent. Compensation mostly from federal funds is to be paid for removal of junkyards or billboards. Whether prohibition of the future establishment of junkyards or future creation of billboards also requires compensation is at this time (1966) one of the unresolved ambiguities of the Highway Beautification Act.

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.³² 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 non-state 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.

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 fifteen lots, each less than one and a half acres in area.

³² *Laws of Wisconsin 1949, Chapter 138. 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.*

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.³³

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.³⁴ 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 III 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. 84.25³⁵ to direct that certain highways be designated as limited-access roads. This is in effect limited state level zoning 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 with respect to 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 the overall authority of the Commission is limited to 1,500 miles of highway. To date (January 1966), the Commission has actually used this power along approximately 400 miles of state trunk highway.

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 with respect to the new highway.³⁶

³³For 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).

³⁴Wis. Stats. 236.45(2).

³⁵Such an order can be issued only after notice and a public hearing. Wis. Stats. 84.25(1).

³⁶*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.

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 Commission³⁷ is instructive. 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.³⁸ 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 reasonable alternative (though indirect) access exists. What is reasonable alternative access has been the subject of substantial litigation, which is summarized in the leading work on the subject.³⁹ 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.⁴⁰

Recent state enabling legislation, Wis. Stats. 83.027, permits county boards to designate up to 10 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 2,000 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. There is in Wis. Stats. 86.191 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.⁴¹ 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 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

³⁷13 Wis. 2d 511, 109 N.W. 2d 71 (1961).

³⁸Mrs. Nick was again unsuccessful in Nick v. State Highway Commission, 21 Wis. 2d 489, 124 N.W. 574 (1963).

³⁹Netherton, Control of Highway Access (1963), 157 et. seq.

⁴⁰Stefan Auto Body Co. v. State Highway Commission, 21 Wis. 2d 363 (1963).

⁴¹Wis. Stats. 84.30.

premises of land abutting the interstate highway; and one sign giving advance information relative to food, outdoor recreational, or automotive service facilities located on land adjacent to the highway if space is available within authorized sign areas and if a permit is issued by the State Highway Commission. Areas within incorporated cities or villages which are zoned for industrial or commercial use are also exempt from regulation.

Pursuant to the Highway Beautification Act of 1965, previously mentioned, the Wisconsin Legislature will probably soon be adopting comparable controls applicable to lands adjacent to all federal-aid primary highways in the state. Failure to do so would mean a 10 percent reduction in Wisconsin federal aid highway allotments. Certain ambiguities in the federal legislation need first to be worked out, however.

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 which 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 scenic 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,⁴² 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 with cigarette tax monies made available under the Outdoor Recreation Act.⁴³ 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 possibly 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.⁴⁴

Where the highway is a part of a county highway system, limited purchase authority for the turnout area exists;⁴⁵ but power to buy the easement beyond is doubtful.⁴⁶ 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.⁴⁷ 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.⁴⁸

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.

The State Highway Commission has proposed in response to a federal interagency committee request that Wisconsin establish with federal help a scenic road system totaling almost 6,000 miles. About 60 percent of the roads involved are county or town roads. Amendments broadening the powers of counties and towns so as to clearly authorize the purchase and maintenance of turnouts, roadside parks, and the purchase of scenic easements seem required before a major part of Wisconsin's program could be accomplished.

⁴² Wis. Stats. 84.04 and 84.09.

⁴³ Wis. Stats. 20.420(86), 84.04, and 84.09.

⁴⁴ See Chapter VIII of this report.

⁴⁵ Wis. Stats. 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.

⁴⁶ No statute authorizes counties or towns to buy scenic easements. Since these are not "home rule" general charter units, it is doubtful that they have the authority.

⁴⁷ Ibid.

⁴⁸ Wis. Stats. 60.74(8) and (9).

Chapter X

SUMMARY AND RECOMMENDATIONS

Comprehensive land use-transportation planning in urbanizing regions is becoming more essential each day because of the growing complexities of a highly technological society. It is being made a mandatory requirement of federal aid programs as a means of attaining better coordination in government spending and assuring both urban and rural citizens that minimum health, safety, and general welfare standards will be maintained; that needed public facilities will be expanded in an orderly and efficient manner; and that irreplaceable natural resources, such as soils, water, and forests, will be used with care.

The sovereign power of the State of Wisconsin can be asserted to accomplish planning goals either through direct action of the Legislature, through state level administrative agencies, or through areawide or local units of government. This very dispersion of power and authority, however, is a major difficulty when the products of comprehensive planning activities involving many overlapping units of government are sought to be carried out. Furthermore, many planners and lawyers tend to compartmentalize governmental powers first into the major areas of: power of eminent domain, power of taxation, power of appropriation, and police power. Then the major plan implementation police power tools, such as zoning, subdivision control, and official mapping, are broken out and often dealt with as if they existed apart from the whole fabric of governmental power. So that comprehensive areawide planning may be successfully implemented, the entire range of police powers must be effectively coordinated one with another; police and taxing powers must be integrated with each other; and these together must be interwoven with the state's power to spend, to exercise eminent domain, to exercise its proprietary interest, to authorize grants-in-aid, and to deal in the public's interest. In short, a more unitary concept of the entire range of the sovereign powers of the state must be developed. (see Appendix E)

While planning and plan implementation are often thought of as state or local matters, it must be recognized that the Federal Government not only has a large and important planning function of its own, but via federal spending and aid programs is perhaps one of the most important single forces shaping state and local planning and plan implementation efforts. The U. S. Department of Housing and Urban Development, Bureau of Public Roads, Corps of Engineers, and Soil Conservation Service are just a few of the numerous federal agencies which are actively engaged in financing, providing technical assistance, and generally lending impetus to state and local planning efforts.

Though planning and plan implementation of necessity focus on public needs and desires, it is important to be aware of and understand private property rights which exist and are protected by both the federal and state constitutions. The goal of the courts as arbiter between the uses of public power which are in conflict with, or encroach upon, alleged private property rights has been to strike a balance—a balance which will on one hand allow needed public programs to be carried out and at the same time preserve as large a sphere as possible within which the private decision-maker may operate and private property rights may be exercised. Often the public goals must give way or the private interest which is injured must be compensated. However, in many instances the private interests must be subordinate to public regulation, without compensation, in order to promote public health, safety, and general welfare.

If comprehensive planning and plan implementation are to rely more and more on various forms of regulation to achieve their goals, a factual underpinning becomes increasingly necessary to sustain an exercise of governmental regulative power in a court of law. 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 decision on a single or narrow ground, the court undoubtedly will be moved by the weight of evidence and by the quality and comprehensiveness of the planning program. It must be remembered that it is not just the reasonableness of the development goals that are important, but that the court is also concerned with the reasonableness of the means to the goal; and unless the community by use of sound research and data-gathering techniques can adequately justify the means, both in principle and as applied to a particular litigant, the regulation being challenged may well be declared invalid.

It seems clear that the placing of development and the control of alternative uses of land are necessary from an economic standpoint to ensure the wisest use of scarce resources and to adequately protect the health, safety, and general welfare of the community. Federal, state, and local governments and private individuals in the course of carrying out their respective affairs all make decisions which affect the placing of development. Often a failure to plan or a failure to communicate causes these decisions to be at odds with one another and, thus, self-defeating to both public and private long-range planning goals. Each level of government possesses a wide range of development placing powers. The nuances and modern applications of each should be understood and used singly or in combination to achieve the planning goal desired.

Governmental services and facilities must be provided to each new subdivision and to each new resident of the community. Since there is a limit to the availability of tax dollars, and bonding powers can be exhausted, the pacing of development becomes critically important in rapidly growing urban regions. If the quality and extent of governmental services are not to be impaired and if standards of health, education, safety, and general welfare are to be maintained, the process of growth must be paced over time. This will enable expenditures to be kept more nearly within revenue limitations. It will allow time for the shaping of programs and policies and thus avoid costly mistakes attributable to undue haste. It allows for the timely extension of community facilities and for the maintenance of a high level of quality in governmental services.

The reservation of open space has become more important in recent years for economic, scientific, sociological, and aesthetic reasons. At almost every level of government—federal, state, and local—there are active programs underway bent on inventorying, mapping, evaluating, planning, acquiring, reserving, maintaining, and improving open-space areas either to retain their natural condition or to create an area capable of being used for recreation purposes. 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 familiar tools of zoning, official map, and subdivision control are the most frequently used tools for open-space reservation; but such devices as setbacks, planned unit development, private covenants, taxing policies, and possibly in the near future some form of compensated regulation should not be overlooked as alternative means of preserving and regulating land for the open-space needs of the future.

Highways are perhaps the singly most important means of transportation in our society. As such, it becomes necessary not only to reserve land for future highway widening or for completely new rights-of-way but it is important to protect existing highways from the interference of abutting land uses. The creation or preservation of scenic

highways is also a means of achieving our open-space, beautification, and amenity planning goals. The justification for such reservation or regulation, as the case may be, is largely economic, 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. Yet, this has happened and is happening today. Useable highway facilities are being rendered prematurely obsolete by inadequate prior planning and the lack of access controls.

Recommendations

Suggestions of legal means for the accomplishment of major land use planning goals have appeared in the main body of this report. They will not be repeated here. Instead the focus here will be on specific organizational ways in which the SEWRPC can foster the implementation of the areawide plans which are now being prepared. The discussion is divided between those recommendations which are possible under existing law and those which would require new legislation.

Once an advisory plan to guide the physical development of the Region has been adopted, the SEWRPC will need to accelerate the use of its non-investigatory functions as it seeks to facilitate implementation of the plan. These include the authority to:

- 1) Certify such plans to the federal, state, and local units of government concerned;
- 2) Publicize its purposes, objectives, findings, and recommendations;
- 3) Provide advisory services on regional and local planning problems to all levels and agencies of government and to private agencies;
- 4) Act as a coordinator between local governmental units and state and federal agencies desiring to implement various aspects of the original plan;
- 5) Upon request, review proposed locations and acquisitions of land for facilities included in the regional plan;
- 6) Review subdivision plats when authorized by local action; and
- 7) Upon request, make more specific and detailed planning and plan implementation studies and give advice to local units of government on land use, transportation, community facilities, public improvements, and other developments.

The SEWRPC has already done much along some of these lines. It will need to increase its liaison advisory, coordinating activities and contacts with federal, state, and local units and agencies of government and with private agencies. More specifically, the following suggestions are made:

- 1) Actions possible under existing law
 - a) On contract for selected local governmental units, the SEWRPC should prepare an integrated packet of zoning, subdivision, and official map ordinances as an actual demonstration of plan implementation using integrated development regulations. Here the SEWRPC planning guides on land devel-

opment, zoning, and official mapping will be helpful. But beyond these manuals it would be instructive to all governmental units in the Region to see what can be done with tailor-made, integrated ordinances which could be put in force and administered to implement a part of the original plan in a specific locality which includes more than one governmental unit.

- b) The SEWRPC should consider the preparation and publication of a manual offering guidance to local units with respect to negotiations between public bodies and land developers resulting in conditions of public approval in connection with land development review; official map appeals; and zoning variances, exceptions, and special use permits, including those for planned unit developments. Attached as Appendix F is the substance of an agreement between Sylvania Electric Products, Inc. and Needham, Massachusetts, which was upheld by the Massachusetts court. It demonstrates the substantial scope of the power to negotiate. The manual should identify and describe the possibilities of restrictive covenants, dedications of fee simple or less-than-fee interests and monetary fees in lieu of dedications. The manual should be shaped in the light of Wisconsin enabling acts, constitutional law, and high standards of justice and fairness. It would at once serve to promote uniform practices within the Region so that developers would know what to expect from one unit of government to the next, and it would also guide local officials in an uncharted area of plan implementation. There should be included ordinance provisions, covenant and dedication terms, and ways of conducting bargaining sessions to assure uniformity of treatment and fairness.¹
- c) The SEWRPC should also consider the preparation of a short guide describing the provisions and potentials of the joint contracting and bonding provisions of Wis. Stats. 66.30. This publication should indicate specifically how the contract between two or more local units can be used to achieve particular, designated regional planning goals. Drawing on actual experience of Wisconsin municipalities, the guide could report what has been done with this device, provide sample contract clauses (see Appendix A), and underline potential uses in the Region. In addition, the SEWRPC might serve as the catalytic agent to bring about a number of such joint agreements between local units of government aimed at implementing a particular phase of the regional plan.
- d) The SEWRPC should consider forming a "Cooperating Council" of officials from mortgage lending, mortgage insuring, and fire and casualty insurance companies. After careful study of regional and local master plans, this council should explore the possibility that comprehensive land use plans may be implemented through the forces of the urban land market. For example, higher rates of interest or higher insurance premiums might well be in order for structures which violate the plan on the theory that the neighborhood in which they have been mislocated will not afford the investment or casualty insurance security of a planned neighborhood. It seems possible to achieve working rules in these industries which will simply deny loans or insurance to those developers or individuals who choose to build on lands poorly located or too low, too steep, or too susceptible to periodic flooding. Decisions based on sound business considerations by such a committee could be a major factor in the effective implementation of regional land use plans.

¹Urban Land Institute Technical Bulletin No. 50, October, 1964, and Mandelker, *Legal Aspects of Planned Unit Development*, ASPO 1966.

- e) A second "Cooperating Council," made up of representatives of local planning commissions, zoning administrators, and real estate tax assessors seems advisable. A principal purpose of this council would be one of intercommunication, alerting assessors to the effect zoning and zoning limitations have on market values of land, particularly low density, restrictive, exclusive, or corridor zoning and special flood plain and soil restrictions. Where zoning of these types is proposed in accordance with a master plan, this council could serve a valuable function in coordinating the real estate tax assessment policies of the community with the community's land use planning goals embodied in the zoning proposal.
- f) The State Industrial Commission, the State Highway Commission, the State Board of Health, and the State Public Service Commission each have regulatory powers which can be important in the implementation of plans within the Region:
 - 1) The SEWRPC should establish working relations with the Industrial Commission to the end that state level building codes and safety codes may be amended so as to impose special requirements on those who choose to build in flood plains, on steep slopes, and on lowlands or problem soils. (See SEWRPC Technical Report No. 2, Water Law in Southeastern Wisconsin, 1966, p. 41.) These codes apply to structures for three or more families and to commercial and industrial buildings. It would be necessary to route building plans by way of the SEWRPC to the Industrial Commission, so that the SEWRPC could indicate whether or not the location required the imposition of the stricter than normal requirements.
 - 2) The excellent cooperation between the SEWRPC and the State Highway Commission should be continued as the plan implementing stage is reached. The SEWRPC on its part should encourage local units of government to pass ordinances controlling setbacks along highways and controlling metes and bounds sales of lands along state highways, which now escape State Highway Commission control. The SEWRPC should continue to play an important role in recommending specific limited access controls along state trunk highways. It should prepare and propose, where appropriate, local zoning ordinances for highway construction corridors; and the SEWRPC should offer leadership within the Region in carrying out not only highway interchange planning but also highway beautification and scenic drive programs, offering expert help on easement purchase and zoning protection of interchanges and scenic corridors along highways.
 - 3) The continued cooperation between the State Board of Health and the SEWRPC should likewise be encouraged, with the SEWRPC at the Board's request playing a certifying role for subdivisions not to be served by public sewer. In this way the detailed soils information available to the SEWRPC will be used in the subdivision review process for the purpose of determining whether or not proposed lots may be built on and, if so, what size lot is required. The SEWRPC should encourage local units to adopt septic tank permit laws even to the extent of forbidding private disposal systems in soils not suitable for such systems. It should work

with the Board of Health in the improvement of private sewage system specifications, particularly in areas near lakes or streams. Above all, concerted programs should be instituted, particularly in lake areas, for the creation of town sanitary districts. The common assumption that such districts must of necessity install public sewers and treatment facilities at great cost to the users is not correct. These districts can perform a major role in policing new private treatment installations, in checking existing installations, in insisting on more efficient joint private systems where necessary, in organizing for the regular pumping of holding tanks, and the like. What is currently being done by such a district in the Green Lake area is indicative of what improvements could come from such a program.

- 4) The State Public Service Commission has important regulatory responsibilities over all navigable waters. These include establishing water levels, rates of flow, bulkhead lines, and the conditions governing the installation, maintenance, and abandonment of dams. It also controls the formation of regional Flood Control Boards under Chapter 481, Laws of 1965. Effective liaison on these matters should be maintained between the Public Service Commission and SEWRPC.

2) Actions involving a change in existing law

- a) At the municipal planning level, it is usual to protect the master plan by authorizing the local planning agency to: review proposed zoning amendments; review subdivision plats; review annexations; and review proposed public facility plans, land leases, and purchases, sales, and other dispositions by public bodies which relate to the master plan. (See Wis. Stats. 62.23(5).)

When section 66.945 authorizing the creation of regional planning commissions was enacted in 1955, it directed a reference to the regional planning commission "for its consideration before final action is taken" of the following:

The location of, or acquisition of land for, any of the items or facilities which are included in the adopted regional master plan, and all subdivision plats of land within the Region.

The subdivision plat review requirement was later moved from the statute. At the very least, it should be restored. In fact, protection and implementation of the master plan requires more. Subdividers should be required to furnish a copy of all proposed plats in the Region to the Commission, which should have the right to halt the filing of the plat if the master plan is being violated.

Secretaries of local planning agencies or local clerks should be required to notify the Commission of all zoning applications for special permits and for planned unit developments and of all proposed initial zoning ordinances or proposed zoning amendments. The notice should specify the nature of the proposed action and the area affected. If the Commission finds that the proposed action is contrary to the recommendations of the master

plan, the local governing body should not be permitted to act until after a conference with Commission representatives and then only if 75 percent of the entire local governing body approves. Proposed official map ordinances which threaten the regional transportation plan or environmental corridors should be subject to similar requirements.

- b) Attempts to preserve for the Region the critically needed open spaces indicated in the master plan will lead to frustration and failure unless the people of the Region are willing to go to the Legislature and obtain a departure from the traditional total reliance on local governmental units. This is not to say that local units are not frequently anxious to preserve open space. They are. But often they lack the necessary finances. Sometimes they lack a perspective of regional needs and sufficient bargaining status and experience vis a vis large-scale developers. Often local units of government do not effectively use such powers as they do possess.

If the citizens of the Region really want the remaining critical open spaces preserved, they should obtain from the Legislature authorization for a state agency, such as the Wisconsin Conservation Commission, to negotiate directly with owners of lands in such designated critical areas. In lieu of such legislative authorization, the local units of government could authorize the Commission to undertake those functions pursuant to a contract under Wis. Stats. 66.30. This state agency or Commission must be in a position to exercise alternatives. For example, it should be empowered to buy or, if necessary, condemn temporary interests in such lands, paying rent until funds can be raised for fee simple purchase. Or it should be in a position to work out the purchase of a permanent easement against development. Where the land is earning a fair return, it should be in a position to deny permission for development. In some instances, development of low density might be permitted as being in accord with the plan. Or development on part of a tract and open-space dedication of the rest might be a solution. The state agency or Commission should have power to negotiate for the appropriate alternative. As indicated, this would constitute a considerable change from traditional procedures. But unless something of this sort is done, it is safe to predict that a substantial part of the recommended open space will be lost to unplanned urban development during the next 20-year period.

- c) In his February 23, 1966, message to Congress, President Johnson proposed a clean rivers demonstration project; and to implement the proposal, Senator Muskie has introduced Senate Bill 2789. Federal matching funds would be made available. Under planning and organizational leadership from the SEWRPC, preliminary steps should be taken now to prepare the Region for participation in such demonstration projects. With appropriate enabling power, a Regional Water Pollution Abatement Authority could be created to carry out such a program in cooperation with the Milwaukee Metropolitan Sewerage District. The possibility exists that through such an effort the quality of the water in the Region's 11 watersheds could be materially improved and the attractiveness and amenities of the whole Region enhanced.
- d) As has been shown, there are separate and sometimes conflicting grants of planning and plan implementation enabling legislation for cities, vil-

lages, towns, and counties. Wisconsin's land use enabling statutes have been permitted to lag behind those of other states. For example, amortization of nonconforming uses; clear authorization for planned unit development zoning; and needed special authorizations for regulation of flood plains, lands along major highways, and lands in highway interchange areas are lacking. The SEWRPC is in a strategic position to observe the particular problems posed by these inadequacies, as many local units attempt to exercise statutory powers within the Region. The local units of government should recognize this and request the Commission to advise the Legislative Council and the Legislature on matters pertaining to the coordination, integration, and updating of Wisconsin's land use control enabling acts.

- e) Occasionally a court declares a land use control invalid as applied to a particular landowner. This typically means that the land is then left completely uncontrolled, and development may occur which is not only inconsistent with the plan but also grossly unfair to nearby property owners. The local units of government should request SEWRPC to urge the enactment of state legislation requiring in such cases that the court enter a stay of 90 days in order to give the unit of government concerned an opportunity to change the control, so as to make it valid, or to purchase the land.

APPENDICES

Appendix A

MODEL AGREEMENT CREATING A COOPERATIVE CONTRACT COMMISSION¹

Section 1. Introduction

This Contract, entered into this ____ day of _____, 19____, by and between the undersigned Municipalities and any subsequent undersigned Municipalities (all hereinafter referred to as the Municipalities), WITNESSETH THAT:

WHEREAS, certain common areawide problems and needs have occurred within the *area district or, watershed* which transcend municipal boundaries; and

WHEREAS, certain areawide plans and plan implementation actions, which also transcend municipal boundaries, have been proposed and are required to solve these problems or meet these needs; and

WHEREAS, Section 66.30 of the Wisconsin Statutes provides that any city, village, town, county, school district, state agency, or regional planning commission may contract with one another for the receipt or furnishing of services or the joint exercise of any power authorized or duty required by statute; and

WHEREAS, the Municipalities are eligible under the Wisconsin Statutes to exercise all powers and duties enumerated herein;

NOW, THEREFORE, the Municipalities pursuant to the Wisconsin Statutes and in consideration of their mutual dependent promises and agreements thereto create the _____ Cooperative Contract Commission and contract and agree as follows:

Section 2. Membership

The Commission shall consist of *three (3)* members from each participating Municipality appointed by the Mayor, President, or Chairman and confirmed by their respective governing body. These commissioners shall either be elected or appointed officials or citizen members of recognized experience and qualifications.

Term of Office for each commissioner shall be for a *three-* year period except that the initial appointees from any one Municipality shall be staggered for one-, two-, and three-year periods; and any elected or appointed official's term shall expire at the same time that his term as an official expires.

Chairman, Secretary, and Treasurer shall be elected by the other commissioners for *one-* year periods.

Vacancies shall be filled in the same manner as appointments or elections for the full term or period.

Official Oaths shall be taken by all members, in accordance with Section 19.01 of the Wisconsin Statutes, within ten (10) days of receiving notice of their appointments.

Section 3. Organization

The Commission shall organize and adopt rules for its own government, including bylaws, per diem, travel expenses, personnel bonding, and the regulation of receipts and disbursements in accordance with the provisions of this Contract and the Wisconsin Statutes.

Meetings shall be held *monthly* and at the call of the Chairman or a majority of the full Commission and shall be open to the public except for executive or closed sessions authorized under Section 14.90 of the Wisconsin Statutes.

An Annual Meeting shall be held, to which all members of the governing bodies of the Municipalities shall be invited.

Notice of the time and place of all meetings shall be mailed to the commissioners and other interested parties so as to reach them at least *five (5)* days before the meeting.

¹It is extremely important to note that this model agreement is intended only as a guide to be used by municipalities in the formulation of their own contracts. Competent legal, planning, and engineering assistance must be obtained in conjunction with the use of this model agreement.

²Words, numbers, terms, or paragraphs appearing in italics are provided as examples only and should be changed or omitted to best meet the needs and desires of the individual signatories.

Standing and Special Committees may be appointed by the Chairman.

Quorum shall be at least *one-third* of the Commission, each commissioner present representing one of the Municipalities. Adoption of a budget shall require at least *two-thirds* of the full Commission.

A Written Record shall be kept showing all actions taken; contracts let; and resolutions, findings, determinations, transactions and recommendations made. A copy of such record shall be filed with the Clerk of each Municipality as a public record.

An Annual Report shall be made to the Commission and each member of the governing body of the Municipality covering the Commission's activities, receipts, and disbursements.

Section 4. Duties³

The Commission shall have the following functions and duties:

To Protect and Preserve the Environmental Corridors shown on the regional, county, or municipal land use plans adopted by the municipalities.

To Prevent Flood Damage in the watershed.

To Construct and Maintain water supply, treatment, storage, transmission, and distribution systems; sanitary sewerage systems; sewage treatment or pollution abatement facilities; or storm water drainage systems within the District shown on an attachment to this Contract.

To Furnish Certain Educational or Municipal Services to certain Municipalities by other Municipalities as specified in an attachment to this Contract.

To Coordinate all Activities and Projects with those local, county, regional, and state agencies affected by such activities and projects.

Section 5. Powers⁴

The Commission shall have such powers as may be necessary to enable it to perform its functions and duties. Such powers shall include the following:

To Prepare and Adopt zoning, land division, and building ordinances necessary to protect and preserve certain environmental corridors and lands subject to inundation.

To Acquire the Fee or less than the fee interest in certain park and recreation lands lying in the environmental corridors.

To Erect Flood Warning Signs and acquire and remove flood vulnerable structures in the watershed.

Design, Acquire, Develop, and Operate those facilities required for the water, sewerage, sewage treatment, or storm water drainage systems.

To Plan and Administer any of the above functions or projects, including the proration of expenses incurred, the deposit and disbursement of funds appropriated, the submission and approval of budgets, and the formation and letting of contracts.

To Finance the acquisition, development, remodeling, construction, and equipping of land, buildings, and facilities for the above projects in accordance with Sections 66.066 and 66.067 and Chapter 67 of the Wisconsin Statutes.

To Acquire by Condemnation any real estate and personal property appurtenant thereto or interest therein for any lawful purpose in case such property cannot be acquired by gift or purchase at an agreed price, provided the Commission has the approval of the Municipality in which such condemnation is proposed.

To Employ Experts and a Staff and to pay for such services, supplies, equipment, and other expenses as may be

³These powers and duties are for illustration purposes only. Section 66.30 of the Wisconsin Statutes provides that municipalities may contract for the joint exercise of any power or duty granted or required.

⁴Ibid, Footnote 3.

necessary and proper, not to exceed the appropriations and regulations made by the Municipalities.

To Request Available Information from any public official to be furnished within a reasonable time.

To Enter Upon Any Land. The Commission, its members and employees, may enter upon any land in the performance of their functions, make examinations and surveys, and place and maintain necessary monuments, signs, and marks thereon.

Section 6. Additional Duties and Powers

The Commission shall have all additional duties and powers assigned or granted by the Municipalities. All the duties and powers assigned or granted by the State Legislature to Cooperative Contract Commissions created pursuant to Section 66.30 of the Wisconsin Statutes and any amendment thereto are hereby assigned and granted to this Commission, and such Statutes are hereby adopted by reference.

Section 7. Abrogation and Severability

Nothing contained herein is intended to nor shall change, circumvent, amend, repeal, annul, impair, or interfere or restrict the statutory power given the Municipalities by the Wisconsin Legislature.

If Any Section or Part of This Contract or bylaws adopted or actions taken pursuant to said Contract is adjudged unconstitutional, void, or unenforceable by a court of competent jurisdiction, the remainder of this Contract and the aforesaid bylaws and actions shall not be affected thereby.

Section 8. Changes

The Commission or any Municipality may request or propose changes to this Contract from time to time. Such changes, including project cost allocations which are mutually agreed upon by and between the Municipalities, shall be incorporated by written amendments into this contract and shall be attached hereto.

Section 9. Withdrawal

Any Municipality may withdraw at the end of the *third* year or at the end of any subsequent fiscal year by giving at least *six*(6)

months notice in writing to all other municipalities.

Such Withdrawal shall not, however, release such Municipality from any liability jointly incurred hereunder or under any supplementary contract, amendment, or bond issue and shall not affect this Contract between the remaining Municipalities.

IN WITNESS THEREOF the following officials of the below named Municipalities, having been duly authorized by appropriate action of their governing bodies, have executed this Contract as of the date first above written or on the subsequent date below.

_____	COUNTY OF _____
County Clerk	_____ (Seal) Chairman
_____	CITY OF _____
City Clerk	_____ (Seal) Mayor
_____	VILLAGE OF _____
Village Clerk	_____ (Seal) President
_____	STATE AGENCY _____
Secretary	_____ (Seal) Chairman
_____	SCHOOL DISTRICT NO. _____
Secretary	_____ (Seal) President

Appendix B

LAKE AND STREAM CLASSIFICATION
RECOMMENDATION NO. 8



Madison
July 30, 1965

Administrative Memorandum No. 545

: Supplements AM 423, 4/12/62; :
: AM 450, 11/13/62; AM 459, :
: 1/25/63; AM 473, 8/21/63; :
: AM 481, 11/12/63. :

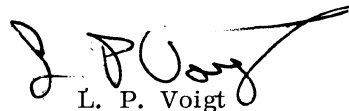
TO: All Supervisory Personnel

FROM: L. P. Voigt

SUBJECT: Lake and Stream Classification Recommendation No. 8.

Attached for your information is a copy of Lake and Stream Classification Recommendation No. 8. It concerns Department feelings regarding the need for wild land on the shores of lakes. Your employment of the basic idea is urged in your discussions of public land needs and zoning needs for the various waters.

This recommendation has been reviewed by the Commission and approved by them. It is hoped that it will have good use for educational purposes.



L. P. Voigt

Attach: Lake and Stream Classification Recommendation No. 8

LAKE AND STREAM CLASSIFICATION
RECOMMENDATION
NO. 8

Recommendation: People desire a whole range of recreational values from inland glacial lakes and impoundments, including fishing, wildlife study and observation, hunting and trapping and aesthetics. These important values require, in part, the existence of wild shore. Therefore, it is the Conservation Department's opinion that at least 25 percent of the shore of a particular lake or impoundment ought to be preserved in a wild state through zoning and acquisition if these values are to be protected.

Explanation: The various recreational demands made on water have a space requirement in the form of required habitat. For the fishery this will be spawning grounds for various species, especially the marsh spawners, and nursery grounds for young fish; or it may be the subtle contribution of a food-producing area where frogs, turtles and other lower vertebrates hold forth. For hunting, trapping and wildlife observation, this wild land space is the nesting grounds from which wetland wildlife has its necessary seclusion for family rearing and finds abundant food. It is the base of operations for this community. Many of the aesthetic demands of water users are met by the wild shore. This shore grows stands of bulrush and wild rice and supports clones of water lilies. From here terns and other types of birds will be able to fan out over the whole lake. This shore is an element of varied landscape which should not "grow" buildings like most of the rest of the shore. Also it makes a subtle contribution to the health of the lake where influent waters are cleansed of the silts and excessive nutrients.

The natural characteristics of inland lakes commonly make reservation of 25 percent, plus or minus, of the shore feasible. Prevailing westerly winds permit marshes to develop on west shores and protected shores and keep exposed shores well sorted and most adapted to the needs of people. By reserving a portion of the shore whether marsh or other important habitat for fish and wildlife and aesthetic purposes, we would be contributing to preservation of at least half of the recreational demands made on water.

Without a measure of this kind, losses of water recreational values are to be expected.

CWT:ds

APPROVED:

/s/C. W. Threinen
C. W. Threinen

/s/C. N. Lloyd
Charles N. Lloyd

6/28/65

/s/G. E. S.
G. E. Sprecher

6/28/65

/s/L. P. V.
L. P. Voigt

6/29/65

Appendix C

LAKE GEORGE PARK COMMISSION

CONSERVATION LAW

Section 842

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.

Appendix D

A MODEL ACT FOR THE PROTECTION OF FUTURE HIGHWAY RIGHTS-OF-WAY

Section 1. Purpose

The purpose of this Act is to implement the planning of a comprehensive system of public highways within the state, to protect the public investment in these highways, and to coordinate the development of the highway system with the planning and development of the rural and urban areas of the state. To carry out these purposes, this Act authorizes the public regulation of the use, development, and subdivision of land lying within, abutting on, or lying near highways that are proposed for new locations, for relocation, or for widening. It is the intent of this Act to avoid the undue restriction of private ownership in land without the payment of just compensation, and through the coordinated planning of the highway system to protect the private investment in land that will be affected by the highway system.

Comments: The declaration of purpose has been adapted in part from the New York county official map enabling act. The last sentence refers to the section of the Act providing for compensation to private landowners in cases in which the regulations authorized by the law would be unduly restrictive. The last sentence also calls attention to the fact that land values benefit from the accessibility of a modern system of highways.

Section 2. Definitions

As used in this Act.

"commission" means the state highway commission.

"highway" means a state trunk highway which is proposed for a new location, for relocation, or for widening, including all limited-access highways and all highways that are or will be part of the Federal Aid Primary, Federal Aid Secondary, and National Defense and Interstate Highway System.

Comments: These definitions will have to be redrafted if local practice varies. For example, in some states the routes of the highway system are prescribed in detail by statute, and the definition of a highway may have to refer to these routes. All other terms requiring a definition are defined when they first appear in the Act, but their definitions are made applicable to all sections of the Act.

Section 3. Comprehensive Highway Plan

(a) It is the function and duty of the commission to prepare and adopt a comprehensive plan for state highways. The plan may include existing highways, and the commission shall prepare the plan at a scale sufficient to show proposals for new, relocated, and widened highways together with their interchanges, intersections, service areas, and any other information or proposals which the commission considers relevant. The commission may show alternate routes for the same highway.

(b) The commission shall consult with municipalities and counties that have adopted a highway plan prior to the effective date of this Act, and the commission shall incorporate as part of the state highway plan those elements of the local highway plan that are acceptable to it. The commission shall also offer technical assistance to those counties and municipalities that have not adopted a highway plan prior to the effective date of this Act, and the commission shall consult with these counties and municipalities on all aspects of the state highway plan that fall within their jurisdictions.

Comments: The comprehensive state highway plan provides the framework for the control of rights-of-way prior to acquisition. The state plan can help implement those local plans that have already been prepared, and the commission is authorized to stimulate highway planning in those areas for which plans have not yet been drawn. While the scale requirements for the state plan are flexible, it would be expected that a more detailed plan would be needed for urban and urbanizing areas.

Section 4. Adoption and Effect of Comprehensive Plan

(a) The commission may prepare and adopt the comprehensive plan in its entirety or by segments. In its discretion, the commission may classify the state into planning areas, may classify the highway system by type of highway, and may limit any segment of the plan to those planning areas and those highways which it shall designate.

(b) The commission shall adopt the plan, or any of its segments, by rule, and in like manner may amend, add to, or extend the adopted plan or any adopted segment of the plan. The commission shall publish the adopted plan, or any adopted segment of the plan, in such form as it thinks desirable.

(c) The publication of the plan or of any of its segments shall not constitute the opening or acceptance of any highway shown on the plan, and the plan is advisory only. However, no municipality or county may adopt a local highway plan which varies from the applicable published portions of the state highway plan.

Comments: This section authorizes the preparation and adoption of the state highway plan in stages. It is the intent of this section that any segment of the plan can be limited to a designated planning area and to certain designated highways. For example, the commission may want to prepare an Interstate highway plan for a metropolitan area containing several counties. The statute thus provides a method for metropolitan and regional planning. The ultimate aim, of course, is a comprehensive plan for all highways and all areas of the state. The published plan is advisory to the commission, but no local highway planning may be carried on which is at variance with the plan. This section should present no difficulties in Home Rule states, since state highways are a state and not a local matter. However, the section may have to be modified in those states which require local consent to the location of a state highway.

Section 5. Highway Conservation Zones

(a) The Commission may establish a "highway conservation zone" wherever it is needed to protect the right-of-way of any highway that is shown on the published comprehensive state highway plan, or on any published segment of that plan.

(b) For the purposes of this Act, a "highway conservation zone" is an area which includes a fixed length of highway as shown on the published comprehensive plan for state highways, or on any published segment of that plan, together with highway interchanges and intersections and such adjoining areas as are needed for the protection of the highway. No highway conservation zone may cover more than one county. When the published plan shows alternate routes for the same highway, the commission may establish a highway conservation zone for each route.

(c) The commission shall show each highway conservation zone by means of a right-of-way plat or aerial mosaic, in sufficient detail to indicate individual property lines. The commission shall make the plat or mosaic available for public inspection at times and places that are convenient for persons owning property within the zone.

(d) Before establishing a highway conservation zone, the commission shall give notice to the owners of property within the zone, and shall hold a public hearing at which they may be heard. The provisions of the state statute governing rule-making by administrative agencies are applicable to any notice given and any hearing held under this section.

(e) Following the hearing, the commission by rule may establish a highway conservation zone, and shall include in the rule the names of the owners of any parcel of property located wholly or partly within the zone. The commission shall forward a copy of the rule, together with the plat or mosaic showing the area of the zone, to the county recorder of the county in which the zone is located. The recorder shall record the rule, together

with the plat or mosaic, in the same manner as he would record a plat for the subdivision of land.

(f) The commission may amend, add to, or extend a highway conservation zone, in the manner provided by this Act for its establishment.

Comments: The highway conservation zone is the control technique made available for protecting right-of-way prior to acquisition. The zone is established in order to "protect" the highway, and when deciding whether to establish a zone the commission should consider such factors as the urban or rural character of the area, the rate of development, the trends in land values, the type of development contemplated by the local land-use plan for the area, and the extent of the risk that the highway may be affected by incompatible development if the zone is not established. For recording purposes, no zone may cover more than one county, but the highway plan will permit functional zone linkages, and unity of administration will be provided by the state highway commission.

In some areas, the route can be flown and the zone shown by an aerial mosaic. This method of mapping is less expensive than the preparation of a plat. No fixed criteria are established for the width of the route. However, note is taken of the practice, in some states, of planning new highways within one-mile bands. Ordinarily, a half-mile depth on each side would be sufficient.

Notice to affected landowners is considered necessary, and recording will give notice to subsequent purchasers. Procedural provisions may have to be added if the state does not have an administrative procedure act. Local variations may also be necessary in the provisions authorizing recordation.

Section 6. Control Over Development

(a) A permit from the commission is required before any property may be developed within a highway conservation zone. For the purposes of this Act, "development" means any of the following:

- (1) The construction of any new building or structure;
- (2) The repair, alteration, modification, or reconstruction of any existing building or structure;
- (3) Any material change in the existing use of land;
- (4) The division of any lot or parcel of land into two or more lots or parcels of land;
- (5) The provision of access to an existing or proposed highway.

(b) When deciding whether to authorize the development for which permission is requested, the commission shall consider the character of the development, the extent to which it will encroach on proposed highway right-of-way, the traffic it will generate, the effect it will have on surrounding land-use patterns, the extent to which it will impair the safety and traffic-carrying capacity of the existing or proposed highway that is affected, and the likelihood that the highway will be constructed within the reasonably near future. The commission may promulgate regulations governing the issuance of permits for development in highway conservation zones.

(c) The commission may authorize or prohibit any development for which permission is requested, and is explicitly authorized to prohibit any development in or any access to any existing or proposed highway. The commission may attach such modifications, restrictions, and conditions to a permission for the carrying out of development as are necessary for the protection of an existing or proposed highway, including restrictions on the use of land, conditions limiting the bulk, dimensions, and siting of any development permitted, and conditions limiting the duration of any building, structure, or part thereof that is to be permitted. In addition, the commission may require the dedication of land, easements, or rights in land for new highway right-of-way, in proportion as the development permitted will contribute to the traffic which will be carried by the new or widened highway for which dedication is required.

Comments: This section integrates existing police power techniques for the control of land use. Development is defined broadly to include any alteration in the existing land-use pattern. The permit technique is an extension of traditional subdivision regulation procedures, although the broad definition of development makes the permit requirement applicable to other than new sub-

divisions. Note also that the dedication requirement of subdivision regulation has been included.

Section 7. Cooperation With Local Authorities

(a) No municipality or county may authorize any development that has not been authorized by the commission under the provisions of Section 6. Except to the extent that authority to administer the highway conservation zone has been delegated to a municipality or county under the provisions of this section, the permit requirement of Section 6 is additional to any permission for development that is required by a municipal or county zoning ordinance, subdivision ordinance, or other land use regulation.

(b) The commission may enter into agreements of delegation with counties and municipalities, authorizing them to exercise control over development in highway conservation zones. The commission shall set the terms and conditions of agreements of delegation, and may include provisions authorizing commission review of decisions made by local authorities. In its discretion, the commission at any time may modify or revoke the agreement of delegation. Municipalities and counties authorized to exercise control over development in highway conservation zones shall be governed by the terms and conditions of the delegation agreement, the provisions of this Act, and any regulations adopted by the commission to implement its purposes.

(c) The commission, if it finds that local ordinances and their administration are adequate to provide protection for proposed highways, may authorize municipalities and counties to control development in highway conservation zones under such ordinances as it may designate. At any time, and in its discretion, the commission may revoke the authority to control development under local ordinances. The method of delegation provided by this subsection is intended as an alternative to the method of delegation provided by Section 7(b).

Comments: The state's interest in protecting its highways requires that state regulation take precedence over local regulation whenever the two conflict. However, local machinery for planning administration may exist, and local officials may be more familiar with local conditions. In addition, the administrative burden on the state highway commission may be considerable. Accordingly, this section provides for the delegation of administration to the local level, but reserves control over the delegation in the state highway commission.

Section 8. Petition for Relief

(a) If the commission, or a municipality or county acting under an agreement of delegation, has prohibited development or has granted permission for development subject to modifications, restrictions, conditions, or dedications alleged to be unreasonably burdensome, the owner of the property for which permission to develop was requested may petition the commission for relief authorized by Section 9.

(b) An owner of property who does not presently contemplate development may file a petition for relief after first making application to the commission for a Declaratory Order. The commission shall then issue a Declaratory Order, in which it shall indicate what development it would allow. The owner of the property may file a petition for relief if, under the terms of the Declaratory Order, development is prohibited or is authorized subject to modifications, restrictions, conditions, or dedications alleged to be unreasonably burdensome.

(c) The petitioner for relief shall allege 1) that diligent and bona fide efforts have been made to sell the affected property which is the subject of the petition, and either that a buyer has not been found or that a price has been offered which is less than the price being offered for comparable property; and 2) that the commission would be justified in ordering relief under the provisions of Section 9. For the purposes of this Act, "comparable property" means property that is comparable in size, shape, location and topography to the affected property which is the subject of the petition, but which is not subject to the prohibition, modification, restriction, condition or dedication of which complaint is made.

Comments: This section authorizes an owner of property within the highway conservation zone to petition the commission for relief from a decision that unreasonably restricts the use of his

property. In some cases, the owner may be suffering hardship but may not be ready to develop his property, as it is defined in this Act. For example, he may own a house in the bed of a proposed highway, may be transferred to another job, and may have to sell. In this event, he is authorized to file for a Declaratory Order, in which the commission will indicate what use he can make of his property. Again, he may file for relief if the Declaratory Order is unduly restrictive.

Relief is predicated on two conditions. The petitioner must show hardship, and hardship is defined objectively as inability to sell or inability to sell at a fair price. The petitioner must also show grounds for relief under Section 9. That section authorizes the commission to weigh the equities of the case when deciding whether to grant one of several alternative forms of relief to the petitioner.

Section 9. Order for Relief

Upon receipt of a petition for relief, the commission shall hold a hearing as provided by the state statute governing adjudications by administrative agencies. After the close of the hearing, the commission shall take one of the following actions:

(a) It may purchase or refuse to purchase the affected property. It may purchase the property if it finds that the petitioner has been unable to find a buyer, or that a substantial disparity exists between the price offered for the affected property and the price offered for comparable property.

(b) It may authorize the development for which permission was requested, or it may remove or amend the modifications, restrictions, conditions, or dedications of which complaint was made. In making this decision, the commission shall consider the same factors applicable under Section 6(b) to an initial consideration of an application to develop land. If the commission authorizes development that was previously refused, it may impose any modifications, restrictions, conditions, or dedications which it is authorized to impose under Section 6(c).

(c) It may make an award of interest to the petitioner, payable until the date the affected property is acquired for highway purposes, and in a sum which will afford him a reasonable return on the difference between the price offered for the affected property and the price of comparable property. The commission may make an award of interest if it finds that the disparity between the price offered for the affected property and the price of comparable property is not substantial, and that acquisition of the highway right-of-way is expected in a reasonable period of time. The commission shall compute and pay interest semi-annually, and in a proceeding to condemn the property may introduce evidence of the amount of interest that has been paid prior to the commencement of the proceeding.

(d) If the commission has not absolutely prohibited the development of the affected property, it may refuse any relief under the preceding paragraphs of this section unless the petitioner has been deprived of any reasonable use of the land. If the commission so finds, it shall grant relief to the petitioner under one of the preceding paragraphs of this section.

Comments: This section authorizes three alternative types of relief.

(a) The commission may purchase or refuse to purchase the property. If it refuses, its initial decision will stand. Whether the commission will purchase the property depends on the seriousness of the hardship to the petitioner. The commission should also try to avoid acquiring any property which it expects to hold for an unreasonable length of time, but this criterion is not sufficiently absolute to be included in the statute.

(b) The commission may reconsider its initial decision.

(c) In effect, the commission is authorized to acquire a negative easement forbidding the further development of the property by paying the petitioner for his loss of return. Paragraph (d) contains an important caveat to take care of the traditional "zoning" decision. For example, the commission might forbid an apartment project but permit single-family residences. Of course, the property would be worth substantially more if unrestricted, and the petitioner would be entitled to some relief under the tests of the preceding paragraphs. However, a decision like this has the effect of a zoning ordinance which restricts the land to single-family residential uses. A zoning classification is sustainable unless it prohibits any reasonable use of the land, and so the decision of the commission in this instance is

subjected to a similar test. Paragraph (d) would also apply to development which is authorized, but in a modified form, or subject to conditions or dedications.

Section 10. Review of Commission Action

The provisions of the state statute governing judicial review of adjudications by administrative agencies are applicable to any action of the commission under Section 9 of this Act. If the commission has awarded interest, the petitioner may reopen the proceedings before the commission by filing a petition alleging that an unreasonable time has elapsed since the award was made, and that the commission has not yet started proceedings to acquire the property. The commission shall then make a decision on the petition as if it were a petition filed for the first time under Section 8.

Comments: More explicit review procedures may have to be provided if the state does not have an administrative procedure act.

(Alternative Provision to Sections 8 through 10)

Section 8. Acquisition of Property When Development Refused or Conditioned. If the Commission, or a municipality or county acting under an agreement of delegation, has refused permission for development or has granted permission for development subject to modifications, restrictions, conditions, or dedications alleged to be unreasonably burdensome, the owner of the property for which permission to develop was requested may serve the commission with a notice of purchase. Unless within 90 days from the date of the notice the commission has purchased the property, or has started proceedings for its acquisition, the property may be developed free of any modifications, restrictions, conditions, or dedications of which complaint was made.

Comments: This section is an alternative to the provisions for purchase and compensation that are included in sections 8 through 10. This section has the advantage of simplicity of administration, but it makes the commission's obligation to purchase absolute in any case in which the petitioner serves a notice. The alternative section is adapted from Ind. Stat. Ann. sec. 36-2955 (Supp. 1961).

Section 11. Sale of Property

No owner of any property within a highway conservation zone shall complete the sale of his property without having first served notice of the sale on the commission. The owner of the property may complete the sale unless within 90 days from the date of the notice the commission has acquired the property or has started proceedings for its condemnation. If the sale is completed without notice having first been given to the commission as provided by this section, the consideration paid for the property shall not be received as evidence of its value in any proceeding for its condemnation.

Comments: The purpose of this section is to prevent speculation in land within a highway conservation zone. Trading in land within the zone may have an inflationary effect on value, and the commission is given the option of buying land that is put on the market in order to prevent speculation from occurring. The last sentence penalizes the purchaser who buys from an owner who sells without giving notice, and will permit a court to disregard the amount paid for the land in this event.

Section 12. Advance Acquisition of Rights-of-Way

The commission is authorized to acquire highway rights-of-way within highway conservation zones in advance of its construction needs. The commission may acquire rights-of-way either by purchase or condemnation, and either before or after permission to develop the land has been requested under Section 6 of this Act. The commission shall be provided with a fund for the purposes of carrying out the authority conferred by this section, and of financing the acquisition of any property which it acquires or is compelled to acquire under this Act.

Comments: This section, which is based on a Tennessee law, provides legal authority for the practice of those commissions that have informally bought individual properties in order to avoid undue hardship. One purpose of the section is to allow the

commission to purchase hardship parcels before claims for relief are presented, but it is not limited to these situations.

Section 13. Acquisition and Management of Property

The general law governing the purchase and condemnation of property by the commission is applicable to the acquisition of any property which it acquires or is compelled to acquire under this Act. Prior to construction of the highway, the commission may lease any such property for private use, and is explicitly authorized to enter into agreements for the purchase of property and its subsequent reletting to its previous owner.

Comments: The second sentence codifies the sale and leaseback technique which some commissions have found to be successful. This Act does not attempt to deal with the excess condemnation question.

Section 14. Rules for Compensation

The following rules are applicable to any purchase or condemnation by the commission of property within a highway conservation zone:

(a) No compensation is payable for any development of property which is carried out without permission having been obtained as required by Section 6 of this Act.

(b) No account is to be taken of any enhancement or depreciation in the value of property which is attributable to its inclusion within a highway conservation zone.

Comments: The first rule penalizes the property owner who develops his land without first securing permission. The second rule guarantees the property owner that he will be paid the value of his land as of the date the highway conservation zone was established. It also protects the commission against any inflation in the value of the land subsequent to the establishment of the zone. These general statements are qualified, however, by the provision in this section that the depreciation or inflation must be attributable to the conservation zone. Normal depreciation or inflation will be deducted from or added to the value of the land. The second rule is an adaptation of the Land Compensation Act, 1961, 9 and 10 Eliz. 2, c. 33, sec. 9.

Section 15. Termination

(a) The commission shall terminate a highway conservation zone when the highway covered by the zone is open for travel.

The commission, upon termination for this reason, may elect to continue in being any modifications, restrictions, conditions, or dedications that it has attached to a permission to develop land.

(b) The commission may also terminate a highway conservation zone if it abandons the highway which is being protected by the zone. Upon termination for this reason:

- (1) All conditions or restrictions attached by the commission to property for which permission to develop has been granted lapse, and the commission, by registered mail, shall send notice of termination to the owner of any property which is subject to restrictions or conditions.
- (2) The commission shall reconvey, to the previous owner of the land or to his successor in interest, any land that has been dedicated for highway purposes.
- (3) The commission may retain, as a land reserve for highway purposes, any land that it has acquired, or may sell the land under the law applicable to the sale of commission-owned real property.
- (4) The commission shall make a final payment of interest on any awards made under this Section 9(c), with an adjustment to the date of termination.
- (5) The commission shall mail a copy of the notice of termination to the office of the county recorder in which the rule establishing the highway conservation zone is recorded. The recorder shall attach the copy of the notice of termination to the recorded copy of the rule establishing the highway conservation zone.

Comments: This section provides for the adjustments that will have to be made upon the termination of a highway conservation zone, including the giving of adequate notice to property owners within the zone.

Section 16. Short Title

This Act may be cited as the "Highway Planning and Conservation Act."

NOTE: A title and severability clause have been omitted

Appendix E

PLAN IMPLEMENTATION AND FINANCIAL ASSISTANCE PROGRAMS^a

Regional Plan Element	Implementation Device or Action Available	Applicable Unit of Government	Statutory Authority ^b	Financial Assistance Program	Reviewing, Cooperating, or Administrating Agency
1. Residential Land Use Spatial Distribution Density Existing Use Protection Development	Exclusive Residential Zoning Districts	Municipalities ^c	ss. 59.97, 60.74, 61.35, 62.23 (7)	Mortgage Financing Insurance	Federal Housing Administration
	Building Regulations ^d	Municipalities	ss. 59.09 (51), 60.18 (12), 61.35, 62.23 (9), 66.058		
	Nuisance Regulations	Cities, Villages, Towns	ss. 60.18 (12), 66.052, 146.10		
	Subdivision Regulations	Municipalities	s. 236.45		State Highway Commission State Board of Health
2. Agricultural Land Use Preservation Conservation Development	Exclusive Agricultural Zoning Districts	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
	Soil and Water Conservation Regulations	Soil and Water Conservation Districts	ss. 92.09 through 92.20		
	Improvements and Practices	Soil and Water Conservation Districts	s. 92.08	Conservation Aid Program	State Soil and Water Conservation Commission
				Agricultural Conservation Program Cropland Adjustment Program	U. S. Agricultural Stabilization and Conservation Service
				Resource Conservation and Development Multiple-Purpose Watershed Program	U. S. Soil Conservation Service
3. Parks, Open Spaces, Woodlands, and Wetlands Preservation Reservation Acquisition Development Existing Site Protection	Exclusive Zoning Districts	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
	Subdivision Regulations	State, Municipalities	ss. 236.13, 236.45		State Board of Health State Department of Resource Development
	Water Regulations	State Department of Resource Development ^e	c. 30		
	Official Mapping	Cities, Villages, Towns	ss. 60.18 (12), 61.35, 62.23 (6)		
	Subdivision Regulations	Municipalities	s. 236.45		
	Purchase ^f	State Conservation Commission	ss. 23.09 (7) (d), 23.09 (16), 27.01	Open-Space Program	U. S. Department of Housing and Urban Development
				Outdoor Recreation Aid Program	State Recreation Advisory Committee State Department of Resource Development
				Land and Water Conservation Fund	State Conservation Commission
		Municipalities	ss. 27.065, 27.08, 27.13	Cropland Adjustment Program	U. S. Agricultural Stabilization and Conservation Service
				Land and Water Conservation Fund	State Conservation Commission

Appendix E (continued)

Regional Plan Element	Implementation Device or Action Available	Applicable Unit of Government	Statutory Authority ^b	Financial Assistance Program	Reviewing, Cooperating or Administering Agency
3. Continued	Improvement	State Conservation Commission	ss. 23.09 (7), 27.01	Land and Water Conservation Fund	State Conservation Commission
		Municipalities	ss. 27.065, 27.08, 27.13	Open-Space Program Urban Beautification Program	U. S. Department of Housing and Urban Development
		State Highway Commission		Highway Beautification Act	U. S. Bureau of Public Roads
4. Major Industrial Sites Reservation Acquisition Development Existing Site Protection	Exclusive Industrial Zoning Districts	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
	Purchase and Improvement	Cities, Villages, Towns	ss. 66.22, 66.52		
5. Airports Reservation Acquisition Development Existing Site Protection	Holding Districts	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
	Airport Protection Regulations	State Aeronautics Commission	s. 114.135		
	Approach Protection Regulations	Municipalities	s. 114.136		
	Purchase and Improvement	Municipalities	ss. 114.11, 114.34	Airport Development Program	Federal Aviation Agency
				Airport Aid Program	State Aeronautics Commission
6. Lakes and Streams Navigability Protection Flood Damage Prevention Water Quality Protection	Channel Regulations	Municipalities	ss. 30.11, 30.12		State Department of Resource Development ^e
		State Department of Resource Development ^e	c. 30		
	Conditional Use Regulations	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
	Flood Plain Zoning Regulations	Counties, Cities, Villages	s. 87.30		State Department of Resource Development
	Subdivision Approval	State, Municipalities	ss. 236.13, 236.45		State Board of Health State Department of Resource Development
	Flood Control Measures	Soil and Water Conservation Districts	s. 92.08	Multiple-Purpose Watershed Program	U. S. Soil Conservation Service State Soil and Water Conservation Committee
	Building Regulations	Municipalities	ss. 59.09 (51), 60.18 (12), 61.35, 62.23 (9), 66.058		
	Shoreland Zoning Regulations	State, Counties	ss. 59.971, 144.26		State Department of Resource Development
	Sanitary Regulations	State, Counties	ss. 59.07 (51), 144.025 (2) (q)		
	Soil and Water Conservation Regulations	Soil and Water Conservation Districts	ss. 92.09 through 92.12	Conservation Aid Program	State Soil and Water Conservation Committee

Appendix E (continued)

Regional Plan Element	Implementation Device or Action Available	Applicable Unit of Government	Statutory Authority ^b	Financial Assistance Program	Reviewing, Cooperating or Administrating Agency
6. Continued	Pollution Abatement Measures	Cities, Villages, State, Sanitary Sewerage Districts	ss. 60.30, 61.36, 62.18, 144.025, 144.21	Water Pollution Control Act	Federal Water Pollution Control Administration
				Water Resource Program	State Department of Resource Development
7. Timing of Development Growth Area Service Area Community Facilities	Annexation	Cities, Villages	ss. 66.021, 66.024		State Department of Resource Development
	Consolidation	Cities, Villages, Towns	s. 66.02		
	Incorporation	Towns	ss. 66.013 through 66.018		
	Holding Districts	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)	Mortgage Financing Insurance	Federal Housing Administration
	Water Service Extensions	Cities, Villages, Towns	ss. 60.30, 61.36, 62.18	Consolidated Farmers Home Administration	Farmers Home Administration
				Housing and Urban Development Act	U. S. Department of Housing and Urban Development
	Sanitary Sewer Service Extensions	Cities, Villages, Towns	ss. 60.30, 61.36, 62.18	Water Pollution Control Act	Federal Water Pollution Control Administration
				Housing and Urban Development Act	U. S. Department of Housing and Urban Development
				Consolidated Farmers Home Administration Act	Farmers Home Administration
		Metropolitan Sewerage Commissions	ss. 59.96, 66.20	Water Pollution Control Act	Federal Water Pollution Control Administration
8. Freeways and Expressways R.O.W. Reservation Acquisition Development Protection	Capital Budgeting	Cities, Villages, Towns	s. 62.23 (4), c. 65		
	Expenditures	Municipalities	ss. 59.01, 60.01, 61.34, 62.22	Advance Acquisition Program	U. S. Department of Housing and Urban Development
	Official Mapping	State Highway Commission	s. 84.295 (10)		
		Municipalities	ss. 62.23 (6), 80.64		
	Platting Plans	Counties	s. 236.46 (1)		
	Subdivision Regulations	Municipalities	s. 236.45		County Planning Agency State Highway Commission
	Purchase and Construction	State Highway Commission	s. 84.01	Federal Aid Highway Program	U. S. Bureau of Public Roads
		Milwaukee County Expressway Commission	s. 59.965		
	Development Rights Acquisition	Milwaukee County Expressway Commission	s. 59.965 (5)		
		State Highway Commission	s. 84.09		

Appendix E (continued)

Regional Plan Element	Implementation Device or Action Available	Applicable Unit of Government	Statutory Authority ^b	Financial Assistance Program	Reviewing, Cooperating or Administrating Agency
8. Continued	Conditional Use Parking and Access Regulations	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
9. Arterial Streets and Highways R.O.W. Reservation Acquisition Development Protection	Official Mapping	Municipalities	ss. 62.23 (6), 80.64		
	Platting Plan	Counties	s. 236.46 (1)		
	Building Lines	Municipalities	ss. 27.05 (1), 59.97, 60.18 (12), 61.35, 62.23 (10) and (11)		
	Subdivision Regulations	Municipalities	s. 236.45		County Planning Agency State Highway Commission
	Development Rights Acquisition	Municipalities	ss. 61.34, 62.22, 83.07		
	Controlled Access Designation	State Highway Commission	s. 84.25		
		Counties	s. 83.027		
	Driveway Permits	State Highway Commission	s. 86.07 (2)		
	Land Use Regulations	Municipalities	ss. 59.97, 60.74, 61.35, 62.23 (7)		
	Subdivision Regulations	Municipalities	s. 236.45		State Highway Commission
	Purchase and Construction	State Highway Commission	s. 84.01		
		County Highway Committee	s. 83.015	Federal Aid Highway Program	State Highway Commission
		Cities, Villages, Towns	ss. 60.29 (27), 61.36, 62.22, 62.23 (17)	Advance Acquisition Program	U. S. Department of Housing and Urban Development
10. Rapid Transit System Development Operation	Construction and Maintenance	Metropolitan Transit Authority	s. 66.94	Urban Mass Transportation Program	U. S. Department of Housing and Urban Development
	Management	Private Transit and Utility Companies	s. 66.94 (9)		
	Rate, Route, Schedule, and Service Area Regulations	State Public Service Commission	s. 194.18		

^a This appendix has been especially prepared by SEWRPC staff so as to relate to the recommended regional land use and transportation plans.

^b Wisconsin Statutes, 1965 (Volumes 1, 2, and 3)

^c Municipalities include counties, towns, villages, and cities.

^d Building Regulations include housing, fire prevention, mobile home, and architectural ordinances.

^e Effective July 1, 1967, all water regulatory powers are transferred from the State Public Service Commission to the State Department of Resource Development.

^f Includes purchase of scenic easements.

Appendix F

NEGOTIATION BETWEEN A FIRM AND A CITY LEADING TO AN INDUSTRIAL PLANNED UNIT DEVELOPMENT

Taken from Sylvania Electric Products, Inc. v. City of Newton, 344 Mass. 428, 183 N. E. 2d 118 (1962)

(3) The principal issue is the effect of Sylvania's imposition of restrictions on the locus in connection with the enactment of the amending ordinance and of steps taken by the planning board, and others acting for the city, to cause Sylvania so to do.

In respect of this issue the judge found these facts: Sylvania on April 14, 1960, having an option to purchase a parcel containing 180 acres, inclusive of the rezoned locus, petitioned the board of aldermen (aldermen) to reclassify the parcel. On May 11, 1960, the planning board, after a public hearing held jointly with the aldermen's committee on claims and rules, reported that it had asked the city's planning consultant to review the petition and had decided to withhold action until he should report. On June 2, 1960, the board reported to the aldermen its vote to approve Sylvania's petition except that it recommended retaining in the residence A district a substantial frontage on Nahanton Street, including a parcel of about eighteen and one-half acres on the east side of the parcel adjacent to the property of the Charles River Country Club.

"Meanwhile, Sylvania, in consultation with the planning consultant * * * and members of the planning board and the claims and rules committee * * * had agreed to certain restrictions upon its use of * * * (the locus),"¹ and had agreed to cede three acres, comprising the southeasterly tip of the parcel, to "Oak Hill Park Association" to be retained in the residence district. The restrictions, to be operative for thirty years from September 1, 1960, were set out in a draft of a deed attached to a proposed option agreement whereby Sylvania would give the city an option to purchase within a thirty year period, for \$300, a strip of land on the west and south-westerly side (the river side) of the parcel, adjacent to the land of the metropolitan district commission, containing thirty and one-half acres. By the option agreement Sylvania would agree to abide by the restrictions in the draft deed during the option term pending the city's exercise thereof. The intention would be to give the city a dominant estate capable of enforcing the restrictions. The deed was to convey the thirty and one-half acres subject to the restriction for the benefit of Sylvania's adjoining premises that for

¹ The minutes of the planning board meeting of May 25, 1960, after recording the approval of the petition with the exception noted in the opinion above, state as follows: "The Planning Board also voted to send the following letter to the chairman of the Claims and Rules Committee: 'At a meeting of the Planning Board held May 25, 1960, petition * * * of * * * Sylvania * * * was discussed in great detail and a modified but favorable decision was reached. This decision and a report on the petition are officially submitted in a separate communication to the Board of Aldermen. In considering the change of zone requested by the above petition, the Planning Board respectfully suggests that the following conditions be obtained by agreement with the proper parties concerned, if the Board of Aldermen is favorably disposed to the zone request. * * * (Items 1 to 6, specifying restrictions similar to but not identical with those agreed to and eventually imposed (see text of opinion)).'"

a period of fifty years no buildings or structures (other than fences) should be erected or maintained on the granted premises.

The proposed restrictions limited the floor area of all buildings to be constructed on the premises to 800,000 square feet; required that sixty per cent of the ground area, or seventy-three and nine-tenths acres, be maintained in open space not occupied by buildings, parking areas or roadways; set back the building line from forty to eighty feet; imposed a sliding scale of height restrictions; called for a buffer zone of comparable size to the three acres to be ceded to Oak Hill Park Association and adjacent thereto, on which no structures might be erected; restricted the number and type of signs and the type of lighting; limited the use of buildings to certain, but not all, of the uses permitted in a limited manufacturing district; and established a pattern for traffic in connection with construction on the premises.

On June 27, 1960, the aldermen's committee on claims and rules reported its approval of the petition as modified by the planning board in its formal vote of approval, except that the committee recommended that the strip of Nahanton Street reserved for the residence district be increased in depth from 140 to 180 feet. There was submitted to the June 27 meeting a memorandum by the planning consultant, addressed to the mayor and to the alderman who was chairman of the committee on claims and rules. This memorandum summarized "the acreage breakdown on the Sylvania site, based upon the tentative deed restrictions as of June 23, 1960," and included a sketch map of the site delineating the areas and restrictions.

Thereafter, at the June 27 meeting, the aldermen enacted the ordinance which approved Sylvania's petition as modified in accordance with its committee's recommendation "and in connection therewith passed (the) order * * * authorizing the mayor to accept the proposed option agreement."

The foregoing activities were affirmed by the Supreme Court of Massachusetts as not being in violation of the state's constitution, not being an improper delegation of legislative authority, and not being an arbitrary or improper use of zoning powers.

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