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DEVELOPMENTS IN LAND USE CONTROL

John D. Johnston, Jr.*

I. Police Power

A. Zoning

Recent zoning decisions reflect tension between competing social forces, perceivable on several different levels.

Of prime significance is the continuing exodus of families from city cores to suburbs and the correlative efforts of suburban municipalities to utilize zoning techniques (1) to restrict the rate of admission of new residents and, even more significantly, (2) to limit access to the suburban haven to families deemed socioeconomically acceptable. Concurrently, zoning concepts are rapidly evolving from static specification patterns (called "euclidean zoning" after the well-known Supreme Court decision)¹ to flexible, performance-oriented techniques such as the floating zone, cluster zone, and planned unit development. While planners have generally embraced these new devices, local legislatures and state courts have been more reticent to sanction their use. In addition, the recent extension of zoning power to include effectuation of purely aesthetic objectives presents renewed opportunities for conflict between such groups as advertisers, junkyard operators, and homebuilders on the one hand, and local legislatures, planning commissions, or design control boards on the other. Finally, there is the omnipresent struggle between the landowner-developer attempting to maximize his economic return and the local legislature or board of zoning appeals striving to harmonize such individual interests with the broader social interests of the entire community. While the foregoing exposition of land-use conflicts is by no means exhaustive, it has nevertheless supplied the courts with a number of recent noteworthy zoning cases.

1. Aesthetics

Subsequent to an often-quoted dictum by Mr. Justice Douglas,² the New York Court of Appeals frankly recognized in *People v. Stover*³ that purely aesthetic considerations may be adequate to support police power regulation in furtherance of the "public welfare." As might be expected, subsequent cases are testing the limits of the new doctrine. Two types of regulation associated with zoning ordinances have generated particular interest: nonaccessory advertising and architectural design control.

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1 *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

2 "It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." *Berman v. Parker*, 348 U.S. 26, 33 (1954).

3 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272 (1963).

Following the lead of New Jersey, New York, and Oregon, which upheld local ordinances excluding from entire communities such activities as non-accessory advertising⁴ and automobile wrecking yards,⁵ several jurisdictions have upheld regulation of such unsightly commercial operations⁶ on aesthetic grounds. These courts have rejected the argument that since such "evils" are incident to admittedly legitimate nonnuisance commercial activity, their exclusion from commercial or industrial zones is arbitrary and unreasonable.⁷

To be completely effective, of course, such regulation should not only forbid new construction of such "aesthetic nuisances," but must also provide for the termination of preexisting nonconforming activities. Such action, however, may result in a substantial loss to the owner of an investment that was perfectly legitimate when initiated. A technique for mitigating the harshness of this result is the so-called "amortization statute," which specifies a grace period beyond the effective date of the ordinance during which nonconforming uses may be maintained with impunity. The nonconforming uses must, however, be terminated at the end of the period. The grace period is usually specified in gross rather than as a function of investment recapture; it is typically greater for a nonconforming structure than for a nonconforming use in a conforming structure.⁸ A few courts have upheld the taking of advertising easements without compensation where there was no actual billboard antedating the taking.⁹ Where there are signs already in existence, an amortization provision may be constitutionally required¹⁰ if there is no provision for compensation to the owner.¹¹ A three-year amortization ordinance was upheld in a recent Minnesota

4 *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964); *Cromwell v. Ferrier*, 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749 (1967), *overruling* *Mid-State Advertising Corp. v. Bond*, 274 N.Y. 82, 8 N.E.2d 286 (1937).

5 *Oregon City v. Hartke*, 240 Ore. 35, 400 P.2d 255 (1965).

6 *E.g.*, *State v. Diamond Motors, Inc.*, 50 Hawaii 33, 429 P.2d 825 (1967) (nonaccessory advertising); *Racine County v. Plourde*, 38 Wis. 2d 403, 157 N.W.2d 591 (1968) (automobile wrecking yard). See *Rotenberg v. City of Fort Pierce*, 202 So. 2d 782 (Fla. App. 1967), which upheld a requirement for screening of junkyards.

7 The opinion in *United Advertising Corp. v. Metuchen*, 42 N.J. 1, 198 A.2d 447 (1964) is rather carefully qualified on this point: "[Metuchen's] essential character is residential. Its business and industrial areas are relatively limited and the municipal aim is to achieve the maximum degree of compatibility with the residential areas." *Id.* at 8, 198 A.2d at 450.

In an interesting dissent, Justice Hall agreed that aesthetics ought to be recognized as the actual motivation behind advertising regulation. He felt compelled, however, to reject as "unfair, unequal, and unreasonable" the exemption of accessory, or "on-premises" signs. "It is common knowledge that on-premises signs are frequently just as ugly and offensive as conventional billboards, if not even more garish." *Id.* at 12-13, 198 A.2d at 453.

8 The best opinion upholding an amortization ordinance is *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P.2d 34 (1954). The leading case, *Harbison v. City of Buffalo*, 4 N.Y.2d 553, 152 N.E.2d 42, 169 N.Y.S.2d 598 (1958), is much more equivocal. It was a 4-3 decision with only two judges joining in the opinion of the court. *Contra*, *Hoffmann v. Kinealy*, 389 S.W.2d 745 (Mo. 1965); *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953).

9 *E.g.*, *Wolfe v. State Dep't of Rds.*, 179 Neb. 189, 137 N.W.2d 721 (1965); *Fulmer v. State Dep't of Rds.*, 178 Neb. 664, 134 N.W.2d 798 (1965).

10 *But, cf.* *Ghaster Properties, Inc. v. Preston*, 176 Ohio St. 425, 200 N.E.2d 328 (1964).

11 Although a number of state advertising control statutes make no express provision for payment of compensation to owners of existing signs, a 1965 Congressional enactment contains both an amortization provision and a compensation requirement for sign removal in connection with the interstate highway system. 23 U.S.C. § 131 (Supp. IV, 1965-1968). See 42 Op. ATT'Y GEN. 26 (1966). A similar procedure is in effect with respect to screening or removal of junkyards and "automobile graveyards" along the interstate highway system. 23 U.S.C. § 136 (Supp. IV, 1965-1968). The federal share of compensation payable under each program is seventy-five percent.

case¹² despite testimony that the cost of removal and relocation of the plaintiffs' billboards would exceed \$44,000. Shorter periods for termination of junkyards have been upheld in other cases.¹³

The most comprehensive regulatory scheme for nonaccessory advertising was established by a recent Vermont statute.¹⁴ It creates a statewide Travel Information Council with exclusive authority to establish official tourist information centers and "sign plazas" along the state's highways; to regulate the manner of display of business directional signs; to issue licenses for the construction of such signs (no more than four licenses per eligible business); and to require the removal of nonconforming signs.¹⁵ An amortization clause permits continuance of nonconforming signs for a maximum of five years;¹⁶ accessory signs are not prohibited.¹⁷ The pervasiveness of the statute is indicated by the provision that "[n]o person may erect or maintain outdoor advertising visible to the travelling public except as provided in this chapter."¹⁸ Violators are subject to a maximum fine of \$100 and thirty days imprisonment, and each day a sign is illegally maintained constitutes a separate offense.¹⁹ While the constitutionality of this legislation has not yet been finally determined, it is likely to survive broad-gauge attack, although it could be declared inapplicable in situations of great hardship under the doctrine of *Nectow v. City of Cambridge*.²⁰

A recent decision²¹ to the contrary, holding a Georgia outdoor advertising control statute void on its face, contains little more than repeated assertions of the conclusion reached and is therefore unpersuasive. A Washington decision²² upholding similar legislation after careful consideration of the issues is entitled to greater respect.

A second extension of the power to regulate land use to achieve purely aesthetic objectives—design control—has met with much less success. Design control is an attempt to protect a municipality against "excessive similarity or dissimilarity" between the design and exterior appearance of existing structures and those whose construction is proposed. The control mechanism inheres in a requirement that each applicant for a building permit submit to a "design control board" or "architectural advisory committee" sufficient data for it to judge the compatibility of the proposed structure with existing buildings. A construction permit may not be issued unless the architectural control authority makes a favorable finding.

12 *Naegel Outdoor Adv. Co. v. Village of Minnetonka*, 281 Minn. 442, 162 N.W.2d 206 (1968).

13 *Shifflett v. Baltimore County*, 247 Md. 151, 230 A.2d 310 (1967) (two years); *La-Chapelle v. Town of Goffstown*, 107 N.H. 485, 225 A.2d 624 (1967) (one year).

14 Vt. STAT. ANN. tit. 10, §§ 321-45 (Supp. 1968). The legislation was enacted in 1967, and became effective March 23, 1968.

15 *Id.*, § 337. Compensation is provided only on those cases where federal funds are available. *Id.*, § 336. See note 11 *supra*.

16 *Id.*, § 338.

17 *Id.*, § 333.

18 *Id.*, § 328.

19 *Id.*, § 343.

20 277 U.S. 183 (1928).

21 *State Highway Dep't v. Branch*, 222 Ga. 770, 152 S.E.2d 372 (1966).

22 *Markham Advertising Co. v. State*, 73 Wash. 2d 405, 439 P.2d 248 (1968), *appeal dismissed*, 393 U.S. 316 (1969).

In an early Florida decision²³ a West Palm Beach ordinance that required building inspectors to find proposed structures "substantially equal" in appearance to existing residences was invalidated on the ground that it delegated legislative (zoning) power to the inspector without providing sufficiently definite standards governing the exercise of that power. A more recent Wisconsin decision²⁴ upheld a requirement that no building permit be issued unless a review board (composed of three residents, at least two of whom were required to be architects) found that the "exterior architectural appeal and functional plan" of the proposed structure would not be so at variance with existing structures "as to cause a substantial depreciation in property values." These are the only decisions on point by state courts of last resort that have come to the reviewer's attention. Recent decisions by at least four state trial and intermediate appellate courts, however, are extant; three invalidated similar ordinances. Two²⁵ followed the reasoning of the Florida court; the third²⁶ held that the review board procedure was not authorized by the state zoning enabling act. The only case upholding the design review procedure²⁷ relied primarily on the settled character of the existing neighborhood and on testimony that the proposed residence would have an adverse effect upon the value of surrounding properties. The validity of design control ordinances²⁸ is by no means a settled issue, and further litigation can be anticipated. Professor Michelman has recently attempted to clarify the policy considerations relevant to the validity of such legislation.²⁹

2. Zoning Flexibility

A major advance in zoning administration was signalled by the New York case of *Rodgers v. Village of Tarrytown*,³⁰ which upheld the "floating zone" concept.³¹ At least four different arguments have been advanced against this

23 *City of West Palm Beach v. State*, 158 Fla. 863, 30 So. 2d 491 (1947).

24 *State v. Wieland*, 269 Wis. 262, 69 N.W.2d 217 (1955).

25 *Pacesetter Homes, Inc. v. Village of Olympia Fields*, 104 Ill. App. 2d 218, 244 N.E.2d 369 (1968); *State ex rel. Magidson v. Henze*, 342 S.W.2d 261 (Mo. App. 1961).

26 *Piscitelli v. Township Comm.*, 103 N.J. Super. 589, 248 A.2d 274 (Super. Ct. 1968).

27 *Reid v. Architectural Bd. of Review*, 119 Ohio App. 67, 192 N.E.2d 74 (1963).

28 Design controls are also a feature of "landmark" or historical area zoning. They restrict the owner's ability to alter the exterior appearance of his structure. This type of regulation has been upheld as to areas of settled character and demonstrated tourist appeal. *See, e.g., City of New Orleans v. Pergament*, 198 La. 852, 5 So. 2d 129 (1941); *Opinion of the Justices*, 333 Mass. 773, 128 N.E.2d 557 (1955) (Nantucket); *City of Santa Fe v. Gamble-Skogmo, Inc.*, 73 N.M. 410, 389 P.2d 13 (1964). The Vieux Carre regulations in New Orleans were held inapplicable in *City of New Orleans v. Levy*, 233 La. 844, 98 So. 2d 210 (1957) on special findings that enforcement would be discriminatory in view of the existence of numerous unpunished violations.

As applied to individual structures whose architectural or historical interest generates no economic return, the validity of preservation laws is less certain. *See, e.g., Trustees of Sailors' Snug Harbor v. Platt*, 29 App. Div. 2d 376, 288 N.Y.S.2d 314 (1st Dept. 1968).

29 Michelman, *Toward a Practical Standard for Aesthetic Regulation*, 15 PRAC. LAW 36 (Feb. 1969).

30 302 N.Y. 115, 96 N.E.2d 731 (1951).

31 The local legislature created a new district in which multiple family dwellings were permitted. The boundaries of the new district were not fixed, however. Any owner within an existing low-density residential district could petition for rezoning of his land to the new classification. If his petition met the prescribed requirements, the local legislature would enact a rezoning ordinance. The new, higher density zone would then appear on the zoning map as an enclave within the preexisting lower density zone. The possibility of rezoning other land would continue to exist; hence, the ultimate boundaries of the new zone would remain unfixed.

device: that it is not in accordance with a comprehensive plan,³² that it constitutes an unauthorized delegation of zoning power by the local legislature³³ without provision of adequate standards,³⁴ and that it is inconsistent with the original concept of zoning—lines drawn on a map to indicate zones—by failing to provide public notice of the permitted uses within each zone.³⁵ The floating zone, on the other hand, does not appear on the zoning map until an eligible³⁶ landowner requests rezoning to the special "floating" classification; only after approval is granted does a new zone line appear on the map. Another line of attack has been that such rezoning inures to the benefit of an individual landowner and thus constitutes illegal "spot zoning." The spot zoning issue often affords state courts an opportunity to inquire into the motives of the local legislature and to invalidate rezoning legislation motivated primarily by a desire to benefit a single owner. The legal principle is, however, stated somewhat differently: zoning ordinance amendments that benefit individual landowners are not invalid per se; they are invalid only if they are not "in accordance with a comprehensive plan."³⁷ Thus, the spot zoning contention merges into the original line of argument over compatibility of the floating zone with the comprehensive plan concept.

Although the floating zone survived in New York, it encountered difficulties in Maryland³⁸ and Pennsylvania.³⁹ It can perhaps be safely predicted that the level of judicial hostility to this device will remain a function of (1) the degree of judicial unfamiliarity with the evolutionary development of zoning concepts,

32 Most state zoning enabling statutes repeat the requirement of the prototype statute that ordinances must be "made in accordance with a comprehensive plan," to prevent "haphazard or piecemeal zoning." U.S. DEPT OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT § 3 (rev. ed. 1926). It would thus appear that adoption of a master plan should precede enactment of zoning ordinances. However, such was not the case in many municipalities. Consequently, the judiciary has experienced great difficulty in applying this requirement to individual enactments. See Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154 (1955).

33 When a court doubts the constitutionality (wisdom?) of a new land use device, it can avoid direct confrontation of the issue by declaring that its use is not authorized by the applicable state enabling act. See, e.g., Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 887 (1967).

34 This rationale is frequently employed to invalidate regulations that offend the notions of state court judges regarding "economic due process." The contrast between their attitudes and those of the Supreme Court is striking. Compare McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUPREME COURT REVIEW 34 (Kurland ed.) with Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91 (1950).

35 "The essence of zoning is territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division." Schmidt v. Board of Adjustment, 9 N.J. 405, 417, 88 A.2d 607, 612 (1952).

36 In *Rodgers v. Village of Tarrytown*, 302 N. Y. 115, 96 N.E.2d 731 (1951), rezoning was permissible only if the petitioner's plans showed a minimum of ten acres of land, a maximum building height of three stories, adherence to strict building setback and spacing requirements, and no more than fifteen percent coverage of the ground area by buildings.

37 The vagueness of this standard was discussed in note 32, *supra*. In the spot zoning cases, it functions as a rubric under which zoning amendments tainted by impermissible legislative motives, such as individual favoritism, can be invalidated without accusing local legislators of moral turpitude.

38 In *Huff v. Board of Zoning Appeals*, 214 Md. 48, 133 A.2d 83 (1957), a "restricted manufacturing" use was authorized, by special exception, in a residential zone. The Maryland Court of Appeals held that a decision by the local board granting such an exception was not invalid spot zoning. The opinion cited *Rodgers v. Tarrytown* with approval.

In *MacDonald v. Board of County Comm'rs*, 238 Md. 549, 210 A.2d 325 (1965), the court invalidated an ordinance rezoning land in a low-density residential district for high rise residential use. The majority relied on the presumption of correctness in the original zoning,

and (2) the degree of "incompatibility" perceived to exist between the uses permitted within the larger, fixed zone and the uses permitted within the floating zone.⁴⁰

Another zoning innovation aimed at greater flexibility is the planned unit development.⁴¹ Like the floating zone, this device provides an incentive for owners to utilize advanced design concepts in planning large-scale developments within districts characterized by adherence to traditional use and density patterns. Unlike floating zones, which may be used to inject commercial or even industrial uses into a residential area, the planned unit development is a residential use

holding that there was insufficient evidence of original mistake or subsequent change of conditions to uphold the ordinance. In a brilliant dissenting opinion, Judge Barnes attacked the premises underlying the mistake-change requirement and concluded that it tended to produce an unfortunate rigidity in zoning administration.

In *Beall v. Montgomery County Council*, 240 Md. 77, 212 A.2d 751 (1965), Judge Barnes, speaking for a unanimous court, refused to apply the mistake-change requirement to an amendment rezoning land from low density residential to a high rise, planned residential classification. Noting that the situation was similar to the floating zone in some respects, he relied upon *Rodgers* and *Huff* in sustaining the ordinance. *MacDonald* was distinguished on the ground that there the local planning commission had disapproved the proposed amendment, whereas in *Beall* the commission had approved it.

The court reverted to the mistake-change requirement in *Woodlawn Area Citizens Ass'n v. Board of County Comm'rs*, 241 Md. 187, 216 A.2d 149 (1966), and invalidated an amendment rezoning land from single-family homes to a garden apartment classification. Judge Barnes again dissented, arguing that the "fairly debatable" rule should supplant it.

In another about-face, the court sustained amendments rezoning land from low-density residential use to higher-density planned residential developments in *Bujno v. Montgomery County Council*, 243 Md. 110, 220 A.2d 126 (1966) and *Knudsen v. Montgomery County Council*, 241 Md. 436, 217 A.2d 97 (1966). Both opinions by Judge Barnes for a unanimous court classified the procedure as a floating zone and relied on *Beall* and *Huff*. The mistake-change rule was therefore held inapplicable.

The Maryland court thus has two clear, but mutually inconsistent lines of authority. The validity of rezoning ordinances seems to depend upon whether or not Judge Barnes can convince his colleagues that the circumstances are sufficiently analogous to floating zones to disregard the mistake-change rule.

The ultimate issue is the mistake-change rule itself. Judge Barnes remains unalterably opposed to it. See *Wahler v. Montgomery County Council*, 249 Md. 62, 238 A.2d 266 (1968) (dissenting opinion). The court continues to adhere to it. See *Hunter v. Board of County Comm'rs*, 252 Md. 305, 250 A.2d 81 (1969); *Board of County Comm'rs v. Turf Valley Associates*, 247 Md. 556, 233 A.2d 753 (1967).

39 See *Eves v. Zoning Bd. of Adjustment*, 401 Pa. 211, 164 A.2d 7 (1960) where the floating zone provided for limited industrial uses in a primarily residential area. A high-density residential floating zone was upheld, however, in *Donahue v. Zoning Bd. of Adjustment*, 412 Pa. 332, 194 A.2d 610 (1963). The opinion attempted, rather unsuccessfully, to distinguish *Eves* on grounds other than incompatibility of the "floating zone" use with uses permitted on surrounding land.

40 Strict performance standards can, of course, minimize or even eliminate the incompatibility stemming from objective factors such as noise, odor, etc. See note 42, *infra*.

41 See generally *Symposium, Planned Unit Development*, 114 U. PA. L. REV. 1 (1965). The most striking feature of this type of development is its rejection of the old pattern of single-family detached residences on uniform "cookie-cutter" lots in favor of cluster development, townhouses, and other techniques resulting in more closely spaced dwellings with provision for open space and recreational areas to be used by all residents jointly. As one commentator described it,

[p]lanned unit development is a concept designed to avoid most of the unfortunate results of uniform housing development. The planned unit enables the builder to create, within the confines of a sizable development, a variety of housing types which will broaden and diversify his market while at the same time enhancing the possibilities of attractive environmental design and providing the public with open space and other common facilities. In addition, the planned unit provides the builder with the appealing possibility of accommodating a greater density of living units without sacrificing spaciousness and livability. Lloyd, *A Developer Looks at Planned Unit Development*, 114 U. PA. L. REV. 3, 4 (1965).

concept. The Pennsylvania Supreme Court recently used this difference⁴² to distinguish its leading anti-floating zone case, in the course of an opinion upholding planned unit development.⁴³ The court, after reviewing what it considered the traditional concept of zoning, described the effect of planned unit development in these words:

Under traditional concepts of zoning the task of determining the type, density and placement of buildings which should exist within any given zoning district devolves upon the local legislative body. In order that this body might have to speak only infrequently on the issue of municipal planning and zoning, the local legislature usually enacts detailed requirements for the type, size and location of buildings within each given zoning district, and leaves the ministerial task of enforcing these regulations to an appointed zoning administrator, with another administrative body, the zoning board of adjustment, passing on individual deviations from the strict district requirements, deviations known commonly as variances and special exceptions. At the same time, the overall rules governing the dimensions, placement, etc. of primarily public additions to ground, e.g., streets, sewers, playgrounds, are formulated by the local legislature through the passage of subdivision regulations. These regulations are enforced and applied to individual lots by an administrative body usually known as the planning commission.

This general approach to zoning fares reasonably well so long as development takes place on a lot-by-lot basis, and so long as no one cares that the overall appearance of the municipality resembles the design achieved by using a cookie cutter on a sheet of dough. However, with the increasing popularity of large scale residential developments, particularly in suburban areas, it has become apparent to many local municipalities that land can be more efficiently used, and developments more aesthetically pleasing, if zoning regulations focus on density requirements rather than on specific rules for each individual lot. Under density zoning, the legislature determines what percentage of a particular district must be devoted to open space, for example, and what percentage used for dwelling units. The task of filling in the particular district with real houses and real open spaces then falls upon the planning commission usually working in conjunction with an individual large scale developer.⁴⁴

It is interesting to note that the challenge to planned unit development was grounded on arguments similar to those that were successful in *Eves*, the Pennsylvania floating zone case, and that the court's reasoning in *Cheney* is consistent with the rationale of the New York Court of Appeals in *Rodgers*.

It would appear that, despite the possibility of additional setbacks, the survival of both the floating zone and the planned unit development against legal attack can be safely predicted. This is a victory not simply for two new zoning concepts but also for the notion that zoning administration ought be accorded a latitude of judicial tolerance sufficient to permit — dare one say encourage? — innovative responses to felt needs.⁴⁵

42 The "difference" is largely illusory if operation of the nonresidential activity is circumscribed by adequate performance standards with respect to noise, odor, effluent emission, off-street parking, screening, maximum height and lot coverage, etc.

43 *Cheney v. Village 2 at New Hope, Inc.*, 429 Pa. 626, 241 A.2d 81 (1968).

44 *Id.* at 628-30, 241 A.2d at 82-83.

45 Other devices to increase zoning flexibility include the conditional grant of special excep-

3. Rezoning

As we have seen, controversies over flexible zoning devices are often presented to the judiciary in the context of reviewing rezoning decisions. This section will discuss a different type of conflict—one that arises when the owner-developer finds himself entitled to a construction permit under existing zoning regulations but is confronted by a local legislature determined to alter those regulations to prohibit his development.

Applying the maxim that "ignorance of the law is no excuse" to zoning regulations inevitably leads to the conclusion that every party interested in real estate has record notice of the relevant provisions of the applicable zoning ordinances.⁴⁶ A corollary proposition is that every interested party is on notice that the zoning ordinance can and may be amended so as to alter the pattern of permissible uses or structures. What, then, of the situation where a construction permit is issued but the zoning ordinance is later amended so as to prohibit the use or structure authorized by the permit?

A result consistent with the foregoing reasoning would suggest that the permit is revoked by the zoning amendment. The weight of authority is in accord with this conclusion.⁴⁷ There is a widely recognized exception, however: where the owner has expended substantial sums in good faith reliance upon his permit, it is not revoked by a subsequent zoning change.⁴⁸ This is easily identified as an application of the doctrine of equitable estoppel. Relief for the landowner turns upon favorable resolution of two issues: (1) have substantial sums been expended (2) in justifiable reliance upon the building permit? A negative finding on either issue precludes exemption from enforcement of the amended ordinance.

The "substantial expenditure" issue hinges not only on the *amount* expended but, in some jurisdictions, also on the *type* of expenditure. Substantial expenditures are sufficient to support an estoppel only if they are expended for actual construction of a new structure. In one recent case,⁴⁹ the court ignored a \$56,000 architect's fee that was paid in reliance on the building permit and held that the amended ordinance revoked the permit. This result is questionable. So long as so-called "front end" costs (e.g., architect's fees, financing fees, advances to builders, expenditures for site clearing and preparation) are substantial, are incurred in good faith, and will be lost if the permit is invalidated by the zoning change, the requirements for estoppel seem to be met. There is, happily, authority for this proposition.⁵⁰

The "substantial expenditure" requirement was dispensed with in two recent cases that held the subsequent enactment inapplicable because it was not pend-

tions, variances, and rezoning amendments. *See generally* 1 R. ANDERSON, AMERICAN LAW OF ZONING §§ 8.17-8.21 (1968) [hereinafter cited as ANDERSON].

46 *See* 8 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 25.56 (3d ed. 1965) [hereinafter cited as McQUILLIN].

47 1 ANDERSON § 4.27; 8 McQUILLIN §§ 25.66, 25.156; 2 A. RATHKOPF, ZONING AND PLANNING ch. 57, § 1 (3d ed. 1966) [hereinafter cited as RATHKOPF].

48 8 McQUILLIN § 25.157; 2 RATHKOPF ch. 57, § 3.

49 *Ross v. Montgomery County*, 252 Md. 497, 250 A.2d 635 (1969).

50 *See, e.g., Krekeler v. Saint Louis County Bd. of Zoning Adjustment*, 422 S.W.2d 265 (Mo. 1967).

ing before the local legislature at the time the building permit was or should have been issued.⁵¹ This result cannot be supported on estoppel theory; it probably reflects judicial impatience with local legislatures that use the police power as a weapon in cat-and-mouse games with developers. Decisions of this sort may impel local legislatures toward systematic review of zoning ordinances so that desired changes can be made in advance of the filing of applications for construction permits.

The "justifiable reliance" issue is, of course, generally a question of good faith on the part of the construction permittee. A corollary principle has developed, however, to the effect that there cannot be good faith reliance on an invalid permit.⁵² While this may be a satisfactory generalization, it cannot be slavishly followed, as the New York Court of Appeals recently recognized.⁵³ Where the invalidity of the permit is attributable to a legal technicality⁵⁴ and good faith on the part of the permittee is indicated, the requirements for estoppel are met and the permit should survive subsequent zoning changes.⁵⁵

In an unusual case,⁵⁶ the Nevada Supreme Court reversed itself on rehearing and declined to enjoin the defendant from seeking a rezoning amendment from the city of Reno with respect to its land. The injunction was viewed as an unwarranted intrusion by the judiciary into the legislative province,⁵⁷ in spite of

51 *Ben Lomond, Inc. v. City of Idaho Falls*, 92 Idaho 595, 448 P.2d 209 (1968); *Gallagher v. Building Inspector*, 432 Pa. 301, 247 A.2d 572 (1968).

52 See 8 McQUILLIN § 25.157.

53 *Jayne Estates, Inc. v. Raynor*, 22 N.Y.2d 417, 293 N.Y.S.2d 75, 239 N.E.2d 713 (1968).

54 In *Jayne Estates* the permit was issued in reliance on an agreement between the developer and the local legislature. Technically, only the local board of zoning appeals had the authority to approve the developer's plan. The Court of Appeals noted, however, that the original arrangement had received approval from the village's planning board and that the zoning board had had knowledge of it and had not expressed any opposition. Finally, the agreement had been filed and approved in the supreme court in settlement of an action pending between the developer and the village.

55 Perhaps the most interesting aspect of *Jayne Estates* is its procedural posture. An owner of nearby land had successfully contested the original permit on the ground of its invalidity, and the court of appeals refused to review the decision. Thereafter, the developer sought a variance so that it could proceed with its original plans. The zoning board and supreme court held there was insufficient showing of hardship to warrant a variance. The court of appeals affirmed a judgment of the appellate division reversing the lower court. On the issue of reliance on an invalid permit the court stated:

The problem is not unlike that involved in those cases where a property owner argues that he has obtained a vested right to build for a use no longer permitted under a new or amended zoning law. The test in such cases is whether substantial construction expenses have been incurred prior to the effective date of the new law or, if no building permit has been issued, whether the property was purchased without knowledge of the proposed change and sums were thereafter expended in anticipation of the issuance of the permit, but the municipal officials deliberately delayed the processing of the application and misled and hindered the applicant in order to prevent the accrual of any rights. . . . In principle, a similar rule should be applied to the situation here. In particular, if there was good faith reliance on the invalid permit, it should be considered in determining whether Jayne has suffered "unnecessary hardship." 22 N.Y.2d at 423, 293 N.Y.S.2d at 79, 239 N.E.2d at 716.

The factual background of the case, as presented in the opinion of the court of appeals, presents an excellent case study in conflict between the developer and his neighbors and local legislature, as well as the intricate series of legal proceedings required to bring the matter to conclusion.

56 *Eagle Thrifty Drugs & Mkts., Inc. v. Hunter Lake Parent Teachers Ass'n*, — Nev. —, 451 P.2d 713 (1969).

57 In Nevada it is established that equity cannot directly interfere with, or in advance restrain, the discretion of an administrative body's exercise of legislative power [citing case]. This means that a court could not enjoin the City of Reno from entertaining Eagle Thrifty's request to review the planning commission recommendation.

a factual situation that seemed to favor the plaintiff.⁵⁸

4. *Control of Population Density*

Zoning litigation presents no current problem of greater intractability than density control. Population density correlates directly with demand for municipal services such as schools, fire and police protection, and water and sanitary facilities. To the extent that local density controls are related to a municipality's capacity to supply these services (assuming a good faith effort to do so) they ought to be accorded at least *prima facie* validity. Selective application of such controls, however, tends to influence the timing, location, and type of new housing construction in the community. The inevitable result is a shifting of development initiative away from individual developers toward the local legislature (with the advice and consent of its planning commission). While this situation is accepted as the norm in several western European countries, it is often regarded with disfavor by the American judiciary.⁵⁹

Two density control devices that have been the subject of considerable litigation are minimum lot size regulations and provisions for exclusion of, or severe restrictions upon, apartments in residential zones. These controls are now widely employed, especially in suburban communities on the fringe of large urban concentrations and in resort areas. In many instances, however, their use reflects considerations other than legitimate concern for providing newcomers with essential municipal services. The dominant motive may be a desire to prohibit entry of "undesirables" into the community. Density controls thus present an opportunity to accomplish indirectly—through exercise of "state action"⁶⁰—a goal that could hardly be constitutionally achieved directly through enactment of ethnic and religious qualification or minimum income requirements for eligibility to reside in the community.

Restricting a community to large single-family residential lots, however, virtually assures that only expensive houses will be constructed. Similarly, open space, minimum floor area, and other multifamily dwelling restrictions assure that only luxury apartments will be economically feasible in the community. Hence, it just "happens" that as the community develops it retains an overwhelmingly white, middle class constituency. Density control regulation thus spans the entire spectrum from clearly valid to obviously invalid, depending upon—what?

This established principle may not be avoided by the expedient of directing the injunction to the applicant instead of the City Council. *Id.* at —, 451 P.2d at 714.

58 On three previous occasions the local planning commission had denied defendant's request for the change. Plaintiff argued that the city ought not be permitted to grant defendant's fourth request absent a change of circumstances, equity having ample power to enjoin "vexatious litigation." The Reno Municipal Code, however, provides that an unsuccessful applicant for rezoning may reapply after six months without limiting the number of successive applications that may be filed.

The court, properly recognizing that the problem stemmed from the loose procedural provisions of the ordinance, held that the remedy (since those provisions could hardly be found in conflict with the state constitution) would have to come from the local legislature by way of an amendment to the ordinance.

59 See, e.g., *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). Cf. 1 ANDERSON §§ 7.26-.27, 7.32; 8 McQUILLIN § 25.27.

60 Zoning was held to be state action within the purview of the fourteenth amendment at least as long ago as *Buchanan v. Warley*, 245 U.S. 60 (1917).

Since courts must struggle with complex issues in cases contesting the validity of density controls, a neat pattern of consistency in their rulings is beyond legitimate expectation at present. We shall first consider the recent cases involving minimum lot size restrictions.

In recent years minimum lot area restrictions ranging from one-half acre to five acres have been sustained.⁶¹ In one case involving a five-acre minimum,⁶² a planning consultant to the local legislature testified as follows:

"[W]e have provided five types of R or residential districts, R-1, R-2, R-3, R-4 and R-5. The standards applied to these different districts [are] designed in that order, that is R-1 being the most restrictive, and R-5 the least restrictive as to the standards which apply in each district, with each one designed to meet a specific need in the County, leveling to the lowest one, the R-5. Generally that's the area where the most modest kind of home are [*sic*] of a type on the smallest size lots would be permitted, and would seem to meet the need for the very lowest income home occupants, including even the migratory or seasonal workers that have to be housed, and we have provided amply for those needs in a number of different locations in the County, particularly near the industrial areas, and it is not a question of forcing people to go into one district or another. We are simply providing different types of areas to meet different needs, different size lots with different size income, we will say, and different standards that apply, and that's the sense of our zoning."⁶³

The contested districts accounted for less than seven percent of the county's total area, and the court found that the county's small population was "not expected to increase more than 25 percent in the next ten years."⁶⁴ These circumstances, said the court, were sufficient to distinguish a recent Pennsylvania decision⁶⁵ invalidating four-acre minimum lot size and a prior Virginia decision⁶⁶ invalidating two-acre zoning.

The *Kohn* case is distinguishable on its facts, since considerable population pressure was already in evidence from two distinct urban areas, and the contested classification included approximately thirty percent of the county's total area. Nevertheless, a difference in judicial attitude toward density controls is apparent in a comparison of the following passages from the two opinions. From the *Miles* case:

We agree that if the primary purpose or effect of the ordinance is to benefit private interests, rather than the public welfare, the legislation

61 *Levy v. Board of Adjustment*, 149 Colo. 493, 369 P.2d 991 (1962); *Senior v. Zoning Comm'n*, 146 Conn. 531, 153 A.2d 415 (1959); *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967); *Padover v. Township of Farmington*, 374 Mich. 622, 132 N.W.2d 687 (1965); *Mountcrest Estates v. Mayor and Township of Rockaway*, 96 N.J. Super. 149, 232 A.2d 674 (Super. Ct.), *cert. denied*, 50 N.J. 295, 234 A.2d 402 (1967); *Levitt v. Village of Sands Point*, 6 N.Y.2d 269, 189 N.Y.S.2d 212, 160 N.E.2d 501 (1959); *Jones v. Town of Woodway*, 70 Wash. 2d 977, 425 P.2d 904 (1967).

62 *County Comm'rs v. Miles*, 246 Md. 355, 228 A.2d 450 (1967).

63 *Id.* at 355, 228 A.2d at 456.

64 *Id.* at 371, 228 A.2d at 458. Is this not a self-fulfilling prophecy?

65 *National Land & Inv. Co. v. Kohn*, 419 Pa. 504, 215 A.2d 597 (1965). The holding did not invalidate four-acre zoning per se but only as applied to the facts found with reference to the defendant township.

66 *County Bd. of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

cannot be held valid merely because some of its incidental effects may be for the general good. On the other hand, if the ordinance has a substantial relationship to the general welfare of the community in that it can fairly be taken as a reasonable effort to plan for the future within the framework of the County's economic and social life, it is not unconstitutional because under it some persons may suffer loss and others be benefited. Courts of other states have had occasion to balance these factors; the decisions, as we read them, turn on the various economic, physical and sociological factors involved in the particular case.

Conditions in Queen Anne's County may change. Megalopolis, in its sweep, may engulf even Maryland's Eastern Shore. With increasing leisure and the endemic yearning for life on the water front, the five acre limitation as applied to the County's river frontage may prove too restrictive.⁶⁷

From the *Kohn* case:

Four acre zoning represents Easttown's position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon the administration of public services and facilities cannot be held valid. Of course, we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that the municipal services which the community requires are provided in an orderly and rational manner.

The brief of the appellant-intervenors creates less of a problem but points up the factors which sometime lurk behind the espoused motives for zoning. What basically appears to bother intervenors is that a small number of lovely old homes will have to start keeping company with a growing number of smaller, less expensive, more densely located houses. It is clear, however, that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary.⁶⁸

In each case the parties to the dispute were a private developer and the local legislature. The *Kohn* opinion, however, manifests a much more keen awareness of interests not represented to the court by either the formal parties to the action or by various amici curiae.

In *Carper*,⁶⁹ a two-acre minimum lot size restriction had been imposed throughout the western two-thirds of the county, which contained only ten percent of its population. In addition, the county's population had more than doubled in the previous seven years. In the course of declaring this regulation invalid, the court pointedly noted that its economic effect would be to force low-income families to live in the eastern one-third of the county, reserving the rest for their more affluent "neighbors."

67 246 Md. at 368, 373, 228 A.2d at 457, 459.

68 419 Pa. at 432-33, 215 A.2d at 612.

69 200 Va. 653, 107 S.E.2d 390 (1959).

It cannot be gainsaid that by referring to such relevant and objective criteria as current growth rate and total population density "mix," the Maryland court grounded its conclusion on a firmer foundation than do those courts that are content to state banally that, with fewer residents, the municipality's problems "due to the population explosion will be lessened."⁷⁰ On the other hand, it is difficult to pass over lightly, as the court did, the testimony in the Maryland case that the needs of low-income families have received ample provision, "particularly near the industrial areas, and it is not a question of forcing people to go into one district or another."⁷¹ The record in *Miles* clearly demonstrates the utility of zoning in effectuating economic segregation. By sustaining the hyper-restrictive five-acre minimum lot size requirement, the court gave implicit support to the scheme of economic segregation; the cream is approved because it represents only a small percentage of the total volume in the bottle, and no matter that it rests in comfortable isolation on top of the milk.

It could be that the systematic use of the zoning power by suburban communities to deny or restrict access to members of "lower" ethnic and economic strata, or to confine them to the least desirable locations, will one day be recognized as an infringement of constitutionally protected rights. In this connection, a recent article cogently argues that snob zoning violates the equal protection clause of the fourteenth amendment.⁷²

A recurring issue in the area of population density control arises out of the effort of suburban and resort communities to exclude apartment buildings from the community.⁷³ In fairness, it is at least arguable that multifamily dwellings impose greater costs for public services than they return to the municipality by way of ad valorem taxation.⁷⁴ Thus, ordinances restricting apartment development in suburban or resort areas present questions similar to those previously discussed in connection with minimum lot size. In a recent Arizona case,⁷⁵ a developer's petition to rezone land surrounding a golf course for multifamily dwellings was denied by the local legislature. A trial court decision holding that the local legislature had acted arbitrarily was reversed by the court of appeals despite evidence that the proposed rezoning would not have an adverse effect on values of surrounding property. The opinion includes this illuminating passage:

There was testimony presented to the effect that some people prefer to live in denser areas while others prefer to live in rural areas and therefore low density zoning is established to provide for the welfare of people that seek the rural way of life. The low density zoning minimized traffic hazards, dust and air pollution, noise and other disagreeable facets of high density living.

70 *E.g.*, *Mountcrest Estates, Inc. v. Mayor and Township of Rockaway*, 96 N.J. Super. 149, 154, 232 A.2d 674, 677 (Super. Ct.), *cert. denied*, 50 N.J. 295, 234 A.2d 402 (1967).

71 See text accompanying note 63, *supra*.

72 Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

73 The apartment house has been characterized as "a mere parasite" interfering with "free circulation of air and monopolizing the rays of the sun." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 394 (1926). The origins of this antiapartment bias are explored in Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040 (1963).

74 But see Babcock & Bosselman, *supra* note 73, at 1062-65.

75 *Rubi v. 49'er Country Club Estates, Inc.*, 7 Ariz. App. 408, 440 P.2d 44 (1968).

We take judicial notice of the fact that the City of Tucson, by virtue of its climate, which affords relief from numerous ills such as arthritis and respiratory difficulties, has a unique attraction. Bearing this in mind, we fail to see how low density zoning cannot but be consistent with and promotive of the general health and welfare.⁷⁶

By contrast, a recent New York decision⁷⁷ dealt with the validity of a zoning ordinance amendment designed to prohibit further construction of multiple dwellings. The rezoning amendment converted plaintiff's land from multifamily use to a single-family classification. The justification advanced for the amendment was that it would forestall an increase in the volume of effluent discharged into the village's sewage system (and eventually into the Hudson River) until such time as more adequate sewage treatment facilities could be constructed. The ordinance was held invalid as to the plaintiff since it shifted a burden attributable to general community conditions to a few landowners and in the process prevented the use of plaintiff's property for any purpose to which it could be reasonably adapted. The court concluded that since the village could require the plaintiff to pay his share of the cost of new sewage facilities through water and sewer assessments, it was "impermissible to single out this plaintiff to bear a heavy financial burden because of a general condition in the community."⁷⁸ Arguably, there were stronger health, safety, and welfare grounds (i.e., a temporary sanitation emergency) for upholding the New York ordinance than the Arizona enactment. Still, the latter was sustained while the former was held invalid. The explanation for this apparent anomaly may be that the New York court, though urban-oriented, retains a sensitivity to investment-backed individual expectations,⁷⁹ while the Arizona court is more sympathetic toward exercise of the police power to preserve static development conditions.⁸⁰ In any event, it is clear that the differences between the two decisions are more easily attributable to judicial viewpoint than to legal doctrine.

The duty of a municipality to accept and accommodate the inevitable population increment attributable to expanding urbanization of nearby communities has been alluded to earlier.⁸¹ Also well established is the duty of a municipality to

76 *Id.* at 413, 440 P.2d at 49.

77 *Westwood Forest Estates, Inc. v. Village of South Nyack*, 23 N.Y.2d 424, 244 N.E.2d 700, 297 N.Y.S.2d 129 (1969).

78 *Id.* at 427, 297 N.Y.S.2d at 132, 244 N.E.2d at 702.

79 The owner produced evidence showing that his property was worth \$125,000 for apartment use and only \$10,000-15,000 for one- or two-family residences. *Id.* at 426, 244 N.E.2d at 701, 297 N.Y.S.2d at 131.

80 The court referred to testimony indicating that low-density zoning had been established for those who "seek the rural way of life." Evidence of the appeal of other townhouse projects in proximity to golf course developments similar to the owner's was dismissed with the comment that those developments "were in far distant areas of metropolitan Tucson." 7 *Ariz. App.* at 413, 440 P.2d at 49.

81 See text accompanying notes 61-71 *supra*. In *Euclid v. Ambler Realty Co.* the court stated:

If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course which it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way. 272 U.S. at 389-90.

consider existing conditions in adjacent communities before imposing zoning regulations upon its own peripheral areas.⁸² A recent Second Circuit decision raises the prospect of a conflict between these two municipal responsibilities.⁸³ The plaintiff, a New Jersey township, sued a New York town alleging that by rezoning property contiguous to the New Jersey line for an "office park," it had deprived the plaintiff of property without due process of law. The alleged deprivation consisted of (1) a reduction in value of land within the plaintiff township, accompanied by a loss of tax revenue; and (2) the necessity for additional expenditures by the plaintiff to provide for adequate traffic and other related expenses attributable to the defendant's rezoning action. In essence, the plaintiff argued that while the defendant will enjoy the high-revenue, low service-cost offices, the New Jersey town will be forced to accommodate the high-cost, low-revenue population generated by the office complex on defendant's land.

The court of appeals reversed a judgment of the district court dismissing the action and held that the plaintiff had standing to sue.⁸⁴ The case was remanded to the district court with the comment that "it may prove difficult to establish that the challenged zoning ordinance was arbitrary and capricious."⁸⁵ Should there be further litigation, it will be interesting to observe the manner in which the federal judiciary evaluates the two conflicting municipal duties as well as the extent to which reference is made to state law.

The literature of zoning has been significantly enriched recently by the publication of Professor Anderson's comprehensive treatise.⁸⁶ Several recent articles of more than routine or local interest have also become available.⁸⁷

B. Subdivision Control

This area of land use law has generated a much smaller volume of litigation than zoning. Subdivision control originated with a felt need for certainty in land conveyancing;⁸⁸ it expanded in the 1930's to include a form of consumer pro-

82 The leading case is *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). See 1 ANDERSON § 5.09.

83 *Township of River Vale v. Town of Orangetown*, 403 F.2d 684 (2d Cir. 1968).

84 "We hold that a municipal corporation like any other corporation is a 'person' within the meaning of the fourteenth amendment and is entitled to its protection." *Id.* at 686.

85 *Id.* at 687. The "arbitrary and capricious" standard was taken from *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926): "[I]t must be said before the ordinance can be declared unconstitutional that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

86 R. ANDERSON, *AMERICAN LAW OF ZONING* (1968).

87 Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 L. & CONTEMP. PROB. 220 (1967); Bowe, *Regional Planning Versus Decentralized Land-Use Controls—Zoning for the Megalopolis*, 18 DEPAUL L. REV. 144 (1968); Cunningham, *Public Control of Land Subdivision in Michigan: Description and Critique*, 66 MICH. L. REV. 3 (1967); Freeman, *Towards a National Policy on Balanced Communities*, 53 MINN. L. REV. 1163 (1969); Makielski, *Zoning: Legal Theory and Political Practice*, 45 J. URBAN L. 1 (1967); Mixon, *Jane Jacobs and the Law—Zoning for Diversity Examined*, 62 NW. U.L. REV. 314 (1967); Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968); Williams, *Legal Techniques to Protect and to Promote Aesthetics Along Transportation Corridors*, 17 BUFF. L. REV. 701 (1968).

88 Typical requirements include the specification of material from which subdivision plats must be made, and the enumeration of required engineering data such as indication of the north point, location of monuments, lot lines and streets. Finally, a form of surveyor's certificate is frequently prescribed. Plats that fail to meet the requirements are ineligible for recording.

tection legislation requiring subdividers to provide minimally adequate streets and utilities.⁸⁹ The runaway housing demand characteristic of the post-World War II era has added a significant new dimension to the subdivision control picture. Financially overburdened municipalities have attempted to shift to subdividers a part of the cost of investment in new public facilities necessitated by residential development. Consequently, plat recordation has been conditioned upon dedication of land for park, playground, or school uses. A subsequent refinement in this procedure has been to convert the land dedication requirement into a cash exaction for each new residential building lot, to become part of a municipal school or park fund.

A flurry of litigation from 1964 to 1966 culminated in Montana, New York, and Wisconsin decisions upholding such requirements as a proper exercise of the police power.⁹⁰ While there have been contrary holdings in some subsequent cases,⁹¹ the validity of these exactions, assuming proper authorization, seems reasonably well assured.

In general, courts have experienced less difficulty in upholding subdivision control regulations requiring installation of improvements within the subdivision boundaries than with those that require provision of public facilities outside the subdivision. In a New Jersey case,⁹² a developer was required to pave a previously dedicated but unimproved road 361 feet from the subdivision boundary to a public road. Access to another public road already existed.⁹³ The New Jersey Supreme Court invalidated the requirement but flatly declined to hold that no off-site improvement requirements were authorized by the state's subdivision control enabling act. The court reasoned:

The Land Subdivision Ordinance of Princetown Township does not establish any procedures or standards by which the cost of off-site improvements might be apportioned to the subdivider on the basis of the benefits to the subdivision. This deficiency in the ordinance is fatal to the Planning Board's attempt to require the paving of the off-site right-of-way. It is clear to us that, assuming off-site improvements could be required of a subdivider, the subdivider could be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision. It would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement [citing case]. In the present case, it is stipulated that lands to the north of plaintiff's subdivision would benefit

89 E.g., street widths in conformity to established master plans, curbs and gutters, paving requirements and installation of water and sewer facilities.

90 See Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967).

91 In *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 27 Conn. Super. 74, 230 A.2d 45 (1967), a superior court judge held that mandatory cash exactions in lieu of land dedication were an unconstitutional tax. None of the leading cases is cited or discussed. Cash exactions were held to be unauthorized by existing enabling legislation in *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1 (1966). The court specifically declined, however, to "prejudge" the constitutionality of such exactions if properly authorized.

92 *Longridge Builders, Inc. v. Planning Bd.*, 52 N.J. 348, 245 A.2d 336 (1968).

93 This fact distinguishes the case from *Noble v. Township of Mendham*, 91 N.J. Super. 111, 219 A.2d 335 (Super. Ct. 1966), where an intermediate appellate court held that the subdivider could be required to furnish access to the existing street or highway network where none previously existed.

from the improved road. Thus, it is clear that the total cost of the road cannot be imposed on the plaintiff. In view of the need for such apportionment, there must be adequate standards and procedures for determining how the allocation of costs should be made.⁹⁴

This is a sensible and perceptive response to an issue whose resolution can best be assured by encouraging local governments to formulate uniform standards. All too often, subdivision control has proceeded on a purely ad hoc basis.

An analogous problem arises with respect to extension of municipal water and sewer lines to proposed subdivisions. Frequently the developer is required to bear the entire initial cost of such "off-site" extensions with the municipality rebating a portion of the fees it collects from subsequent users who tap onto the extension. In effect, the scheme is a mandatory interest-free loan by the developer to the municipality. The technique has apparently not been questioned in recent litigation.

Two Texas cases,⁹⁵ however, presented a controversy over "on-site" water mains, i.e., extensions within the subdivision boundary. In each case the municipality permitted nondevelopers to recoup the cost of on-site extensions out of subsequent tap-on charges but refused to pay rebates to developers. The developers contended that this was discriminatory treatment, a denial of equal protection, and a taking of property without just compensation. In both cases these contentions were rejected. The *Crownhill Homes* opinion contains an analysis of the costs of water service extension, indicating that the cost to the subdivider was not disproportionate to the cost to the municipality. Neither opinion, however, provides a satisfactory discussion of the validity of the distinction between developers and nondevelopers. *Crownhill Homes* does hint that serious rate-making problems and revenue bond financing dislocations could result from a decision favorable to the developer. It is nonetheless unfortunate that no serious analysis of the propriety of the developer-nondeveloper distinction was attempted.

In a recent Illinois case,⁹⁶ the owner of a twenty-five-acre parcel submitted a plat subdividing his land into two new tracts. One, aggregating eight and one-half acres, contained a residence; each had direct access to a public street. Recordation of the plat by the municipality was conditioned upon dedication of two strips of land (33 ft. by 2,000 ft. and 66 ft. by 355 ft.) for roadway purposes.

The Illinois Supreme Court held that these requirements were improperly imposed. There is ample precedent for requirements that subdividers provide streets within their subdivisions adequate to serve the new lots created thereby.⁹⁷ The Illinois court, however, reiterated its prior holdings that no subdivision control requirement can be sustained unless the need for it is specifically and

94 52 N.J. at 350-51, 245 A.2d at 337-38.

95 *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448 (Tex. Civ. App. 1968); *Johnson v. Benbrook Water & Sewer Authority*, 410 S.W.2d 644 (Tex. Civ. App. (1966)), *cert. denied*, 393 U.S. 836 (1968).

96 *People v. City of Lake Forest*, 40 Ill. 2d 281, 239 N.E.2d 819 (1968).

97 *E.g.*, *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949); *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

uniquely attributable to the development of the subdivision.⁹⁸ During oral argument, however, the subdivider had stated that he had no plans to develop his vacant tract.⁹⁹

The result is sound, but the opinion is somewhat puzzling. Cases that have upheld subdivision exactions for street, recreational, and educational purposes without applying the "uniquely attributable" test are cited and distinguished on the ground that in each the subdivider was a residential developer. The Illinois subdivider, of course, was not; thus the cases are distinguishable. Despite this the difficulty arises from the fact that there is contrary Illinois authority where the subdivider *was* clearly a developer.¹⁰⁰ It may be that the Illinois court is retreating from its "specifically and uniquely attributable" test and is instead restricting its application only to nondeveloper subdividers.

Finally, a New Jersey decision,¹⁰¹ adjudicating the constitutionality of a state statute¹⁰² authorizing municipalities to "reserve" land within proposed subdivisions for one year as potential park and playground sites, deserves attention. The purpose of the reservation, or "freeze," is to forestall construction of improvements on the reserved land during the time allotted the municipality to reach a decision as to its purchase. In this respect, the procedure resembles official mapping techniques, which have been upheld with respect to streets even though the reservation is for an unlimited period.¹⁰³ With respect to reservation for parks, however, a three-year reservation has been held unconstitutional while a thirteen-month period has been sustained.¹⁰⁴

The New Jersey Supreme Court upheld the statute, holding that in effect

98 See *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *Rosen v. Village of Downers Grove*, 19 Ill. 2d 448, 167 N.E.2d 230 (1960). The former decision is criticized in Johnston, *supra* note 90, at 907-9.

99 The subdivider stated that he was attempting to sell the house and had concluded that it would be more marketable without the additional acreage. 40 Ill. 2d at 283, 239 N.E.2d at 821.

100 See note 98 *supra*.

101 *Lomarch Corp. v. City of Englewood*, 51 N.J. 108, 237 A.2d 881 (1968).

102 The governing body may, by ordinance after public hearing, establish an official map of the municipality or of any part or parts thereof. The official map shall be deemed conclusive with respect to the location and width of streets and drainage rights of way and the location and extent of public parks and playgrounds shown thereon, whether such streets, drainage rights of way, parks or playgrounds are improved or unimproved. Upon the application for approval of a plat, the municipality may reserve for future public use the location and extent of public parks and playgrounds shown on the official map, or any part thereof and within the area of said plat for a period of one year after the approval of the final plat or within such further time as agreed to by the applying party. Unless within such one year period or extension thereof the municipality shall have entered into a contract or purchase, or instituted condemnation proceedings for said park or playground according to law, such applying party shall not be bound to observe the reservation of such public parks or playgrounds. During such period of one year or any extension thereof the applicant for the plat approval, and his assigns and successors in interest, may use the area so reserved for any purpose other than the location of buildings or improvements thereon, except as provided in section nine of this act. N.J. STAT. ANN. § 40:55-1.32 (1967), *as amended*, N.J. STAT. ANN. § 40:55-1.32 (Supp. 1969) (the amendment added flood control basins, as well as scenic and historic sites to the official map). Another provision authorizes issuance of permits for structures within any reserved area when the land cannot otherwise "yield a reasonable return to the owner." N.J. STAT. ANN. § 40:55-1.38 (Supp. 1969).

103 See, e.g., *Headley v. City of Rochester*, 272 N.Y. 197, 5 N.E.2d 198 (1936).

104 *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A.2d 34 (1951) (three-year period); *Segana v. Inglesias*, 71 P.R.R. 139 (1950) (thirteen-month period).

it authorizes the taking of a one-year "option" to purchase. Accordingly, the owner is entitled to compensation.¹⁰⁵ Although the statute did not provide for payment of compensation, the court implied this requirement in order to sustain the statute.

It is a statesmanlike opinion if one grants that compensation must be paid. The only authority cited for this proposition was a prior New Jersey case¹⁰⁶ in which a zoning classification required the owner to retain his land virtually in its natural state. The statute was declared invalid as to the owner as a taking of his land without compensation.

The vital distinction between the two cases is that the park reservation carried a one-year time limit whereas the zoning ordinance was of unlimited duration. If a zoning analogy is applicable, the most relevant would seem to be "interim" zoning ordinances, which, although freezing land use, have been sustained so long as the period is not unreasonably long.¹⁰⁷ The court seemed particularly concerned over the fact that the owner would be required to pay ad valorem taxes on his land during the period of the "freeze." Perhaps a statutory abatement provision would have induced a more favorable view on the taking question. In any event, the court's failure to come to grips with the issue of taking versus regulation is disappointing.

II. Eminent Domain

The United States Constitution limits the power of the federal government to seize private property.¹⁰⁸ Every state has similar restrictions, of constitutional or judicial origin.¹⁰⁹ Legal issues in eminent domain may be conveniently categorized within the Constitution's own cryptic framework: "private property," "taking," "public use," and "just compensation." The first two concepts are closely related (and sometimes overlap) since each necessitates judicial delineation of the point at which public interference with private interests becomes compensable. The third constitutes a limitation on the purposes for which public interference is deemed justifiable. Theoretically, only after the first three clusters of issues are favorably settled, i.e., that the purpose is proper and the interference is compensable, is the fourth reached: the amount of compensation the sovereign must pay for its interference. It is convenient to employ a similar classification scheme for our summary of recent developments in eminent domain.

105 "The 'option' price should, among other features, reflect the amount of taxes accruing during the 'option' period. This sum can be established by expert advice and opinion." 51 N.J. at 114, 237 A.2d at 884.

106 *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963).

107 *E.g.*, *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965). See 1 ANDERSON § 5.15.

108 "[N]or shall private property be taken for public use without just compensation." U.S. CONST. amend. V.

109 See 1 P. NICHOLS, *EMINENT DOMAIN* § 1.3 (rev. 3d ed. 1964). Some states have added "or damaged" after the word "taken"; otherwise, the wording of state constitutions is virtually identical to the provision in the fifth amendment to the U.S. Constitution. North Carolina is the only state that has no such clause; the duty to pay just compensation has been inferred from that state's due process clause. See *Johnston v. Rankin*, 70 N.C. 550 (1874).

A. Public Use

Several state constitutions expressly provide that the propriety of the purposes for which the sovereign interferes with private interests is a judicial question.¹¹⁰ Attempts to exercise the power of eminent domain have been invalidated on the ground that they were not in furtherance of an acceptable public purpose.¹¹¹ In recent years, however, courts have increasingly manifested a willingness to defer to legislative decisions as to which public programs and projects sufficiently serve the public interest to justify exercising the power of eminent domain.¹¹² There is little reason to doubt that this trend will continue in the foreseeable future.

One form in which the "public use" issue arises is the area of "excess condemnation." That is, assuming that a particular project qualifies as a public purpose, is the condemnor limited to taking just enough land to accomplish that purpose, or may it sometimes appropriate more? In two recent cases, the contention was advanced that the condemnor had acquired land not for completion of public projects but for resale to specific private firms for use in the ordinary course of their business.

In *Katz v. Brandon*,¹¹³ a case involving an urban redevelopment project, the court properly noted that resale to private firms is often the end result of such programs.¹¹⁴ It refused to review the findings of the redevelopment agency as to the existence of substandard, unsafe buildings on the land in question.¹¹⁵ The court went on to dismiss the argument that the taking was for the benefit of a particular business with the observation that

[t]here is nothing in the record to indicate that any conveyance of land has been made to [the firm] or that any agreement or understanding exists which would provide it with any advantage which is not available to others who may be interested as redevelopers.¹¹⁶

*Omartian v. Mayor of Springfield*¹¹⁷ concerned a city beltway project, with an alleged excess taking of land for resale to a developer for a shopping center.

110 See 2 P. NICHOLS, EMINENT DOMAIN § 7.4 (rev. 3d ed. 1963) [hereinafter cited as NICHOLS].

111 For discussion of the expansion of "public use" to encompass public purpose and, finally, "public advantage," see *id.* at § 7.2.

112 *E.g.*, *Berman v. Parker*, 348 U.S. 26 (1954); *Courtesy Sandwich Shop, Inc. v. Port of New York Authority*, 12 N.Y.2d 379, 240 N.Y.S.2d 1, 190 N.E.2d 403 (1963). See 11 E. McQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.25 (3d ed. 1964).

113 156 Conn. 521, 245 A.2d 579 (1968).

114 The public purpose requirement is met through the clearance of slums and blighted areas. It is not, therefore, necessary for the land taken to remain in public ownership.

115 A finding was made by the agency that the structures in the area were substandard and unsafe, that the facilities were inadequate, and that the conditions were unsuitable for a residential development and were detrimental to the health, safety, morals and welfare of the community. This decision is open to judicial review only to discover whether the agency has acted unreasonably, or in bad faith, or has exceeded its powers. 156 Conn. at 531, 245 A.2d at 585. *But cf.* *Lyons v. City of Camden*, 48 N.J. 524, 226 A.2d 625 (1967).

116 156 Conn. at 534, 245 A.2d at 586-87. The evidence showed that the firm had been approached with a view to stimulating its interest in purchasing the land in question for expansion of its existing facilities. Later, the firm made an offer to purchase the land, but the offer was never acted upon. *Id.* at 527, 245 A.2d at 583-84.

117 354 Mass. 439, 238 N.E.2d 48 (1968).

In fact, the condemnor had a contract with the developer to convey the land to him in return for a stipulated "contribution" toward the cost of the beltway project. Thus the missing link in the Connecticut case — persuasive evidence of favoritism — was present. The Massachusetts court, however, rejected the contention that the taking was not for a public purpose with this comment:

[T]he allegations of the present bill do not specifically assert facts which, if proved, would establish that this taking is primarily for Albano's private benefit. It also is not improper for a body making an eminent domain taking to make a reasonable business contract in the public interest in anticipation of, or because of, the effects of that taking [citing case]. No facts have been alleged which sufficiently show that the proposed contract with Albano, by which the city would obtain a substantial contribution by Albano to the cost of the project, was not in the public interest.¹¹⁸

A demurrer by the condemnor was sustained.

The result is disturbing. In such situations the "public benefit" may be nothing more than a premium above the anticipated condemnation award, which an eager developer is willing to pay in order to acquire land unavailable to him through private market channels. If so, and the demurrer prevented the plaintiff from establishing this, then the condemnor is simply trading on its power of eminent domain. Perhaps the promotion of shopping centers along beltways is itself a public purpose; apparently, no case has yet so held. A direct approach to the transaction would require legislative authorization to condemn land for resale as privately-owned shopping centers, and to negotiate privately with potential purchasers of such land. But this court decision sanctions the same result by indirection, with no semblance of authorization to the municipality to use the power of eminent domain for such an end. If excess condemnation was in fact used for the purpose of recouping part of the project cost, then the Massachusetts court has repudiated a position of which it has long been considered a leading exponent.¹¹⁹

Excess condemnation has been frequently upheld in another situation: the so-called "remnant theory."¹²⁰ A recent California case¹²¹ presented a new variation on the remnant theme. A small tract (.65 acres) was taken for a freeway. As a result, an adjacent fifty-four acre tract owned by the condemnee was landlocked. The condemnor proposed to acquire this tract also, and the condemnee resisted. The court held that, although the landlocked tract was not a "remnant" in the physical sense, it could constitute an "economic remnant." Accordingly, the case was remanded with the instructions that the tract could be acquired if the trial court should find the taking "justified to avoid

118 *Id.* at —, 238 N.E.2d at 51.

119 See Opinion of the Justices, 204 Mass. 607, 91 N.E. 405 (1910); 2 NICHOLS § 7.5122[3].

120 The justification for this theory is that when part of a parcel or tract is taken and the remainder is left in such condition as to be of little value, the condemnor may take the whole and sell the remainder, "it being felt that it will be less expensive in the end for the city to take and pay for the whole of such lots and . . . sell [the remainder] for a fair price, than to engage in protracted litigation over the question of damages to the remaining land with each owner." 2 NICHOLS § 7.5122[1].

121 *People ex rel. Dep't of Pub. Works v. Superior Court*, 68 Cal. 2d 206, 436 P.2d 342, 65 Cal. Rptr. 342 (1968).

excessive severance or consequential damages."¹²² This novel extension of the remnant theory was justified, said the court, by a California statute providing that:

Wherever a part of a parcel of land is to be taken for state highway purposes and the remainder is to be left in such shape or condition as to be of little value to its owner, or to give rise to claims or litigation concerning severance or other damage, the department may acquire the whole parcel and may sell the remainder or may exchange the same for other property needed for state highway purposes.¹²³

A dissenting opinion argued that the statute's first clause was inapplicable since it referred to remnants of little value "to the owner," whereas here the condemnee obviously thought the tract was of value. The second clause, it continued, suggested that a benefit to the state must be found; if the tract was actually of as little value as the condemnor contended, then there would be no benefit to the state upon its resale. The dissent went on to characterize the taking as an application of the discredited recoupment theory.

On the facts of the case, the majority view seems sound. If only the small acreage was taken, the condemnor would still be required to pay, as "severance damages," the diminution in value of the remaining tract attributable to the taking. If, as in this case, the taking has substantially destroyed the value of the remainder, then in effect the condemnor is required to pay full value for land that it has not acquired. The condemnee has received a potential windfall at public expense: he realizes the present value of the land and yet retains title to it. This windfall is surely undeserving of constitutional protection. In cases where severance costs will substantially equal the full market value of the remainder, acquisition of the remaining tract by the condemnor seems unobjectionable; the sovereign receives no more than it is required to pay for. The more difficult question, of course, is at what ratio of severance damages to the value of the remainder does the power of acquisition cease? The majority reiterates that the trial court can order acquisition of the remainder only if it is necessary to avoid "excessive" severance damages, without attempting to predetermine the threshold of excessiveness. Thus there is ample latitude for future litigation over the scope of the new "economic remnant" justification for excess condemnation.¹²⁴

122 *Id.* at 210, 436 P.2d at 345, 65 Cal. Rptr. at 344-45.

123 CAL. STREETS & HIGHWAYS CODE § 104.1 (West 1969).

124 The court attempted to forestall one foreseeable but impermissible extension of the new approach to excess condemnation:

We need not decide in what specific cases other than those mentioned the statute authorizes excess condemnation. It should be emphasized, however, that the economic benefit to the state must be clear. The economic benefit of avoiding the cost of litigating damages is not sufficient. The statute does not authorize excess condemnation anytime the condemnee claims severance or consequential damages. To allow such condemnation would nullify the constitutional guarantee of just compensation (Cal. Const., art I, § 14) by permitting the state to threaten excess condemnation, not because it was economically sound, but to coerce condemnees into accepting whatever value the state offered for the property actually taken or waiving severance or consequential damages to avoid an excess taking. 68 Cal. 2d at 213-14, 436 P.2d at 347,

65 Cal. Rptr. at 347.

B. Property-Taking

These are by far the most sensitive and difficult issues in eminent domain. They are also probably the most important, since their case-by-case resolution establishes the outlines of the frontier between compensability and noncompensability in a given jurisdiction. These can be characterized as "all or nothing" issues. Frequently, the moving party is a private owner who asserts that an interest in his land has been taken for which he is entitled to compensation. This is the so-called "inverse condemnation" action. Alternatively, the condemnor may be the moving party but may deny that compensation is constitutionally required for some aspects of the damage claimed by the condemnee.

The elements common to all cases in the area are (1) a landowner who can show diminution of the use and enjoyment of his land — hence, also a diminution in its value — attributable to an act of the sovereign, and (2) a public authority that, though acknowledging that the landowner has suffered harm, denies his constitutional claim for compensation.¹²⁵

Over the past several years an upsurge in highway construction has generated much litigation over the compensability of interference inevitably associated with such projects. Two general types of interference are: (1) impairment of access to highways and thoroughfares, and (2) deprivation of the benefits of seclusion and view associated with the intrusion of throughways into formerly remote resort areas.

A number of cases have held that compensation for such "indirect" interference as impairment of access is not recoverable in the absence of physical appropriation of some part of the claimant's land.¹²⁶ This view sometimes results in questionable distinctions, i.e., situations in which two adjoining owners suffer exactly the same degree of interference, but only one has actually had a strip of his land condemned.¹²⁷ Other cases have rejected physical appropriation requirements.¹²⁸

Even where there has been a physical appropriation, however, the cases are sharply split on the issue of compensation for impairment¹²⁹ of access. One of the leading decisions, *People v. Ricciardi*,¹³⁰ authorized recovery where a

125 There may, of course, be other theories on which recovery could be predicated, including tort liability. With the lingering vestiges of sovereign immunity, however, and the "discretionary function" exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a) (1964), the cause of action in tort is often fraught with considerable risk if not altogether barred. For this reason, actions that seem to be more compatible with tort liability are sometimes judicially molded into inverse condemnation proceedings. A prime example is the "avigation easement" litigation. See, e.g., *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *United States v. Causby*, 328 U.S. 256 (1946); *Thornburg v. Port of Portland*, 233 Ore. 178, 376 P.2d 100 (1962). But cf. *Batten v. United States*, 306 F.2d 580 (10th Cir. 1962). In recent "sonic boom" cases, the discretionary function exception has been invoked to deny liability. See *McMurray v. United States*, 286 F.Supp. 701 (W.D. Mo. 1968); *Schwartz v. United States*, 38 F.R.D. 164 (D.N.D. 1965); *Huslander v. United States*, 234 F.Supp. 1004 (W.D.N.Y. 1964).

126 See *Stoeck, The Property Rights of Access Versus the Power of Eminent Domain*, 47 TEXAS L. REV. 733, 753-54 (1969); 3 NICHOLS §§ 10.2211[1] to [3].

127 A striking example generated by a taking for construction of a sewage treatment plant is *City of Crookston v. Erickson*, 244 Minn. 321, 69 N.W.2d 909 (1955).

128 See, e.g., *State v. Wilson*, 103 Ariz. 194, 438 P.2d 760 (1968); *State v. Tolliver*, 246 Ind. 319, 205 N.E.2d 672 (1965); 3 NICHOLS § 10.2211[3].

129 Where access is completely destroyed, compensation is usually recoverable. See *Stoeck*, *supra* note 126, at 740 n.21; 2 NICHOLS § 6.32.

130 23 Cal. 2d 390, 144 P.2d 799 (1943).

highway relocation project practically destroyed the visibility of the condemnee's business from the highway. In addition, direct access from the highway to the condemnee's land was rendered indirect and circuitous. Perhaps the court was actually concerned about resultant business losses, but chose to couch the legal issue in terms of access "rights" so as not to conflict with the widely-accepted rule that compensation for business losses is not recoverable as a separate item of damage.¹³¹ In any event, a number of courts have followed *Ricciardi*, requiring compensation in cases where access was rendered more indirect.¹³² In an equally imposing array of cases, compensation for impairment of access has been denied;¹³³ the California court itself has apparently had second thoughts.¹³⁴

Some courts, in awarding compensation, have relied on their state's constitutional provision for compensation when private property is taken "or damaged." Although these two words were introduced into a number of state constitutions for the purpose of liberalizing the compensability standard,¹³⁵ their significance ought not be overemphasized. Intrinsically, they manifest no clearer insight or direction than the single word "taken." No matter which terminology exists, courts must still formulate their own policy-oriented rationales for discrimination between compensable and noncompensable interferences. Further, technical analysis might compel the conclusion that the critical issue here is not "taking" or "damage," but whether or not the asserted right of access is "property" within the purview of the constitution. Again, the court is left to its own policy-making resources.

It is fair to say that no generally acceptable rationale for dealing with access impairment has yet emerged. One recent suggestion is that the rule of reason be applied and compensation awarded for any "substantial" or "unreasonable" diminution.¹³⁶ Whether the determination is to be made in physical terms, or economic terms, or by some other criteria, is not disclosed. That such vague

131 The leading case is *Mitchell v. United States*, 267 U.S. 341 (1925). The court stated, however, that the special amenability of land for particular business uses may properly be considered as an element bearing on its fair market value. While the Supreme Court has not always adhered to the Mitchell doctrine—see *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949)—it has never questioned the ruling. State courts have followed the same line of reasoning. See 4 NICHOLS § 13.3. 1 L. ORGEL, VALUATION UNDER THE LAW OF EMINENT DOMAIN § 162 (2d ed. 1953) [hereinafter cited as ORGEL].

132 E.g., *State v. Wilson*, 103 Ariz. 194, 438 P.2d 760 (1968); *Clayton County v. Billups E. Petroleum Co.*, 104 Ga. App. 778, 123 S.E.2d 187 (1961); *State v. Tolliver*, 246 Ind. 319, 205 N.E.2d 672 (1965); *Hendrickson v. State*, 267 Minn. 436, 127 N.W.2d 165 (1964); *Mississippi State Highway Comm'n v. Finch*, 237 Miss. 314, 114 So. 2d 673 (1959); *Balog v. State Dep't of Rds.*, 177 Neb. 826, 131 N.W.2d 402 (1964); *State Highway Dep't v. Allison*, 246 S.C. 389, 143 S.E.2d 800 (1965).

133 E.g., *Ray v. State Highway Comm'n*, 196 Kan. 13, 410 P.2d 278 (1966); *Jacobson v. State Highway Comm'n*, 244 A.2d 419 (Me. 1968); *Moses v. State Highway Comm'n*, 261 N.C. 316, 134 S.E.2d 664 (1964); *In re Lands of Williams*, 15 Ohio App. 2d 139, 239 N.E.2d 412 (1968); *Wolf v. Commonwealth Dep't of Highways*, 422 Pa. 34, 220 A.2d 868 (1966); *State ex rel. Woods v. State Rd. Comm'n*, 148 W. Va. 555, 136 S.E.2d 314 (1964).

134 The liberal approach embodied in *Ricciardi* and in *Bacich v. Board of Control*, 23 Cal. 2d 343, 144 P.2d 818 (1943) prevailed in *Breidert v. Southern Pac. Co.*, 61 Cal. 2d 659, 394 P.2d 719, 39 Cal. Rptr. 903 (1964). It was rejected, however, in *People v. Ayon*, 54 Cal. 2d 217, 352 P.2d 519, 5 Cal. Rptr. 151 (1960) and *Blumenstein v. City of Long Beach*, 143 Cal. App. 2d 264, 299 P.2d 347 (1956) (hearing denied by Supreme Court of California). See also *Colberg, Inc. v. State Dep't of Pub. Works*, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967), noted in 21 VAND. L. REV. 277 (1968).

Justice Traynor dissented from the decisions in *Bacich* and *Ricciardi*.

135 2 NICHOLS § 6.44; 1 ORGEL § 6.

136 Stoebeck, *supra* note 126 at 763-65.

distinctions generally lead into a semantic bog is illustrated by the following excerpts from a recent decision by the New York Court of Appeals:

It is beyond dispute that mere circuitry of access does not constitute a basis for an award of consequential damages [citing cases]. But, this legal proposition is controlling in a particular case only if, as a question of fact, the access involved is shown to be *merely* circuitous [citing cases]. If the facts established at the trial of a claim show that the access involved is more than merely circuitous so that it can be characterized as "unsuitable," compensability follows.

... "Circuitous," in its commonly accepted understanding, indicates that which is roundabout and indirect but which nevertheless leads to the same destination. "Suitable," in its commonly accepted understanding, describes that which is adequate to the requirements of or answers the needs of a particular object. The concepts are not mutually exclusive and, therefore, a finding that a means of access is indeed circuitous does not eliminate the possibility that that same means of access might also be unsuitable in that it is inadequate to the access needs inherent in the highest and best use of the property involved.

... [T]here is virtually no evidence to support the Appellate Division's finding that it was merely circuitous, though its circuitry was acutely apparent from the fact that the remaining access requires vehicles to cross an opposing stream of traffic on a heavily travelled bridge approach in order to reach a road paralleling the bridge approach and the bridge itself on the side opposite the claimants' property, and that that road intersects with a road which then leads under a bridge to the extreme northern portion of claimants' property, whereas the property taken would allow direct access from the bridge approach to the southern portion of the property. The evidence fairly compels the conclusion that the remaining access, concededly circuitous, was also clearly unsuitable to the established highest and best use of residential development. Since the evidence so clearly supports the finding and judgments of the Court of Claims, its judgments should be reinstated and the orders of the Appellate Division should be reversed.¹³⁷

Several recent decisions have held that impairment of view and seclusion may be taken into consideration in assessing severance damages in cases of partial taking of resort property for highway purposes.¹³⁸ By awarding compensation for frustration of investment-backed expectations, these courts may have adopted *sub silentio* Bentham's concept: "property is nothing but a basis of expectation."¹³⁹ But whether the increment of market value attributable to factors such as seclusion and view is "property," and whether its loss to public improvements is compensable are two different questions. Unfortunately, only one of the opinions in the three cases confronts these issues directly.¹⁴⁰ The issue is admit-

137 *Priestly v. State*, 23 N.Y.2d 152, 156-57, 295 N.Y.S.2d 659, 662-64, 242 N.E.2d 827, 829-30 (1968).

138 *Pierpont Inn, Inc. v. State*, — Cal. 2d —, 449 P.2d 737, 74 Cal. Rptr. 521 (1969); *Dennison v. State*, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968); *Hetland v. Capaldi*, — R.I. —, 240 A.2d 155 (1968).

139 J. BENTHAM, *THEORY OF LEGISLATION* 111 (1931).

140 See *Dennison v. State*, 22 N.Y.2d 409, 239 N.E.2d 708, 293 N.Y.S.2d 68 (1968) (Bergen, J., dissenting).

tedly complex, but the pathway to systematic analysis is by no means unmarked.¹⁴¹ Clearly, certain interferences associated with transportation must be borne by the owner even though they reduce the market value of his land. Judicial opinions ought be addressed to the critical issues: in what situations will compensation be granted, and does the instant case constitute one of them?

The Sixth Circuit rose to the challenge of an unusual fact situation to award compensation in a recent case where there had been no physical appropriation of land.¹⁴² The city of Detroit had commenced eminent domain proceedings against the landowners in 1950, with a view toward including their land in an urban renewal project. Ten years later the proceedings were discontinued. In the meantime, former tenants had vacated in anticipation of eviction by the renewal authority, and the deserted buildings were left to the mercy of vandals. Finally, in 1962, the city again initiated condemnation proceedings. By then, the structures were completely worthless and the owners faced a state court proceeding in which their property would be valued as unimproved land.¹⁴³ Concluding that this state of affairs was attributable to "misfeasance and nonfeasance" on the part of the city, the district court held that it had jurisdiction to award damages for the deterioration in value between 1950 and 1962. The circuit court affirmed, noting:

The City of Detroit's action can properly be considered state action and the accomplishment of what it claimed it had the right to do [i.e., value the properties as unimproved land] would indeed be a deprivation of plaintiffs' property "without due process of law" and if the city's aborted condemnation was a "taking" it was to be carried on "without just compensation," thus would it offend the Fifth and Fourteenth Amendments to the United States Constitution. 28 U.S.C. § 1331 provided Federal jurisdiction to vindicate those rights.¹⁴⁴

The forthright manner of this decision ought serve as a model for other courts and a warning to condemnors.¹⁴⁵

The Supreme Court handed down an interesting "no taking" decision during its last term.¹⁴⁶ The plaintiff owned land in the United States Canal Zone territory on the Panamanian border. The land contained a YMCA building and masonic temple. Rioting occurred in the vicinity of these buildings in January, 1964; they were entered, looted, and one of them was set afire. The rioters were then driven out by a contingent of U.S. Army troops, who deployed outside the buildings. The soldiers were later subjected to a barrage of rocks and similar missiles, as well as molotov cocktails and sniper fire. Finally, they were ordered into the buildings for their protection. The next day, they were

141 See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

142 *Foster v. City of Detroit*, 405 F.2d 138 (6th Cir. 1968).

143 This is in accord with the prevailing doctrine that in eminent domain proceedings, property is valued as of the date it is taken. 5 NICHOLS § 18.43; 1 ORGEL § 21.

144 405 F.2d at 144.

145 *Accord*, *Haczela v. City of Bridgeport*, 299 F.Supp. 709 (D. Conn. 1969). See generally Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HASTINGS L.J. 431 (1969).

146 *National Bd. of Y.M.C.A. v. United States*, 395 U.S. 85 (1969).

besieged and driven out of the buildings, which then became the subject of further firebomb attacks causing substantial damage.

Plaintiff sued to recover compensation from the United States for damages inflicted after the troops had retreated into the buildings. The court of claims denied relief, and the Supreme Court affirmed.

There was advance speculation that the court might reconsider the soundness of its *Caltex*¹⁴⁷ decision, denying compensation for destruction of private facilities by U.S. military units to prevent their falling intact into the hands of Japanese forces during World War II. But *Caltex* was not even mentioned in the opinion of the Court. Justices Black and Douglas, who dissented in *Caltex*, also dissented in *YMCA*. In their view, when the troops entered the buildings for their own shelter and protection they appropriated the structures "for the benefit of the public generally,"¹⁴⁸ i.e., to safeguard the Canal Zone from rioters. Subsequent property damage, they reasoned, was thus attributable to this taking.

Mr. Justice Brennan, however, speaking for the majority, found two alternative grounds for denying compensation. First, the troops were acting to protect the building when they occupied it; therefore its owner became the "particular intended beneficiary of the governmental activity."¹⁴⁹ Second, the governmental activity did not deprive the owner of the use of its property, since riot conditions had already rendered it unusable. As for the increment of damage attributable to the presence of the troops in or near the building, this was not a "direct and substantial enough government involvement to warrant compensation under the Fifth Amendment."¹⁵⁰

Mr. Justice Stewart, concurring, expressed concern over the second alternative. He could conceive of situations in which requisition of buildings for military purposes would be a taking, even though the owner was not thereby deprived of its use. Mr. Justice Harlan, concurring in the result, announced a different test for determining compensability of damage to private property as a result of riot control activities. "[T]he Just Compensation Clause may only be properly invoked when the military had reason to believe that its action placed the property in question in greater peril than if *no* form of protection had been provided at all."¹⁵¹ Applying this test to the facts, he concluded that it precluded the plaintiff from recovering. Comparing the Court's opinion with his increased risk test, he noted ambiguities in the "particular intended beneficiary" formulation that might result in a conflict with *Caltex*.¹⁵² He rejected the "indirect involvement" ground, focusing on the stipulated fact that the military had taken shelter in the buildings for their own protection.¹⁵³

147 United States v. Caltex, Inc., 344 U.S. 149 (1952).

148 395 U.S. at 99.

149 *Id.* at 92.

150 *Id.* at 93.

151 *Id.* at 94-95.

152 If, for example, the military deliberately destroyed a building so as to prevent rioters from looting its contents and burning it to the ground, it would be difficult indeed to call the building's owner the "particular intended beneficiary" of the Government's action. Nevertheless, if the military reasonably believed that the rioters would have burned the building anyway, recovery should be denied for the same reasons it is properly denied in the case before us. *Id.* at 97.

153 Ordinarily, the Government pays for private property used to shelter its officials,

To this author, the Harlan approach seems the soundest, most practical analysis of the "taking" issue in temporary emergency situations. The only certainty, however, is that *Caltex* and *YMCA* have not settled the troublesome question of compensation for military activities in zones of riot and armed conflict.

C. Just Compensation

There is growing recognition that, in the administration of compensation claims, condemnors enjoy a tremendous tactical advantage over condemnees. Most regrettably, there is evidence that some condemnors have used this leverage to effect settlements for amounts even lower than the recommendations of their own appraisers.¹⁵⁴ Overreaching on the part of public agencies is arguably no more conscionable than is the same tactic when employed in private negotiations. Hence, it follows that victimized condemnees may have a cause of action to set aside their "settlements" and recover more adequate compensation. If state courts do not provide an adequate remedy, then perhaps federal jurisdiction could be invoked by analogy to the *Foster* case.¹⁵⁵

Recent decisions furnish several indications of a liberal trend in compensation awards. As was mentioned earlier,¹⁵⁶ the highway access, loss of seclusion, and interference cases approach the question from the "property-taking" side and do not purport to alter the standards for determining the amount of compensation payable once an interest is held to have been "taken." In at least one area, however, valuation methods are undergoing reexamination. Recent cases involving compensation for takings of land subject to leasehold interests have abandoned the traditional "unit valuation" technique in favor of independent valuation of the individual component interests.¹⁵⁷ Although this approach may result in awards in excess of the fair market value of an unencumbered fee simple in the land, it finds support in both policy and precedent.¹⁵⁸

Given the wide variety of extant governmental and quasi-governmental programs utilizing the power of eminent domain, a large volume of condemnation litigation is likely in the foreseeable future. Hopefully, some of the many unresolved "property-taking" and "compensation" issues will be clarified, even though perhaps not finally settled.

Eminent domain articles of more than routine interest have recently become available.¹⁵⁹

and I would see no reason to make an exception here if the military had reason to know that the buildings would have been exposed to a lesser risk of harm if they had been left entirely unprotected. *Id.* at 98-99.

154 See Berger & Rohan, *The Nassau County Study: An Empirical Look into the Practices of Condemnation*, 67 COLUM. L. REV. 430 (1967).

155 See text accompanying notes 142-45, *supra*.

156 See text accompanying notes 125-45, *supra*.

157 *People v. Lynbar, Inc.*, 253 Cal. App. 2d 870, 62 Cal. Rptr. 320 (Ct. App. 1967); *State Highway Dep't v. Thomas*, 115 Ga. App. 372, 154 S.E.2d 812 (1967); *Sholom, Inc. v. State Rds. Comm'n*, 246 Md. 688, 229 A.2d 576 (1967).

158 See Johnston, "Just Compensation" *For Lessor and Lessee*, 22 VAND. L. REV. 293 (1969).

159 Aloï & Goldberg, *A Reexamination of Value, Goodwill, and Business Losses in Eminent Domain*, 53 CORNELL L. REV. 604 (1968); Ayer, *Allocating the Costs of Determining "Just Compensation"*, 21 STAN. L. REV. 693 (1969); Dasso, *Changing Economic Conditions and the Condemnation Value of Real Property*, 48 ORE. L. REV. 237 (1969); Klein, *Eminent Domain: Judicial Response to the Human Disruption*, 46 J. URBAN L. 1 (1968); *Symposium, Eminent Domain*, 20 HASTINGS L.J. 431 (1969).