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SHOPPING CENTERS AND LAND CONTROLS

Louis F. Bartelt, Jr.*

Introduction

Although it has become trite to talk about the post-war "rush to the suburbs," a phrase that has achieved the dubious distinction of a cliché, it remains a fact that in the decade-plus since the end of hostilities there has been an unprecedented mass migration to greener grasses in search of the good life, which evidently should include a split-level home, togetherness and the backyard cook-out. There is no doubt that this kind of movement gains impetus from an economy that gives the appearance at least of being sound,¹ and, with the exception of a few not-to-be-taken-seriously chronic ailments (high-taxes, surpluses, inflation) and occasional, expected, and isolated ups and downs, the national economy is a picture of robust health content in a prognosis of long life.

Unfortunately, boom times do not always lend themselves to consideration, reflection and sound judgment. Quick decision and quicker action is deemed necessary if one is not to be left at the depot when the gravy train pulls out. This thoughtlessness, often engendered by the desire for a fast and easy buck, reproduces itself in the form of municipal problems that increase the frequency and intensity of the city father's headaches. It is small wonder that their reaction sometimes is equally hasty and ill-considered, and not always in the best interests of the public welfare.

Among the many problems to which the "rush" has given birth are those evolving from one of its by-products, another post-war phenomena — the shopping center. Although shopping centers existed for a number of years prior to the war,² the great majority of them are less than fifteen years old. Moreover, there is nothing which evidences a slackening of the pace at which these centers are being planned and built. Indeed, there is every indication that, in addition to increasing numbers of the large regional centers, their scaled-down prototypes will become commonplace in all but the smallest communities.³ The shopping centers, in short, have become a way of life. Their proximity to residential areas (particularly relatively new developments) make them con-

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1 In order to get this impression one need only examine casually the reports of house construction, the quarterly reports of large corporations, and the new appliances and automobiles of one's neighbors.

2 Morris, Shopping Centers — The Role of the Lawyer, 1955 U. ILL. L.F. 681. The author states that the earliest shopping center existed in Baltimore in 1907; the first planned centers were built in the 1920's. As of the date of the article, 1,100 centers were in operation and 2,200 were in the planning or building stage.

3 E.g., in Valparaiso, Indiana (pop. 15,000), two separate requests have been submitted to have several acres on the city's fringe rezoned to permit a shopping center. The "strip" type center is becoming a familiar sight in smaller communities although it apparently is not favored by planners. See Kneier, The Future of Zoning, 1954 U. ILL. L. F. 281, 297.
venient; their adequate parking facilities make them desirable; their oft-times
tastefully designed buildings and landscaped grounds make them attractive. In
view of these attributes (almost totally lacking in the old central business
districts) it is not difficult to understand their success and their rapid reproduc-
tion.

It is inevitable, however, that the success, characteristics, and location of
shopping centers will have an effect not always and entirely to the liking of
certain segments of the community. They are traffic generators; their locations
frequently violate traditional concepts of zoning which call for separation of
residential and commercial districts; they stiffen the competition for desirable
land; and they have a marked, depressing effect on older businesses in the
central districts. These problems (and they are not exclusive) necessitate
thoughtful and objective planning if blight in the established business districts
is to be avoided and the newer sections of established cities, suburbs, and new
communities are to immunize themselves against the urban illnesses that infect
so many municipalities today.

Two methods of controlling the problems of urban growth in general, and
of shopping centers in particular, are subdivision and zoning regulations. With
these tools, a community can, for better or worse, discourage or encourage shop-
ning center development. The future of shopping centers and the effect they
may have on their host communities will depend in part upon how well or how
badly, for what purpose and to what ends the municipal artisans employ the
instruments at their disposal.

I. SUBDIVISION CONTROL

The problems of subdivision control may seem somewhat alien to a dis-
cussion of shopping centers, but certain aspects of this type of land use control
have an important though indirect bearing on the development of shopping
centers. It is common knowledge that a shortage of desirable, undeveloped land
exists in many areas of the nation. The idea prevalent in the past that com-
mercial and industrial developments could be relegated to the least desirable land
is now discredited. It is conceded generally that the same qualities of undevelop-
ed land are desirable and sought after whether the prospective use is for resi-
dential, commercial or industrial purposes. It is true, of course, that land that
cannot be developed economically for residential purposes might be acceptable
to a commercial user because of the promise of a greater return on his invest-

4 This is evidenced by various methods adopted to counteract the losses suffered to the
outlying shopping centers. See, e.g., Wisconsin’s urban redevelopment statute which provides
for tax exemptions to encourage the prevention and removal of blight. Wis. St. Ann. §
66.409 (1957); Chicago’s “Perimeter Plan” is designed to provide, so far as possible, the
prototype of the suburban shopping center in a highly developed urban area. Under the plan,
a thoroughfare is built around a business district. Within the encircled area, no vehicular
traffic is permitted, and all non-commercial buildings are removed. See Morris, supra, note 2,
at 707; Toledo’s experimental “Shopping Mall” plan, whereby several streets in the downtown
shopping district are blocked to traffic. The “Mall” is beautified with shrubs, flowers, and

5 "...[L]and for commercial or business expansion requires most of the same general
qualities sought by residential and industrial users....[I]f the community is to grow it needs
level, well-drained sites for industrial expansion. Land of this character is also sought by
realtors for subdivision and shopping center development.” Horack, Land Controls in an Urban
ment. If, however, heavy expenditures are necessary before any structural development can take place, e.g., the installation of an extensive drainage system, only operators with substantial financial resources could possibly afford it. This means that small-scale commercial developers will be combing the market for undeveloped land of essentially the same type as that on which the residential subdivider also has his eye. Even the large operator often may not be eager to finance costly land improvements before he can utilize the property for his purposes. This competition for land, created by its topographical features, is honed to even a keener edge by its geographic location. The success of the three types of use mentioned above depends to a greater or lesser degree on the same things — availability of municipal services, proximity to arteries of transportation, and — at the risk of a contradiction — proximity to each other in the form of consumers, markets, labor supply, services, etc.

Assuming then that the prospective developer of a shopping center is casting about for a desirable site, with industry and the residential subdivider close on his heels (or ahead of him), what are some of the problems with which he might be faced? What aspects of subdivision control inure to his benefit, or his detriment, and what relief may he expect at the hands of the local legislative body or of the judiciary?

Preliminary to a discussion of these questions certain facets of the basic problem should and can be disposed of in a sentence or two. In the first place, it is not the purpose of the writer to discuss in any detail the attributes of land which make it desirable for shopping center use.⁶ The assumption is that the developer has located a site that satisfies his needs and desires. Secondly, the developer will face few if any problems if he is fortunate enough to find desirable land on the urban fringe which is unannexed, unzoned and unsubdivided.⁷ If Farmer Jones is willing to sell at a price he can afford to pay, the developer — to put it in the vernacular — has it made. We shall refuse to worry about him. If the land is zoned his problems multiply. This question will be discussed under a separate heading.

The developer whose problems form the basis for this discussion is the one who rockets to the zenith of elation upon discovering a natural site for a shopping center, and then plummets to the nadir of moroseness upon finding that it has been subdivided into residential blocks and lots. With rare exceptions land so divided is impossible to utilize for shopping center purposes without making significant changes in the plat.⁸ Shopping centers require substantial acreage,⁹

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⁶ For a discussion of those things which are sought after in choosing a shopping center site, see Morris, supra note 2.

⁷ “Acquisition of the proposed tract by purchase from multiple owners may confront the lawyer with complexities in the nature of vacations or dedications of streets, roads, alleys, as well as easement problems.” Morris, supra note 2, at 686. There is no apparent reason why the same problems would not be present if the entire tract were purchased from the original subdivider, with the exception perhaps of difficulties in getting multiple owners to sell, and price. Some of the problems of dedication and vacation will be discussed below.

⁸ Restrictive covenants also are important considerations at times. I leave this problem to other times and other places. See Horack, supra note 5, at 511; and McCarthy, Restrictive Covenants, 1955 U. ILL. L. F. 709.

⁹ Morris, supra, note 2. The author classifies shopping centers into three groups — the “neighborhood center,” requiring five to ten acres; the “community center,” requiring ten to twenty-five acres; and the “regional center,” requiring a minimum of thirty-five acres.
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and the presence of areas dedicated to the public for streets, alleys, parks and school sites very often preclude the possibility of acquiring sufficient, compact and contiguous land for the proposed center. In addition the cost of lots intended originally for residential development may be so high as to make the total price prohibitive. Assuming, however, that the latter consideration presents no major obstacle, the presence of the plat can still effectively stymie the development of the shopping center.

Several choices are open to the developer who faces this problem. He can skip over the subdivided land to the acreage beyond. This is undesirable for several reasons, the inclusio alii of which is financial. A shopping center too far removed from its host community undoubtedly will expire in infancy from economic malnutrition. Another choice open to the developer is to find other desirable land. The assumption is that this is not possible. The third choice is to have the plat, with all of its property dedicated to public use, vacated. If this result can be achieved without too much delay and expense, it is without question the most feasible approach the developer can take.

A great deal has been written in the recent past about subdivision control.\(^{10}\) This type of land use regulation is designed to assure a healthy development of the municipality's outlying areas. It was prompted in great part by irresponsible, haphazard and excessive subdividing of get-rich-quick promoters bent on maximizing profits during boom times. In the event of recession, these subdivisions frequently become a drug on the market. It was not uncommon during the depression years to see large subdivisions, completely undeveloped structurally, with grass growing in their neatly laid out and very often superbly built streets and sidewalks.

Most of the regulatory measures relative to subdivision control are in the nature of improvement requirements. Conformance with these requirements affords a measure of protection from haphazard development and supposedly, because of the cost element, serves as a brake against excessive subdividing. Whether the type of regulation now in vogue achieves the latter result is doubtful,\(^{11}\) and it is hardly open to question that a myriad of undeveloped lots is an economic factor not to be taken lightly.\(^{12}\) As one author observed:

An excess of subdivided lots may mean not only that whole areas will end up as dead-land, undeveloped but useless as agricultural land because of divided ownerships, confused title and high tax assessments, but also that areas will be left only partially developed.\(^{13}\) This apparent concern with excessive subdivision may provide the materials from which the shopping center developer can forge a weapon or two. There is some

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10 Among the many articles are the following: Melli, Subdivision Control in Wisconsin, 1953 WIS. L. REV. 389; Note, An Analysis of Subdivision Control Legislation, 28 IND. L. J. 544 (1953); (Both of these articles contain complete citations to subdivision control legislation); Note, Land Subdivision Control, 65 HARV. L. REV. 1226 (1952); Hester, Subdivision, 28 ROCKY MT. L. REV. 471 (1956); Reps, Control of Land Subdivision by Municipal Planning Boards, 40 CORNELL L. Q. 258 (1955).

11 See generally, Note, An Analysis of Subdivision Control Legislation, supra note 10, at 556.

12 "Unregulated subdividing which results in an excessive supply of lots may also threaten the economic stability of the community and may eventually result in a slum area." Note, An Analysis of Subdivision Control Legislation, supra note 10, at 545.

13 Melli, supra note 10, at 394.
evidence that improvement controls are not satisfactory methods of discouraging excessive subdivision. As a means of bolstering the defenses to this type of urban enemy, some states apparently have authorized plat disapproval when excessive subdivision is deemed inimical to the public interest. Two questions are pertinent relative to this type of regulation. In the first place, does the language of these statutes actually authorize subdivision disapproval on the ground that there is already an excessive number of vacant lots in the community? Secondly, if this is an accurate analysis of the legislative intent, can such regulations stand the tests of due process and equal protection? Both of these questions seemingly must remain unanswered for the present.

Proceeding, however, on the assumption that both questions can be answered affirmatively, of what value is such legislation to the shopping center developer? If the tract is in the process of subdivision it may be possible to prevail upon the authorities to disapprove the plat. If these efforts are successful there always is the possibility that the subdivider will seek relief through boards of appeal and the courts. If the plat is approved the developer might challenge the decision of approval — assuming for some reason he has "standing" — as arbitrary or unreasonable, or inimical to the public interest (in those states where this is a ground for disapproval). Attendant on this method of relief, of course, is high cost in terms of time and money. And whatever the result, the original subdivider might be so miffed as to refuse to sell the property to the developer under any conditions.

If the tract sought for the shopping center already has been platted, the developer's path is clear. Whether the area is still owned exclusively by the original subdivider, or whether some of the lots have been sold to individual buyers, the first step is to acquire the area or a sufficient part of it, or at least (and undoubtedly sounder from a business point of view) acquire options on so much of the land as he will need. The more formidable obstacle that he must overcome before the shopping center can begin to materialize is the vacation of


15 "These statutes evidently are intended to make possible direct action against residential subdividing in excess and in inappropriate areas and have discarded the zoning-subdivision dichotomy regarding use control." Note, An Analysis of Subdivision Control Legislation, supra note 10, at 556. The author cites Pennsylvania, Washington and Wisconsin as states where this type of authority exists. In the appendix to the article he lists Delaware, Georgia, Maine, New Hampshire, North Dakota, and West Virginia as having limited or possible authority. This type of statute is exemplified by the declaration of intent of the Wisconsin subdivision legislation. "The regulations provided for by this section shall be made with reasonable consideration, among other things, of the character of the municipality, town or county with a view of conserving the value of buildings placed upon land, providing the best possible environment for human habitation, and for encouraging the most appropriate use of land throughout the municipality, town or county." Wis. Stat. Ann. § 236.45(1) (1957).

16 See Melli, supra note 10; Note, 28 Ind. L.J. 544 (1953). Both authors suggest that subdivision disapproval on the sole ground that there already are too many lots might be unconstitutional.

17 Apparently there are no cases either interpreting the legislative intent or passing judgment on the constitutionality of the presumed intent.

18 If disapproval can be premised upon "public interest" grounds, it would seem that approval in the face of considerations that do not serve the public interest could be deemed arbitrary and unreasonable and subject to reversal. In view of the uncertainty and nebulousness surrounding the "public interest" question, the author admits to some dubious speculation.
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the plat, including all of the property dedicated to public use — streets, alleys, parks and school sites.

Allusion was made earlier to the depressing effect that outlying shopping centers have had on the central business districts. The magnetic qualities of the modern shopping center — convenience, parking facilities, attractiveness — have had such a strong pull on the consuming public that the late Frank Horack was prompted to observe that

The threat of the shopping center to the central business district is so real that it would be hazardous to predict that all consumer goods and service enterprises can survive in the central business district, in all but the smallest communities, for more than a decade. Customer preference for easy parking and modern concepts of aesthetics pose an almost insoluble problem to land owners who have failed to make downtown shopping both convenient and attractive.¹⁹

Faced with the prospect of the deterioration in the city’s core and the progeny of problems to which such deterioration gives birth, under pressure from downtown businessmen who inevitably will feel the pinch of declining sales, it is not surprising that a request for vacation to clear the way for a shopping center will meet with something less than an enthusiastic reception. These pressures probably will be more prevalent in smaller communities where associations between governmental personnel and the citizenry usually are closer. Indeed, it is quite likely that downtown businessmen will be members of the city councils, planning commissions, or boards of appeal. Human nature being what it is, the success of a petition for vacation in some instances will be doubtful. If the assumption of sinister motives flies in the face of the theological admonition to put the best construction on everything, it is made only to afford an entry to the problem at hand, to wit, the rights of a developer so far as plat vacation is concerned.²⁰

The question of vacation has many ramifications. It can involve the rights of the public, of the original subdivider, and of other private interests, as well as of the person seeking vacation. Although it is the latter with which we are concerned, his rights are interlocked with those of the public and other private individuals.

If the original subdivider sees an opportunity to unload his investment, or a substantial part thereof, in one fell swoop, thus avoiding the uncertainty, delay, and headaches of individual lot-by-lot sales, he quite likely will aid and abet the shopping center developer in his attempt to free the land of its gridiron of streets and alleys.²¹ How successful they will be depends in part upon whether others have acquired rights in the subdivision by virtue of having purchased lots. If no lots have been sold, the right of the owner²² to vacate his plat seems

²⁰ In the discussion of the problem no account is taken of the jurisdictional variations so far as dedication is concerned, e.g., the question of acceptance. The assumption is that dedication of streets, alleys, etc., is complete regardless of varying statutory requirements. See McQuillan, Municipal Corporations §§ 33.24, 33.29, and 33.42 (3d ed. 1950).
²¹ Once land has been dedicated to public use the dedication is irrevocable by the dedicatory. Id., § 33.60.
²² In zoning cases, holders of options to purchase have been held to have “standing” enabling them to maintain actions for zoning changes. Id., § 25.292.
fairly clear, particularly where no question of street vacation is involved.23 After lots have been sold with reference to streets, the problem of vacation becomes more difficult.24 As a general proposition, the consent of the owners of individual lots must be acquired as a prerequisite to vacation,25 since they purchase their lots in the expectation that designated streets and other public places will be available for their use.26 This general rule is subject to the qualification in most states that owners of lots remotely situated from the streets to be vacated have no standing to complain in the absence of special circumstances.27 The attitude of the courts is reflected in a New Hampshire case in which it was said, How far the lay-out of the whole tract into some 200 lots concerns the purchaser of an individual lot is a question of fact. . . . [T]he relation must be such as to create substantial equities before the relief here sought can be granted.28

Under these circumstances, it might be possible for downtown businessmen, either individually or by pooling their resources, to acquire strategically located lots in a subdivision and block shopping center development by refusing to consent to the proposed vacation.29 Obviously, this is an extreme measure, and any practical value that it might have would depend upon getting timely information of the proposed development before options were acquired or vacation proceedings were begun.

In addition to individual rights that may be affected by vacation, the power to vacate and the rights of the public are also pertinent to a consideration of the general problem. Ordinarily the legislative power to vacate streets is delegated to municipalities with full authority to decide when and whether streets should be vacated.30 This power, of course, is subject to any constitutional or legislative limitations but, with certain exceptions, it does not depend upon the consent of the owners of abutting property.31 In some states courts are given

23 Littler v. City of Lincoln, 106 Ill. 353 (1883) (portion of plat not part of which abutted on streets adjoining properties of other owners); Schemmel v. Town of Alford, 214 Iowa 321, 242 N.W. 89 (1932) (vacation permissible when there are no streets or highways). In some jurisdictions vacation apparently is permissible even though land has been dedicated for street purposes. Conner v. Iowa City, 66 Iowa 419, 23 N.W. 904 (1885) (all of abutting land on unopened streets owned by petitioner); Stockton v. Board of Comm’rs, of Pittsburg County, 184 Okla. 150, 85 P.2d 403 (1938) (vacation even of streets and alleys permissible when justified by facts); In re Vacation of Plat of Garden City, 221 Wis. 134, 266 N.W. 202 (1936) (dedicated areas not accepted). It should be noted that vacation invariably is subject to local laws which may differ on the question of vacation when streets are involved. Sarvis v. Caster, 116 Iowa 707, 89 N.W. 84 (1902) (streets should not be vacated if needed for public use).

24 Owners acquire rights in designated streets and other public places. Stevenson v. Lewis, 244 Ill. 147, 91 N.E. 56 (1910); Brewer v. City of Pine Bluff, 80 Ark. 499, 97 S.W. 1034 (1906); White v. Moore, 139 App. Div. 269, 125 N.Y.S. 1012 (1910).


26 Stevenson v. Lewis, 244 Ill. 147, 91 N.E. 56 (1910).


authority to order vacation under certain circumstances, but aside from the isolated instances in which they may do so, they play relatively minor roles in vacation matters.

Assuming an application for vacation and absent any problems of individual rights, what factors are taken into consideration in determining whether vacation should be ordered, and how far will the courts go in reviewing the decision of the vacating authorities?

It is axiomatic that a street necessary for public use and convenience may not be vacated, and whether the necessity exists will invariably be a question of fact subject to the determination of the vacating authority and reviewable only when there is evidence of fraud or a plain abuse of power. Even in the face of these general propositions, however, there are a number of rules which circumscribe the question of vacation. Unfortunately for the shopping center developer petitioning for vacation, whatever ammunition there is available for an attack against the decision on vacation is in the arsenal of those protesting vacation. Consequently, any discussion must proceed from the point of view of the shopping center's opponents and their ability to block vacation, or at best to analogize from cases unfavorable to the developer's position.

Among the rules limiting the city's power to vacate — recognized in most jurisdictions — is the prohibition of vacation for private purposes. This principle, viewed superficially, appears as an almost insurmountable obstacle in the way of vacation. It is, however, subject to a number of significant exceptions. There is an important distinction between vacating for the benefit of private interests on the one hand, and vacating for the public interest with benefits enuring to private interests on the other hand. Only the former is objectionable. Although street vacation must be carried out for the public interest, the mere fact that special benefits will accrue to private individuals does not of itself negate the propriety of the action. It is only when vacation is prompted by considerations of private, rather than of public interest, that it is invalid. “Public interest” is another of those weasel phrases capable of having its meaning changed to suit the occasion.

Fugate v. Carter, 151 Va. 108, 144 S.E. 483 (1928). If the abutting owner suffers damage as a result of the vacation, the municipality may be required to compensate him for his loss. Johnston v. Lonstorf, 128 Wis. 17, 107 N.W. 459 (1906); Heinrich v. City of St. Louis, 125 Mo. 424, 28 S.W. 626 (1894); Bowers v. Machir, 191 S.W. 758 (Tex. Civ. App. 1917).

32 See Wis. Stat. Ann. § 236.43 (1957), permitting street vacation in plats if the plat was recorded forty years prior to the application and the dedicated portion never was used for street purposes. It is unlikely that a developer intent on building a shopping center would care to wait that long.

33 Walker v. City of Des Moines, 161 Iowa 215, 142 N.W. 51 (1913); City of Goldfield v. Golden Cycle Mining Co., 60 Colo. 220, 152 Pac. 896 (1915).

34 Lockwood v. City of Portland, 288 Fed. 480 (9th Cir. 1923).

35 No case was found in which a decision denying vacation was reviewed judicially.

36 See McQuillan, op. cit., supra note 20, § 50.186, and cases cited.


take too hard a look at this aspect of vacation, unless the impropriety is so gross as to compel notice thereof.\textsuperscript{40}

Closely associated with the matter of public interest are the questions of motive and the discretion of municipal authorities. The courts generally deny that they are concerned with motive;\textsuperscript{41} yet they can and do inquire into allegations of fraud and abuse of discretion.\textsuperscript{42} In some of the cases these two factors seem to blend into one another by imperceptible degrees. While claiming in one breath to be unconcerned with motive, a court in the next breath may insist that it has the prerogative to delve into the facts to determine whether the purpose of vacation was proper and in accord with the tenets of valid vacation. For example, when a court considers a vacation invalid because its purpose was to benefit abuttees, it is a bit difficult to divorce this from the question of motive. If the purpose of vacation was to benefit abuttees, then the decision to vacate was motivated — in part, at least — by concern for private interests. Some courts appear to be candid enough to admit that satisfactory separation of the two is difficult, if not impossible;\textsuperscript{43} others continue to insist upon recognition of the dichotomy.\textsuperscript{44} What probably is meant by the latter is that a vacation decision, in fact redounding to the benefit of the public, will not be upset simply because the authorities’ action was prompted by a desire to aid private individuals and without a thought for the effect — good or bad — that vacation would have on the public interest. If this is the recognized distinction, there is some logic in the position.

It is also possible that abuse of discretion may exist in the absence of improper motives. For example, the closing of a street because of high maintenance costs could hardly be challenged on motivation grounds, but it may be an abuse of discretion because the street is necessary for public use. Most of the cases, however, do not lend themselves to so pronounced and observable a cleavage. The question of private benefit often seems to be a factor. If the shopping center developer should be able to persuade the authorities to vacate streets in a new subdivision\textsuperscript{45} the threat of court action alleging abuse of discretion may

\textsuperscript{40} Lincoln State Bank v. City of Chicago, 263 Ill. App. 625 (1931) (payment as condition precedent to vacation).


\textsuperscript{43} “[T]he motives which induce municipal proceedings of this kind are always of a mixed character. Regard for private interests are necessarily intertwined with public interest. . . .” State v. City of Elizabeth, 54 N.J.L. 462, 24 Atl. 495, 497 (1892).

\textsuperscript{44} In Windle v. Valparaiso, 62 Ind. App. 342, 113 N.E. 429 (1916), the court disclaimed its right to consider motive, but talked about “constructive fraud,” which it defined as invalid action in the absence of proven fraudulent intent. Query whether this could be another method of considering motive without mentioning it. In Pederson v. Town of Radcliffe, 226 Ia. 166, 284 N.W. 145 (1939), one of the town council members was interested in the vacation. The ordinance was passed at a special meeting, but the court ignored the element of motive, content to invalidate the vacation as an abuse of discretion.

\textsuperscript{45} The fact that the request for vacation comes from private individuals is of no apparent significance. Such request undoubtedly is the rule rather than the exception. Rock Hill v. Cothran, 209 S.C. 351, 40 S.E.2d 239 (1946); State v. Elizabeth, 54 N.J.L. 462, 24 Atl. 495 (1892); Village of Bellevue v. Bellevue Improvement Co., 65 Neb. 52, 90 N.W. 1002 (1902).
induce them to change their minds and refrain from taking the requested action. Downtown businessmen (if they are proper parties) could threaten suit on the ground that the proposed vacation was solely for the benefit of private interests. This might be particularly true in instances where residential development of the subdivision, or a part of it, was probable within the foreseeable future, and opening of the streets would be necessary and convenient. If the situation were desperate enough, the downtown businessmen, although improper parties to challenge the vacation, might instigate action by those who would be adversely and directly affected by vacation.

Considering the sum total of the authorities, it is at best doubtful that direct action to block or nullify vacation would attain a substantial measure of success. The courts are reluctant to interfere with the legislative wisdom and prerogative, and apparently are quite insistent upon allegation and clear proof of fraud or collusion. If the vacating authorities put their minds to a decision favorable to vacation, the only apparent method of effecting a change in attitude is by indirect pressures, subtle or otherwise.

The writer admits to a certain amount of nebulousness in the foregoing discussion. The problems of subdivision control and vacation seem never to have taken this particular slant. The complete dearth of cases suggests either that the problem is anything but crucial, or that shopping center developers, rebuffed in their requests, are not willing to exert the time, money and effort to do battle for their rights. It is possible that in the face of evidence of excessive subdivision and discrimination against shopping centers, the legislatures might authorize greater control of subdividing, particularly with respect to amount and to the appropriate use of land, and also enhance the rights of those allegedly affected adversely by present practices of vacation.

II. ZONING

Judging from the number of pertinent cases, the shopping developer will find that zoning is of considerably greater importance and raises significantly more problems than its sibling, subdivision control. Although both were sired

46 Simply being a member of the community and suffering no damage different in kind from the rest of the public does not give one standing to challenge a vacation ordinance. Hebb v. City of Bartow, 142 Fla. 78, 194 So. 312 (1940); Shaw v. Liggett & Myers Tobacco Co., 226 N.C. 477, 36 S.E. 2d 313 (1946); Barker v. City of Charleston, 134 W. Va. 754, 61 S.E. 2d 743 (1950).
48 In view of the number of shopping centers in operation, abuilding and planned, one might wonder whether the problem exists at all. An empirical study to determine whether the problem exists, its magnitude and prevalence may prove valuable in terms of future legislation relative to subdivision control and judicial review.
49 "Preoccupation with the amazingly rapid expansion of suburban areas, usually achieved through the process of large-scale subdividing, may easily obscure perception of the haphazard manner of the typical city's movement to its outer limits." Note, An Analysis of Subdivision Control Legislation, 28 Ind. L. J. 544, 544-45 (1953).
50 "The community has a legitimate interest in any new subdivision. . . . The original layout of an area will determine its character for an indefinite period of time." Melli, Subdivision Control in Wisconsin, 1953 Wrs. L. Rev. 389, 394.
by the same general policy considerations,\textsuperscript{51} their functions differ—subdivision control regulating the lay-out of a given area; zoning the use to which the land can be put. Although subdivision control still is in its swaddling clothes, and zoning may yet be adolescent, both are maturing, the latter with considerable rapidity. Concepts new only yesterday may be discarded tomorrow,\textsuperscript{52} with consequent implications—sometimes favorable, sometimes unfavorable—for the developer. The tremendous post-war emphasis on planning and its enforcing arm, zoning, has given rise to ideas of community living that were alien doctrine a few decades ago. The concept of extraterritorial zoning, for example, still in a tentative stage of development and acceptance,\textsuperscript{53} can not be ignored by developers.

Assuming then that the developer has found a site desirable for the location of a shopping center, that it is either unsubdivided acreage, or, if platted, that there are no problems of vacation, he may yet have to overcome an unfavorable zoning regulation before he can proceed with his shopping complex. In any given case this obstacle could be more formidable than the acquisition of a desirable site and could be present whether the land is in an area relatively underdeveloped, and whether it is annexed or unincorporated. In his attempt to affect a zoning change he may be confronted with several facets of the zoning polyhedron. These could run the gamut from genuine concern for orderly community development and traditional (and sometimes outmoded) concepts of zoning to parochial ideas of the function of zoning, and extralegal pressures.

The general tenets of zoning law are too familiar to merit detailed discussion. Suffice it to say that in passing on the validity of zoning ordinances the courts attempt to strike a balance between the public interest on the one hand and private rights in property on the other. In so doing they consider the adverse effect on property values and compare it with the benefits accruing to the public as a result of the zoning restrictions. In applying the guiding principles, including the rule of reasonableness and substantial relationship to police power objectives—public health, safety, morals and general welfare—cognizance is taken of the character of the neighborhood, the land use of nearby property, the overall development of the community, and adherence to a comprehensive plan.\textsuperscript{54}

How and to what extent these principles are invoked by those desiring or in opposition to zoning changes is reflected in the cases involving business uses in general, and shopping centers in particular.

\textsuperscript{51} "Subdivision control is . . . closely related to zoning control in that both are preventive measures intended to avert community blight and deterioration by requiring that new development proceed in defined ways and according to prescribed standards. . . . The two are mutually dependent because the layout of an area is inseparable from the character of the use to be made of the land." Melli, \textit{supra} note 50, at 389.

\textsuperscript{52} "Today it appears that there is no utility in attempting to create a hierarchy of classifications, but rather the problem of land management is to establish such a pattern of uses that one will not seriously interfere with another. . . . The focus now is upon the effect of a particular land use on the total community development. . . ." Horack, \textit{Land Controls in an Urban Society}, 28 Rocky MtN. L. Rev. 502, 504 (1956).


\textsuperscript{54} See generally, McQuillan, \textit{op. cit., supra} note 20, § 25.40.
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Not infrequently the proposed site of a shopping center, particularly the larger ones, will be in areas relatively undeveloped, although close enough to the consumer market to be economically practical. Whether these areas are within or without the corporate limits is often of no great significance. If it is annexed land the zoning ordinances of the municipality can be and usually are made applicable. If the land lies in unincorporated areas it still may be subject to use regulation, either by virtue of a county ordinance or through extraterritorial control of the nearby city. Territory of this kind, if within the city limits often (but not always) is restricted to residential uses, and, if beyond the corporate boundaries, it ordinarily is zoned "suburban" or "agricultural", classifications which usually prohibit commercial or business development. On the whole, the response of the courts to zoning of undeveloped lands to the exclusion of business and industry has been favorable. The major exceptions to the validity of such ordinances relate to the questions of development and appropriate land use. The shopping center developer may be able to use these limitations as avenues of approach when asking for zoning changes or when challenging the reasonableness of the regulation. The questions of structural development and appropriate use often complement one another. If the area is unsuitable or undesirable for residential purposes, it will remain undeveloped so long as the zoning regulation remains unchanged. Similarly, if there is little or no residential development, it can be assumed that prospective homeowners and builders consider the area undesirable. An illustration of this is found in a New York case in which the Court of Appeals affirmed the invalidation of a regulation restricting land to residential use. In close proximity to the area was a city-operated incinerator and a creek into which raw sewage was dumped. Both of these enveloped the landscape in offensive odors. The emphasis in the opinion was on the fact that the property could not be used for residential purposes in the foreseeable future. Considering the facts, the case admittedly is somewhat atypical. But it does serve to illustrate the proposition that regulations will be declared invalid when they stifle development for an unreasonable length of time.

Aside from factors relating directly to desirability of the area for residential purposes, the courts will look also to development considerations and neighborhood characteristics. For example, in Quilici v. Village of Mt. Prospect, a zoning regulation permitting business use in 1928, when the property was pur-

55 In San Diego County v. McClurken, 222 P. 2d 688 (Cal. App. 1950) the court said that county zoning will be scrutinized more carefully than city zoning.
57 The more enlightened attitude of the courts is epitomized in Acker v. Baldwin, 101 P. 2d 505 (Cal. App. 1950) in which the court said, "[Z]oning looks to the future not the past. . . . An orchard or grain field of today is a thriving, builtup residential section tomorrow. . . ." For a general discussion of this problem see Reps, The Zoning of Undeveloped Areas, 3 Syracuse L. Rev. 292 (1952). For views similar to those expressed in Acker v. Baldwin, see Marblehead Land Co. v. City of Los Angeles, 47 F.2d 528 (9th Cir. 1931); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949); Anderson v. Jester, 206 Iowa 452, 221 N.W. 354 (1928); West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881 (1937).
59 399 Ill. 418, 78 N.E.2d 240 (1948).
chased, was amended in 1944 to a residential classification. At the time of the amendment there were no houses within a half mile of the subject property, and none was built in the intervening four years from the time of the amendment to the decision in the Supreme Court of Illinois. The court held the amending ordinance invalid as arbitrary and unrelated to police power objectives. In support of its decision it considered the use to which adjoining property was put, the character of the neighborhood, and the decrease in property values. In a Florida case the court used the foreseeable-future-development argument to invalidate an ordinance zoning an area for single family estates, despite expert opinion that prospective demand would develop for the land as zoned.

These cases illustrate that zoning undeveloped land is subject to limitation. If the primary consideration for invalidation of this kind of ordinance is suitability for the classification purpose, changing the regulation may not always be helpful to the shopping center developer. As stated above, the qualities that make an area desirable for residential development often are the same as those making it attractive for shopping center purposes. If the land is inappropriate for residences, the commercial developer may also shy away from it. The rule, of course, is not without its exceptions. For example, an area bisected by heavily-traveled thoroughfares may be anathema to home builders; it might be a blessing for one seeking and searching for a shopping center site. But if this is the exception, than the emphasis must be on something other than suitability if the developer is to realize any practical advantage from a zoning change.

One of the policies underlying decisions unfavorable to zoning undeveloped land is economic. Zoning almost always works hardship on someone. This it inherits from its ancestor the police power. The hardship usually is financial, but the courts have become sophisticated enough to ignore these burdens if they are not too great and if the regulation giving rise to them has a reasonable relation to police power objectives. They will not, for example, declare an ordinance invalid simply because it prohibits a use that would be more advantageous financially to the owner. Where, however, development within existing use classifications will be curtailed for an unreasonable length of time, the reason for declaring such ordinance unreasonable ultimately is undue financial burden.

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60 Similar reasoning was employed in People ex rel. Joseph Lumber Co. v. City of Chicago, 402 Ill. 321, 81 N.E.2d 592 (1949). In this case the ordinance went through a residential-manufacturing-residential cycle, the plaintiff having purchased his property while it was zoned manufacturing. For a general discussion on zoning changes while applications for building permits are pending or after construction has begun, see Note, Building Permits—Effect of Pending or Subsequently Proposed and Enacted Legislation on Applications for Building Permits, 34 Notre Dame Law. 109 (1958).

61 Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941).

62 See also Bauske v. City of Des Plaines, 13 Ill.2d 169, 148 N.E.2d 584 (1957). In this case and in the Forde case, supra note 61, there was evidence of unsuitability for residential purposes as the land was presently constituted.

63 See, e.g., Boiger v. Village of Mt. Prospect, 10 Ill. 2d 596, 141 N.E.2d 22 (1957) (property would be worth three to three and one-half times as much if zoned for commercial purposes. This was a shopping center case.); Bauske v. City of Des Plaines, supra note 62; Plymouth Builders, Inc. v. Village of Lindenhurst, 284 App. Div. 895, 134 N.Y.S.2d 225 (1954).

64 Averne Bay Const. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938); Forde v. City of Miami Beach, 146 Fla. 676, 1 So.2d 642 (1941). If the land is completely surrounded by commercial property and would be worth many times more if so zoned, zoning it otherwise
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regardless of the preliminary findings that precipitate the decision. If the shopping center developer can demonstrate to the zoning authorities or the courts that retaining regulations unfavorable to his plans will work an unreasonable financial hardship without concomitant benefit to the public, he may be successful in effecting a change which will permit him to utilize the land for his purposes.

The prospect of acquiring favorable zoning changes in areas experiencing developmental inertia is the silver lining, but the cloud still casts a shadow. If the future does not hold promise of home building in the area and if the site is too far removed from existing residential areas, the commercial success of the center is doubtful, and consequently still may be considered undesirable. The ideal location for a shopping center, and one which is coveted by commercial entrepreneurs, is in the midst of or on the periphery of areas that are in the process of rapid residential development. Some of the more recent cases reflect the competition for these kinds of sites, the persistence of developers to effect zoning changes so that they can be utilized, and the ingenuity of the bar in convincing the courts that such changes will enure to the benefit of the community. They also are straws in the wind indicating a trend in judicial thinking relative to community planning and living. What effect these cases will have and the changes they will inspire remains to be seen. They are, however, particularly pertinent to the general problem and merit somewhat detailed examination and discussion.

The corner grocery store or drug store was a familiar friend in many communities a decade ago. In the larger cities these very often were located on busy thoroughfares on the boundaries of residential districts. With the advent first of the super market and then of the larger shopping center, these neighborhood stores began to disappear from the local scene. The adaptation of the regional and community centers to a smaller scale, however, reversed this trend, and the neighborhood store is again becoming established, although in somewhat different form. Instead of the grocery store on the corner, the drug store two blocks away in one direction, and the bakery three blocks away in the opposite direction, these stores now are concentrated into the “neighborhood center.” Attempts to effect land use changes for these developments, as well as for the larger centers, in residential areas, have met with mixed reactions in the courts. Most often the proposed amendment will change the classification of the area from residential to business use. Whether the decision of the zoning authorities is for or against the requested change, a hue and cry will be raised by the proponents of the amendment if it is denied; by the opponents if it is granted — which clamor cannot be ignored by the courts.

Whatever motivations foster challenges of zoning changes, they frequently may be unreasonable. Vernon Park Realty, Inc., v. City of Mount Vernon, 122 N.Y.S.2d 78 (Sup. Ct. 1953). But see Talbot v. Myrtle Beach Board of Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952) (business properties across the street).


67 “Considerations of private interest will usually be sufficient to convince one that regulation is much more desirable when applied to property belonging to another than to him.” Acker v. Baldwin, 8 Cal.2d 341, 115 P.2d, 455, 459 (1941).
are articulated in a claim of "spot zoning." This kind of zoning always has received the frowning disapproval of the courts, for it is antithetical to a comprehensive plan, one of the essentials of valid use regulation. The mere creation of an "island" in which the permitted use is different from that in the surrounding area does not of itself characterize the action as invalid, nor merit the sentence of "spot zoning." The establishment of an "island" may be in accordance with a comprehensive plan, and if the court is convinced of this, the decision of the zoning authorities will weather the attack against it.

In making their determination of whether the reclassification is invalid, either because it falls within the condemnation of "spot zoning," or for other reasons, the courts have considered several factors — economic advantage, convenience, traffic congestion, and motivation. Since two or more of these issues appear in many of the cases, a certain amount of overlapping in the discussion is inevitable.

In the Quilici case, the court placed a certain amount of emphasis on the convenient location of business districts. In invalidating an ordinance reclassifying to residential uses an area formerly zoned for business, the court said:

Reclassification . . . concentrated the business property of the village in one area in the center of the village and persons living in the extreme south portions . . . must go to this central position to shop. . . .

This concern for the convenience of suburbanites is admissible, but it appears also to be somewhat paradoxical, for the very group which the courts feel will benefit from the change invariably includes those who are most violently opposed to it. These opponents, of course, very often constitute only a small, although vocal and aggressive, minority of the residents of the area and the courts, invoking the principle of the greatest good for the greatest number, are able to rationalize their position.

Another case illustrating this concept even more strikingly is Eicher v.

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68 Typical of spot zoning cases are the following: James v. City of Greenville, 227 S.C. 565, 88 S.E.2d 661 (1955); Grant v. McCullough, 196 Tenn. 671, 270 S.W.2d 317 (1954); Edgewood Civic Club v. Blaisdell, 95 N.H. 244, 61 A.2d 517 (1948); Bishop v. Board of Zoning Appeals, 133 Conn. 614, 53 A.2d 659 (1947); Wilkins v. San Bernardino, 29 Cal.2d 332, 175 P.2d 542 (1946).

69 "A reclassification is considered 'spot zoning' only when it does not bear a substantial relationship to the public health, safety, morals and general welfare, and not in harmony, but in conflict with the comprehensive zoning ordinance." Eckes v. Board of Zoning Appeals, 209 Md. 432, 121 A.2d 249, 253 (1956). See also Bartram v. Zoning Commission, 136 Conn. 89, 68 A.2d, 308 (1949). Although most spot zoning cases involve relatively small areas, e.g., one or two lots, size alone is not determinative. Jones v. Zoning Board of Adjustment, 32 N.J. Super. 397, 108 A.2d 490 (1954). The larger the area rezoned, however, the less likely it is to be condemned as spot zoning. In re Lieb's Appeal, 179 Pa. Super. 316, 116 A.2d 860 (1955). For a general discussion see Spot Zoning and the Comprehensive Plan, 10 Syracuse L. Rev. 303 (1959).

70 Quilici v. Village of Mt. Prospect, 399 Ill. 418, 78 N.E.2d 240 (1948).

71 Id. at 425, 78 N.E.2d at 244. It should be noted, however, that there also was a finding that the land was not desirable for residential purposes.

72 See Kinney v. City of Joliet, 411 Ill. 289, 103 N.E.2d 473 (1952).

73 In Skinner v. Reed, 265 S.W.2d 850 (Tex. Civ. App. 1954) the court apparently placed considerable emphasis on numerical figures. It commented favorably on a survey which disclosed that a large majority of people in the area wanted a shopping center.

Board of Zoning Appeals. In this case the area in question was farm land, apparently as well suited to residential development as for a shopping center. There were no commercial enterprises in the vicinity and there already had been considerable residential development. Taking cognizance of the 5000 residential units within a radius of one mile of the site chosen for the proposed shopping center, the fact that the nearest shopping facilities were three miles distant, and the lack of adequate transportation facilities, the court approved the amendment saying that:

It appears, on account of the large number of group houses and row houses already created and being erected in the vicinity, that there is a definite need for the establishment of a shopping center at this location.

One might speculate on how much the court was influenced by the fact that the houses already in the area and those being built were apparently in the low-cost category. Would the court’s response have been the same had the area been one of large lots and homes in the $25,000 - $50,000 bracket inhabited by families able to afford the finer things in life, viz., the second car?

Closely associated with convenience (if, indeed it is not part and parcel of it) is the problem of traffic. No authorities need be cited to verify the statement that the nation’s main streets are horrors of congestion. The superabundance of cars on the city streets is also attributable to our changing ways of life. Walking apparently is in disrepute; the non-driving housewife is an oddity; today’s teen-agers probably have more cars than yesterday’s elders had two decades ago; and, in the last analysis, homo sapiens is basically lazy. Put these all together and it is no wonder that the bird’s-eye view of a modern community is one of a slowly-moving potpourri of color composed of Detroit’s multi-hued monstrosities crawling along the arteries of travel.

If the contemporary shopper must choose between the shopping center (where he can park within a few feet of his destination) and the congestions of the central business district (where he probably will have to pay to park and still be blocks away from his goal) it does not take much clairvoyance to decide what his decision will be. City planners and business both favor the outlying shopping center although perhaps for different reasons. The traffic engineer is interested in alleviating congestion, particularly in the central business districts. Business knows that shopping convenience means ringing cash registers. The reaction of the courts to the attempted relief of traffic congestion has been some-

75 209 Md. 432, 121 A.2d 249 (1956).
76 121 A.2d at 253.
77 In In re Lieb’s Appeal, 179 Pa. Super. 318, 116 A.2d 860 (1955), the court discussed the change in shopping habits. In years past, the court said, most people walked or rode public transportation facilities. The few who drove their own cars had little trouble finding parking places. Today, the court continued, the reverse is true and people want to shop without paying to park.
79 ...[P]resent day city planning is toward decentralization of business. . . .” Kinney v. City of Joliet, supra note 78.
80 “Shopper convenience is the keynote to modern day merchandising.” The ENO FOUN-
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what erratic. From the legitimation of zoning to the present there has been no question that the prevention of heavy traffic in residential zones was a proper consideration in relegating business and industry to particular areas. If it is proper to maintain the peace and safety of residential areas by the indirect method of prohibiting business and industrial development, it seems but a small and logical step to permit alleviation of congestion by another indirect method, to wit, zoning to decentralize business.

In *Vernon Park Realty, Inc. v. City of Mount Vernon*, the plaintiff was the owner of an island — 86,000 square feet in size — in the middle of a highly developed business district. The land, originally zoned for business, was used as a parking lot. This use continued on a non-conforming basis after the zoning ordinance was amended changing the classification to residential. When the owner began proceedings to gain permission for the erection of a shopping center, the ordinance was amended again, this time restricting the use to parking lot purposes. In defending its action, the city relied on an acute traffic problem as a justification for the restriction. Unconvinced, the majority of the court said:

> However compelling and acute the . . . traffic problem may be, its solution does not lie in placing an undue burden on the individual owner of a single parcel of land in the guise of regulation, even for a public purpose.

The lone dissenting judge, deferring to the wisdom of the zoning authorities, found that a special parking zone was more than warranted by the congestion that existed in the district. He also invoked the well-known principle that merely because the permitted use may not afford as great a return on the owner’s investment does not justify invalidation of the ordinance. A lower New York court stated curtly that traffic problems fall within the domain of the police and are not the business of the zoning authorities.

This strange attitude apparently does not command a wide following. In other jurisdictions, courts seem concerned not only with preventing zoning changes which will increase traffic congestion (especially in residential areas), but are receptive also to the idea of clearing up congestion in the city’s hearts.

In *Bartram v. Zoning Commission*, the court in approving a zoning change that permitted the erection of a small shopping center, gave its blessing to the zoning commission’s policy of encouraging business decentralization to relieve traffic congestion and of permitting neighborhood stores in outlying areas. A dissenting judge, however, remained adamant, saying that “so radical a departure from the general purpose of zoning to separate business from residential districts should not be left to the whims of a zoning board.”

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83 Id. at 498, 121 N.E.2d at 519.
84 See also Deligtisch v. Town of Greenburgh, 135 N.Y.S.2d 220 (Sup. Ct. 1954).
85”Changing Districts merely on account of traffic conditions would destroy the stability of zoning.”
87 Herzog Bldg. Corp. v. City of Des Plaines, 3 Ill.2d 206, 119 N.E.2d, 732 (1954), in which the court refused to disturb the city council’s decision on a debatable issue.
88 136 Conn. 89, 68 A.2d 308 (1949).
89 Id. at 97, 68 A.2d at 312.
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The Texas Court of Civil Appeals was equally beneficent. In addition to being solicitous of the shoppers’ proximity to stores (the area was in a stage of rapid residential development and the nearest shopping facilities were nine blocks away from the proposed center), the court took notice of the congestion and the lack of ample off-street parking in the downtown area, and concluded that off-street parking of a shopping center would alleviate this congestion and make shopping safer. 89

The position assumed by a few courts that traffic problems are not the business of the zoning authorities is a residuum of yesterday that stuck to the bottom of the test tube of experience. It will not be there long. Either the courts will dispose of their old equipment or the legislatures will give zoning authorities some of their own.

It should be remembered, however, that the question of traffic control will not always be resolved in favor of shopping centers. Simply moving congestion from one part of town to another is hardly a desirable solution. Indeed it is unquestionably worse to pour heavy traffic into residential areas than it is to keep it in the central districts and, unless proper planning and control precede action, the cure may well be worse than the illness. In keeping their sojourn as watchdogs of the safe and quiet residential areas, the courts should be expected to scrutinize with meticulous care the effect on traffic flow that a zoning change will entail. Approval or disapproval of such a change, based on alleviation of downtown congestion, should not depend alone upon the desirability of relieving congestion in one area, but partially upon safety considerations in the other. If the safety factor is negligible the courts would do well to abandon arguments based on “safer shopping” 90 and the like. It is not danger in the downtown areas that is the primary force motivating these experiments, but rather a combination of factors including time, convenience and the exasperation index. The courts should get used to the idea that lost man-hours and high blood pressure can take their toll from the good life and should expand the concept of general welfare to permit a consideration of these factors instead of insisting upon statistics on how much lower the mortality rate or the concentration of carbon monoxide will be. In view of the receptive attitude of the courts toward the convenience factor, the future may hold a bright prospect that they will say what they mean when reviewing traffic congestion cases instead of making vain attempts to camouflage their reasons in terms of health or safety.

In matter of economic considerations, two branches are of importance, 91 the economic welfare of the community and the creation of monopolies. Although the zoning cases involving regulations designed to preserve the finan-

89 Skinner v. Reed, 265 S.W.2d, 850 (Tex. Civ. App. 1954). For other cases holding that traffic is a valid consideration see Exchange Nat’l Bank of Chicago v. Cook County, 6 Ill. 2d 19, 129 N.E.2d 1 (1955); Price v. Cohen, 213 Md. 457, 132 A.2d 125 (1957); Ternmink v. Board, 212 Md. 6, 128 A.2d 255 (1957); Northwest Merchants Terminal v. O’Rourke, 191 Md. 171, 60 A.2d 743 (1948); City of Waxahachie v. Watkins, 154 Tex. 206, 275 S.W. 2d 477 (1955). The Maryland cases were decided in the face of a statutory provision making it mandatory on the zoning authorities to take traffic factors into consideration.

90 See Skinner v. Reed, supra note 89.

91 The questions of suitability of the land for the permitted use and unreasonable burdens have been discussed previously.
cial structure of the community are relatively few in number, they indicate a divergence of views on the propriety of such restrictions. An example of this is found in an earlier phase of the litigation in the famous *Wayne Township* case,92 in which an ordinance establishing a minimum size for houses was challenged.

The court invalidating the ordinance said:

[T]he . . . municipality has a fundamental fear of small housing by reason of the fact that the taxes imposed thereon are insufficient to cover the actual pro-rated cost of necessary municipal services and essential facilities. . . . Undeniably, this poses a serious financial problem, which is shared by many municipalities, but the courts have already held it to be specious reasoning.93

In another New Jersey case94 the court held as arbitrary and unrelated to police power objectives the city's refusal to permit the establishment of a shopping center in an area zoned for light industrial use. The city, previously residential, had been successful in attracting light industries, e.g., research laboratories, whose buildings and grounds were esthetically attractive. As a result it was able to maintain a sound tax base without disrupting its residential character. The propriety of the city's action and the policy underlying it were approved by Justice Brennan95 in a dissenting opinion in which he tacitly condoned zoning regulations based upon consideration of the community's prosperity.96

The candor of some appellate courts, however, contrasts sharply with the reluctance exhibited by others. The Supreme Court of Texas, for example, was favorably impressed with the notion that an outlying shopping center would increase the wealth of the city by attracting new business.97 The Supreme Court of Wisconsin was even more frank in its approval of zoning ordinances based upon considerations of the municipality's economy. In sustaining the validity of an ordinance requiring architectural conformity, the court said:

[T]he protection of property values is an objective which falls within the exercise of the police power to promote the "General welfare," and . . . it is immaterial whether the zoning ordinance is grounded solely upon such objective or that such purpose is but one of several legitimate objectives. Anything that tends to destroy

93 73 A.2d at 289. The ordinance eventually was sustained in 10 N.J. 165, 89 A.2d 693 (1952), although the primary emphasis in the New Jersey Supreme Court was on health and safety and only general statements were made relative to the prosperity of the community. Compare the following. "The suggestion in the record that the town would derive more money from taxation if the variance were granted is not tenable even if correct. Such consideration does not enter into the propriety of the granting of a variance in any form." Dixon v. Zoning Board of Appeals, 19 Conn. Supp. 349, 113 A.2d 606, 607 (1955).
95 Now Associate Justice of the Supreme Court.
96 An attitude commensurate with this was expressed in a later New Jersey case, Rockaway Estate, Inc. v. Rockaway Township, 38 N.J. Super. 468, 119 A.2d 461 (1955), in which the validity of minimum size lots was questioned. "So long as such grounds exist for zoning as are demanded by the statute, there is no sound objection to the consideration of cost of municipal services in the establishment of zones." Id. at 466.
property values ... necessarily adversely affects the prosperity, and therefore the general welfare of the entire village.\textsuperscript{98} It would seem that a court so in sympathy with ordinances designed to prevent depreciation in the city's economy would be similarly disposed toward regulations designed to promote appreciation of the city's valuation.

As in matters of traffic, the courts probably will become less inclined to stand in the way of measures designed to enhance a city's financial status. Faced with the high cost of providing ordinary municipal services and with tax rates marching ever onward and upward, a court would be hard-pressed to justify the invalidation of an ordinance permitting a shopping center in a residential area, even though the primary, if not exclusive, reason therefor was the prospect of increased municipal revenues. Only serious adverse effects on the surrounding areas should prompt a court to nullify an ordinance based on economic considerations, for it would be nothing other than a Pyrrhic victory to compel a city to grow and maintain itself in a beautiful and orderly fashion and in the process end up hopelessly bankrupt.

It is not unusual, however, for a city to restrict new or extensive commercial development. It may be that higher tax revenues are considered less important than maintaining the residential character of the community. It may be that the city fathers fear decay in the city's core with possible loss in property valuation and damage to civic pride. Finally, the residents may feel that they simply do not want any more business enterprises. Any one or all of these can pose an obstacle in the way of a proposed shopping center.

The courts apparently find nothing objectionable in a policy designed to keep a city almost entirely and exclusively residential.\textsuperscript{99} If there are no other facts bearing on the validity of an ordinance excluding business uses, the shopping center developer will find the courts deaf to his pleas for a zoning change. When, however, there are overtones of discrimination or arbitrariness which tend to produce business monopolies, he may be able to attract their attention and obtain a sympathetic hearing.

Two of the earliest cases involving the creation of monopolies arose in California.\textsuperscript{100} In the first of these only one lot, fifty by seventy feet in size, was available for business use. In the second case only one and one tenth acres of a total area of 2500 acres had been set aside for unrestricted use. The courts found these restrictions unreasonable and calculated to create monopolies for business already established in the community. This doctrine was again approved some twenty-odd years later,\textsuperscript{101} although the decision went against the claimant.\textsuperscript{102} In these cases the complainant challenged the refusal to amend

\textsuperscript{98} State \textit{ex rel.} Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 69 N.W. 2d 217, 222 (1955).


\textsuperscript{100} \textit{Ex Parte} White, 195 Cal. 516, 234 Pac. 396 (1925); Wickham v. Becker, 96 Cal. App. 443, 274 Pac. 397 (1929).


\textsuperscript{102} The court found that the business districts were not so constricted as to shut out newcomers.
the zoning ordinance. On the other side of the coin is the case in which the decision to amend is attacked. The most striking and recent example of this and one that is particularly relevant to the discussion is found in *In re Lieb's Appeal.*¹⁰³ In this case an area originally zoned residential was rezoned to clear the way for the erection of a shopping center. This action was challenged by the owner of a commercial building located in the old business district. He claimed that the threat of a shopping center was interfering with plans to raze old buildings and erect new ones in the original business districts, and that he was entitled to protection against competition in a new area. The court commiserated with the plaintiff saying that, “Their [shopping center] development has been unfortunate to many merchants who have invested substantial sums in real estate and merchandizing developments in the central areas of boroughs and cities,”¹⁰⁴ but added that “it is not the duty of government to protect . . . businesses from fair competition.”¹⁰⁵ In the course of its opinion the court made two statements of far-reaching importance. Both were relative to the appellant’s demand that he be protected against competition. Of this claim the court said:

This, as far as we have been able to determine, is a new concept concerning the purpose of zoning, and should be promptly put to rest¹⁰⁶ and added that:

[T]he purpose of zoning is not to limit or restrict competition. It would be unlawful for a council to zone or rezone, or refuse to zone or rezone for this purpose. . . . [Z]oning is not for the purpose of limiting or prohibiting competition, and where that is the only purpose of a zoning ordinance it must be declared invalid.¹⁰⁷

These statements are symptomatic of the reaction that probably will follow any arguments in support of zoning regulations designed to restrict competition. But if economic factors generally can properly be considered as bases for zoning regulations, the argument in *Lieb’s Appeal* may not be as far-fetched as the court seemingly thought it was. If redevelopment plans—which undoubtedly would add to the city’s coffers—are abandoned because of shopping center competition, the community could very well suffer a net loss,¹⁰⁸ regardless of the revenues derived from new business enterprises. Preoccupation with shopper convenience should not prompt action or inaction that will be disruptive of the total general welfare. On the other hand, restriction of fair competition is a doctrine alien to the “American way,” at least when it is as blatant as that requested in *Lieb.* There is little promise that the courts will approve regulations restricting competition. For the present, at least, downtown merchants will have to find other methods to attract the consuming public, or try devious means to discourage regulations that are favorable to shopping center development. The

¹⁰⁴ 116 A.2d at 865.
¹⁰⁵ Ibid.
¹⁰⁶ Ibid.
¹⁰⁷ Ibid.
¹⁰⁸ This would be particularly true if the shopping center were located immediately beyond the corporate limits. Antidotes to this would be annexation and extraterritorial zoning control.
city itself, if it is concerned enough, may be able to slow down the rate of increased competition by adopting or refusing to adopt zoning changes that would permit shopping centers. If its action is based on traditional police power objectives, the fact that it stifles competition by indirection is not of any great significance, provided, of course, that the action is reasonable.

This search for means to counteract the supposedly adverse effect of shopping centers brings into view the final aspect of the problem. A shopping center developer, disgruntled because of a decision of the zoning authorities unfavorable to him, may yet have one avenue of attack open to him even though the action taken appears regular and in accord with sound zoning principles. This approach finds its direction in claims of improper motivation and extra-legal pressures. It is the least desirable approach because it is fraught with the most difficulties. The action of legislative or quasi-legislative bodies always enjoys the presumption of validity—the burden is on the complainant to prove otherwise. In addition to this the courts, in a display of self-restraint, have formulated a general proposition that they will not inquire into the motives allegedly underlying decisions of the zoning authorities. If, it is said, there is a reasonable basis for the decision, the fact that ulterior motives entered into the formulation of the decision is immaterial. To these rules there appear to be the inevitable exceptions. An example of this judicial aloofness is found in a Virginia case which involved the rezoning of a block from residential to business uses. Prior to the amendment a member of the city council had acquired an option on one of the lots in the block. After the zoning change was made he exercised his option and opened a filling station. In answer to a charge that the amendment was the product of improper motives, the court disclaimed any right to inquire into the motives and said that when acting in a legislative capacity the members of the council were answerable to the electorate and not to the courts. A similar attitude was evinced by the Supreme Court of California in a case in which “cooperation” was an established fact. The complainant, a privately owned water company, began drilling wells on unincorporated lands in which it owned the water rights. The area was hastily annexed and zoning regulations were adopted which prohibited further drilling. Certain city officials assisted private individuals interested in incorporation in working out the details of annexation proceedings. Interestingly enough, the city also was in the water business. In answer to the implication of evil motives the court said that the purpose of the city in passing a zoning ordinance was irrelevant to any inquiry concerning reasonableness. A 1958 shopping center case is the most recent and pertinent expression on the question of motive. While the instant case was pending below,

109 Sinclair Refining Co. v. Chicago, 178 F.2d 214 (7th Cir. 1949); Dennis v. Village of Tonka Bay, 64 F. Supp. 214 (D. G. Minn. 1946) aff'd, 156 F.2d 672 (8th Cir. 1946); Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 33 P.2d 672 (1934); 2700 Irving Park Bldg. Corp. v. Chicago, 395 Ill. 138, 69 N.E.2d 827 (1946); Tel-Craft Civic Ass’n v. Detroit, 357 Mich. 326, 60 N.W.2d 294 (1953); Kiges v. St. Paul, 240 Minn. 522, 62 N.W. 2d 363 (1953); Stone v. Gray, 89 N.H. 483, 200 A. 517 (1938).
110 Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1949).
111 Sunny Slope Water Co. v. City of Pasadena, 1 Cal. 2d 87, 33 P.2d 672 (1934).
the court had upheld the commission’s denial of the complainant’s similar requests for rezoning an area to permit a shopping center. Subsequently, an amendment was adopted on the petition of another applicant. Unhappy with the turn of events, this action was brought to set aside the commission’s decision. There was uncontroverted evidence that the applicant and members of the commission had met privately and had agreed on conditions under which the application would be given favorable consideration. The most satisfaction that the complainant could garner relative to this apparent collusion was a comment by the court that “the propriety of the conduct of the commission is open to criticism,” although the court eventually found the ordinance unreasonable. In the face of this hesitation to interfere with zoning decisions on the grounds that they were improperly motivated, it is not likely that the shopping center developer will be particularly successful in adopting this line of attack. This is not to say that the courts necessarily are open to criticism for adopting this attitude. The basic justification for it, and one which has the sound of reason, was summarized by the California Supreme Court:

If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence. If the conditions do not justify the enactment, the inquiry as to motive becomes useless.

Despite the court’s assertions that they will not entertain motivation arguments, there is some evidence in one line of decisions that suggests a qualification. These are the “group pressure” cases, in which the courts seemingly have no compunctions about looking behind a zoning decision to see whether it was the product of desire to satisfy some people or a reluctance to dissatisfy others. Typical of this is an Illinois case which involved an amendment changing a zone from manufacturing to apartment use. The amendment had the overwhelming support of the neighborhood which had visions of the area being developed as a park. There was considerable evidence that pressure was exerted to prevent manufacturing development. Although the court found the land unsuitable for the permitted use (and therefore unreasonable) and denied any considerations of motive, one may speculate as to how much the court’s decision was influenced by the specter of group pressure. A New Jersey court, although remaining within the bounds of judicial review, was somewhat more candid in its approach to an amendment that changed a district from business to residential after some shops had been built and were in operation. It said:

115 In re Smith, 143 Cal. 368, 77 Pac. 180, 182 (1904). And see Soon Hing v. Crowley, 113 U.S. 703 (1885). “The diverse character of such motives, and the impossibility of penetrating into the hearts of men and ascertaining the truth, precludes all such inquiries as impracticable and futile.” If the facts are sufficient to show actual fraud, relief evidently will be forthcoming. Mills v. Town Plan and Zoning Comm’n, 145 Conn. 277, 140 A.2d 871 (1958); Blankenship v. City of Richmond, 188 Va. 97, 49 S.E.2d 321 (1948).
117 Of course it could be argued that this is just another case undergirding the general rule, since the land did not lend itself to apartment development. This argument is easier to swallow when the ordinance is upheld in the face of charges of improper motives. See Offner Electronics, Inc. v. Gerhardt, 398 Ill. 265, 76 N.E.2d 27 (1947); (should not rezone “merely because certain parties so desire” the amendment).
It is quite obvious that the zoning under the amendment is not based upon any uniformity or comprehensive scheme such as is contemplated by the statute... but was passed in response to the demands of residents in the vicinity, who evidently feel that they have enough business properties at the present time. ... Cases from other jurisdictions reflect a similar reaction to zoning amendments colored by group pressure.  

Conceding that a zoning regulation adopted at the behest of an individual or a small group and detrimental to the general welfare should meet with the disapproval of the courts, there are still a number of inquiries relative to “polling the neighborhood” that command inquiry. In the first place there appears to be some inconsistency in the decisions. In one breath the courts contend that it is improper to base regulations upon numerical considerations, and yet in the next they evince an attitude favorably disposed towards neighborhood surveys. In two of the recent shopping center cases, for example, the courts bolstered their arguments of convenience with survey results indicating the desires of the area residents. Secondly, the validity of the courts' position in refusing to permit zoning authorities to be influenced by the desires of the people is open to some question. Space does not permit a detailed discussion of the many ramifications of this problem, including matters of delegation, constitutional law, and statutory authority. It seems pertinent, however, to ask why the governing representatives cannot be at least somewhat responsive to the desires of an informed electorate, provided, of course, that constitutional rights of those supposedly affected adversely are not unduly infringed. At the risk of accusations of heresy, I suggest that parochialism in considerations of general welfare and convenience is a bit outdated, and that police power principles should remain attuned to the changing ideas of community life.

Putting these cases in perspective it seems as though group pressure problems will arise with more frequency as attempts are made to establish or prevent the establishment of shopping centers. If the zoning authorities are controlled or influenced by downtown merchants, the shopping center developer's position will be somewhat disadvantageous, particularly if he is an interloper, as he frequently is. If the courts actually pay more than lip service to the principle that zoning regulations are not to be premised on group pressure, they would do well to remember that it should apply against shopping centers as well as in their favor.

119 Benner v. Tribbitt, 190 Md. 6, 57 A.2d 346 (1948) ("we have to live with these people"); Kahl v. Consolidated Gas Co., 191 Md. 249, 60 A.2d 754 (1948) (improper to consider numbers favoring change); Jacques v. Zoning Board, 64 R.I. 284, 12 A.2d 222 (1940) (same); Sundlum v. Zoning Board, 50 R.I. 108, 145 Atl. 451 (1929) (decision should be based on facts relevant to (the) public... not upon "wishes of persons who appear").
121 Eckes v. Board of Zoning Appeals, 209 Md. 432, 121 A.2d 249 (1956); Skinner v. Reed, 265 S.W.2d 850 (Tex. Civ. App. 1954). It is interesting and perhaps significant to note that in the case in which "polling" was condemned, the requested zoning change was disapproved, while in those in which surveys were apparently sanctioned, the requested change was approved.
122 Remonstrances, of course, can be filed against proposed zoning regulations. Experience seems to indicate, however, that these are very often the product of a vocal minority.
Conclusion

There is no blinking at the fact that shopping centers are here to stay. They are already too well ingrained in our living habits to expect any significant change in the trend. As their effect on downtown businesses and services deepens, however, it can be expected that the battle to slow down or stop the movement will become more bitter. Members of local legislative bodies undoubtedly have their own private views of the problems over which this conflict will rage. But regardless of their attempts at objectivity they necessarily will be drawn to one side or the other. The courts then will assume their traditional roles as arbiters of opposing claims and rights, and the job is not one that arouses envy.

The matter of subdivision control is so new as it affects the thesis under discussion that only a few conclusions — tentative at best — can be suggested. The question of land acquisition and the vacation of plots or streets in subdivisions does not at present seem to raise any particular obstacle to the development of shopping centers. It is possible, of course, that city fathers not in sympathy with further shopping center development might raise the barriers in the form of unfavorable decisions on applications for vacation. And, as suggested above, downtown merchants might be successful in stemming the tide by acquiring and subdividing desirable land themselves, only purchasing lots in strategic undeveloped subdivisions and thereby preclude street vacation.

How successful the shopping center developer would be in challenging these tactics on the grounds of improper motivation or excessive subdivision is a matter for conjecture. In the presence of an almost complete dearth of relevant authority, I shall not risk the dangers of speculation.

On the zoning side of the picture, however, some patterns are beginning to emerge. It is evident that courts are favoring shopping centers to the extent at least that they emphasize and are influenced in their decision by the desirability of convenient and proximate shopping facilities. It is possible that they have become infatuated with the novelty of the shopping center and, being by nature somewhat behind the times, have yet to recognize that not all shopping centers are the next things to paradise. It is probable that experience will demonstrate that shopping centers, while laying to rest some old problems at the same time give birth to new ones. For example, an overemphasis on relieving congestion in the central business districts might blind one to the reality that shopping centers are traffic generators of the first order. This fact assumes greater proportions when one remembers that the concentration of traffic is confined to one relatively small area. Observation will demonstrate that when

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123 Even the expenditure of relatively large sums of public funds for off-street parking seems to have had only a limited delaying effect.

124 In the writer's own bailiwick, litigation is in the making over a proposed zoning change which would permit the erection of a shopping center. It is no secret that downtown merchants are frantically button-holing council members and planning commissioners trying to persuade them of the evils of shopping centers.

125 The practicality and effectiveness is illustrated in a collateral example. One of the nation's large steel companies owns 98% of a relatively large tract of land in north Porter County, Indiana. Thus far it has been unsuccessful in acquiring the outstanding 2%, and until it does, the remainder of its holdings is useless.
a shopping center is located in or near a residential district, as they often are—not only are the main arteries of traffic subject to considerably heavier travel, but the secondary streets in the residence areas also come in for a heavier share of the load. If the courts are as concerned with safety as they claim to be, it may be in order for them to scrutinize a little more carefully the traffic problems that the center creates in the outlying districts while alleviating those in the city's heart.

In the same vein is the claim made by at least one court that the shopping center is a safer place in which to shop. In the writer's personal experience, the impracticability of walks, barriers and other safety devices in the center's parking area, the often ill-marked (and sometimes non-existent) indicators of traffic direction, and the multiple exits and entrances, encourage indiscriminate and haphazard driving. This not only creates certain anxieties, but also necessitates a fair amount of agility so that one can scurry from the paths of cars approaching from unexpected directions.

The courts may have to take another look at the question of economic considerations. One phase of this problem lies in the area of business encouragement or discouragement. This is a two-pronged skewer sometimes difficult of deft maneuvers. On the one hand can communities—and eventually the courts—stifle the establishment of new business in an attempt to ward off prospective financial embarrassment of the older commercial districts? On the other hand, can these same communities—and same courts—afford "if some business is good more business is better" and "a dollar is a dollar whatever its source" attitudes which, if adopted irresponsibly, might have serious financial effects on the downtown merchants, and eventually reflect on the general welfare and prosperity of the whole community? Although economic considerations are getting more play of recent years, any interference with private enterprise, of the type only hesitatingly suggested here, would be strong medicine indeed, to be taken only when heroic measures are necessary and then only in small doses under the watchful eyes of the staff physicians.

The second phase concerns the effect that the presence of a residentially-located center will have on the surrounding areas. Although the courts have been fairly zealous in protecting property values, there is some evidence that in this area too, the matter of convenience is taking precedence over other considerations. Despite much ado about the aesthetic qualities of the centers' architecture and landscaping, I have seen in my limited experience a few that were garish and one or two that were becoming a bit unkempt despite their youth. Add to this the traffic increase, with its attendant noise, safety and health factors and it is not difficult to understand why some home owners object

127 In this day none will dispute that government, in the exercise of the police power, may impose restrictions upon the use of property in the interest of public health, morals and safety. That the same restrictions may be imposed upon the use of property in promotion of the public welfare, convenience, and general prosperity is perhaps not so well understood, but nevertheless is firmly established by the decisions. . . ." Adkins v. West Frankfort, 51 F. Supp. 532, (E.D. Ill. 1949).
128 Including a contribution from the writer. See pp. 183-84 supra.
to the presence of a center outside their front door. I, for one, would care to live no closer than a half-mile to a relatively large center.

In considering zoning cases wherein these factors are in issue it may be necessary for the courts to accept less grudgingly the idea that among the purposes of zoning are the community's welfare, convenience and prosperity. And if this acceptance alone is inadequate to cope with new problems aborning of shopping centers, it may be requisite for intelligent solution to these problems to give the concept wider latitude than heretofore has been considered necessary or wise.

Finally, if the adversaries of the conflict begin using underhanded or extralegal methods, the courts may have to revise their attitudes respecting inquiry into motives and pressures. The zoning authorities, opposed to shopping center development, may attempt to embellish an improperly motivated decision with a coating of traditional zoning principles. If too much of this goes on, the courts would be somewhat remiss if they refused steadfastly to scratch away the patina of legality to see what lies beneath.\(^{129}\)

It is evident that the above discussion has not gone much beyond the inquiry stage. The relatively few years of the shopping centers' existence have not been sufficient to establish with any degree of certainty the general effect that they have on community living in general, and on planning and zoning policies in particular. Nor has there been time enough for whatever problems that may lie hidden to be precipitated sufficiently for detailed analysis and suggested solution. If, however, the zoning authorities and the courts are made aware of the fact that the shopping center is a new element with its own peculiar characteristics and capable of creating new and compound problems — both for good and for ill, they will stand a better chance of approaching it with respect and of solving its complexities with skill, imagination, and foresight.

\(^{129}\) In some jurisdictions the presumption of validity does not have the same weight in rezoning as it does in the case of the initial zoning ordinance. Northwest Merchants Terminal, Inc. v. O'Rourke, 191 Md. 721, 60 A.2d 743 (1948).