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EXTRATERRITORIAL ZONING: REFLECTIONS ON ITS VALIDITY*

I. FUNCTION AND NECESSITY

For many years the American law schools treated the subject of municipal corporations as an unwanted and unloved step-child.¹ It always struck me as being a bit incongruous that of all the courses in the general area of public law, the one that probably touched more lawyers than any other was emphasized the least by the law schools. During the past half decade, however, there seems to have been a renaissance of interest in local gov-

* The author would like to acknowledge the valuable assistance of Mr. Jack Hiller, Law Librarian and Instructor in Law at the School of Law, Valparaiso University, in the preparation of this article.

¹ A perusal of law school catalogues indicates that in a substantial number of schools, a course in municipal corporations was not offered at all, and in those in which it was dignified with a course number, it was often taught only in alternate years. There was—and still is—only a small handful of casebooks, and, until a year or so ago, the same was true of up-to-date treatises, excepting, of course, Judge McQuillin's multi-volume work. Cooley's hornbook was published in 1914, and the third edition of Elliott's small text in 1925.

ernment law.² It may be that this reawakening indicates a growing awareness of the importance to the legal profession of the local community and its problems. For better or for worse, this area of the law seems destined to become highly specialized. The past few years have witnessed a tremendous emphasis on one aspect of local law in particular — that of planning and zoning.³ A substantial portion of Dean Fordham's casebook⁴ is given over to this aspect of municipal law, and Professors Horack and Nolan have produced an excellent casebook devoted exclusively to land use control.⁵ Planning commissions are burgeoning throughout the country, the planning consultant is becoming fashionable, and people generally are becoming planning conscious. There is city planning and county planning, metropolitan planning and regional planning — interstate as well as intrastate. This rather unprecedented, but perhaps long overdue, emphasis on planning may be symptomatic of the postwar preoccupation with prosperity, order, beauty and the good life. Whatever the reason, planning is in vogue and is not likely to go out of fashion in the foreseeable future.

The reference to planning is not quite so irrelevant to the title of this paper as it may seem. Planning is at best

² In the last two years, two relatively short treatises have been published: ANTIEAU, *MUNICIPAL CORPORATION LAW* (1955) (two volumes); YOKLEY, *MUNICIPAL CORPORATIONS* (1956) (three volumes). The subject is also appearing with more frequency in law school catalogues.

³ Within the past three years there have been no less than five symposia on the problems of local government. *Symposium on Area Development*, 28 ROCKY MOUNT. L. REV. 453 (1956); *Urban Housing and Planning*, 20 LAW & CONTEMP. PROB. 351 (1955); *Land Planning in a Democracy*, 20 LAW & CONTEMP. PROB. 197 (1955); *Zoning in Illinois*, U. ILL. L. FORUM 167 (1954); *Florida Municipal Law, A Symposium*, 6 U. FLA. L. REV. 275 (1953). The reader will note that three of these are devoted to planning. Undoubtedly there are others. Another sign of the times is the publication of new editions of zoning treatises: METZENBAUM, *LAW OF ZONING* (2d ed. 1955); RATHKOPF, *THE LAW OF ZONING AND PLANNING* (3d ed. 1956); YOKLEY, *ZONING LAW AND PRACTICE* (2d ed. 1953).

⁴ FORDHAM, *LOCAL GOVERNMENT LAW* c. 8 (1949).

⁵ HORACK AND NOLAN, *LAND USE CONTROLS* (1955).

a monumental waste of time and effort unless it is implemented so as to give reasonable assurance that the projected ends eventually will be realized. Zoning is one of the chief tools of implementation. Before proceeding further, each function should be put in its proper perspective. Planning "... connotes a systematic development contrived to promote the common interest" ⁶ It suggests the most feasible approach to a proper relationship among the various factors that together comprise community living, selected on the basis of that which will be most conducive to and commensurate with the common interest. ⁷ On the other hand, "Zoning is a separation of the municipality into districts, and the regulation of buildings and structures in the districts so created, in accordance with their construction and the nature and extent of their use It pertains not only to use but to the structural and architectural design of buildings." ⁸ Briefly then, the planning function primarily is that of outlining a course of action, and zoning is designed to put that course of action into operation and effect.

It is obvious that planning is entirely prospective. In many communities there is not a great deal that can be done with the status quo. Consequently, the planner must exercise considerable foresight and devote his energies primarily to the part of the community that still possesses enough elasticity to respond to his moulding influence. ⁹ This means, of course, that his center of attention will be drawn to land which is for the most part undeveloped, re-

⁶ *Mills v. Baton Rouge*, 210 La. 830, 28 So.2d 447, 451 (1946).

⁷ For further and more comprehensive definitions of planning, see HORACK AND NOLAN, *op. cit. supra* note 5, c. 2; 1 RATHKOPF, *op. cit. supra* note 3, c. 1; 1 YOKLEY, *op. cit. supra* note 3, § 2.

⁸ *Mills v. Baton Rouge*, 210 La. 830, 28 So. 2d 447, 451 (1946).

⁹ For a defense of long-range planning, see Weiner, *Short-Time and Long-Time Planning*, in PLANNING 1954: PROCEEDINGS OF THE ANNUAL NATIONAL PLANNING CONFERENCE 4 (1954). The author suggests that the alleged future benefits of long-range planning must be accepted on faith.

ardless of whether that land lies within or without the corporate boundaries of a municipality.¹⁰ The importance of planning for the future is recognized by most enabling legislation. These statutes ordinarily authorize planning commissions to plan the fringe area surrounding the municipality.¹¹ A planning commission, however, has only advisory functions. Unless there is some power that can compel adherence to its determinations, the planner's exquisitely drawn master plan is worth little more than something that might have been. To make the master plan a reality is the function of zoning. The restrictions suggested by the master plan become mandatory by virtue of the zoning ordinance. "... [A]ye, there's the rub"¹² So long as planning remains advisory and there is freedom to accept it or reject it, opposing forces lie dormant. But if the power of the state is brought to bear and the element of choice is removed, the docility of those affected suddenly erupts in strenuous objection.

Thus far, the desirability of planning has only been assumed. A word about that. Something less than astute observation in almost any of the nation's cities should convince even the most skeptical that planning is desirable. A great many municipalities are conglomerates of slums, crazy-quilt street systems, and multiple-deck sandwiches of apartment buildings, small houses, industries, and businesses situated without rhyme or reason. The approaches to many cities, large and small, are nightmares of irresponsibility. Drive-ins, small businesses, and industries of all types line the highways: many of them are either

¹⁰ Of course, the planner also plays a significant part in planning for the city's older environs. There is constant change in any community and it is desirable to insure the proper direction of these changes, *e.g.*, planning to prevent an older residential area from deteriorating into a slum. Urban renewal programs also fall within this class.

¹¹ For complete citations to enabling legislation, see HOUSING AND HOME FINANCE AGENCY, *COMPARATIVE DIGEST OF MUNICIPAL AND COUNTY ZONING ENABLING STATUTES* (1953).

¹² Shakespeare, *Hamlet* Act III, sc. i, 1.65.

architectural monstrosities or one-story, paint-peeling shacks. In any case, they not only detract immeasurably from the attractiveness of the highway and retard future development, but in many instances they also create serious health and safety hazards. These factors — and they constitute only a few of the problems — can be prevented by rational planning and zoning.¹³ They *cannot* be prevented without planning and zoning.

But why extraterritorial zoning? Why not plan the urban fringe, but postpone the imposition of use restrictions until annexation? This may sound feasible (although I doubt it), but there are compelling arguments that indicate its impracticability. It is a fact that the corporate limits of some cities encompass a substantial amount of undeveloped land. In the writer's opinion, however, this is not ordinarily the case, particularly in the smaller cities and towns. By annexing large areas of undeveloped land, a city perhaps could obviate the necessity for the exercise of extraterritorial powers and still accomplish its planning objectives. This has a pleasing sound, but little else. In addition to the restrictions imposed by many of the annexation statutes, the courts have been reluctant to give their approval to large-scale annexation of undeveloped lands.¹⁴ If foreseeable corporate use of the lands cannot be shown — which often is the case — annexation generally will be denied. This limitation upon the city's power to annex sets the stage for haphazard development¹⁵ and the establishment of a myriad of nonconforming uses. The implica-

¹³ This is not meant to imply that there should be blind acceptance of planning for planning's sake. "There is . . . no magic in 'planning.' There is good and bad planning, insufficient and incompetent planning. The process, good or bad, cannot be ignored for it has the capacity to give value to property or to take it away." HORACK AND NOLAN, *LAND USE CONTROLS* 30 (1955).

¹⁴ See Annot., 64 A.L.R. 1335, 1346 (1929). Some of the cases collected there will be discussed later.

¹⁵ "Unless this land can be planned and zoned before it becomes developed, it will lose its agricultural characteristics without acquiring stable urban qualities." HORACK AND NOLAN, *op. cit. supra* note 5, at 58.

tions of this process obviously are seriously inimical to the orderly development of the community.¹⁶ There can be little planning when land use is a *fait accompli*. Where non-conforming uses have gained a foot hold, the traditional approach of the courts has been frustrating to comprehensive zoning. With a few exceptions,¹⁷ it has been held that a nonconforming user has acquired a vested interest that cannot be divested summarily through the subsequent enactment of a zoning ordinance.¹⁸ If the city is precluded from annexing sufficient undeveloped land, and if it is further denied the right to eliminate nonconforming uses after annexation, there must be other alternatives if long-range planning objectives are to be realized. One of these alternatives is extraterritorial zoning. By exerting this power over undeveloped lands, the city can provide for its future development in an orderly way and assure to subsequent generations that municipalities will be relatively free of the undesirable elements which today disfigure the faces of so many of them.¹⁹ Industry will not be permitted to blight areas desirable for residential purposes, nor will irrational development of land for residential purposes be tolerated when it is ill-suited for that purpose and when

¹⁶ Note, *Amortization and Performance Standards in Zoning Regulations: Study of Existing Non-Conforming Uses in an Indiana Community*, 30 IND. L. J. 521 (1955).

¹⁷ Perhaps the most notable of these are *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613 (1929); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314 (1929), sustaining an ordinance which required non-conforming users to cease operations within a year.

¹⁸ *Higgins v. Baltimore*, 206 Md. 89, 110 A.2d 503 (1954); *Town of Somers v. Camarco*, 126 N.Y.S.2d 154 (Sup. Ct. 1953); *Akron v. Chapman*, 160 Ohio St. 382, 116 N.E.2d 697 (1953). But a nonconforming use must have come into existence, *Lutz v. City Plan Comm'n*, 230 Ind. 74, 101 N.E.2d 187 (1951). See also O'Reilly, *The Non-conforming Use and Due Process of Law*, 23 GEO. L. J. 218 (1935).

¹⁹ "Only as planning and zoning can create, without regard to territorial boundary lines, an over-all community development which will provide adequate industry, good business, desirable residential areas, and proper community improvements and activities, will the area prosper and develop." HORACK AND NOLAN, *LAND USE CONTROLS* 58 (1955). ". . . [T]he power to zone its suburbs, which, in actuality, are a part of the urban community, is intimately related to the well-being of the city. That periphery is the city's vital zoning problem." FORDHAM, *LOCAL GOVERNMENT LAW* 139 (1949).

pre-emption by residential building will exclude desirable industrial or commercial enterprises.²⁰

Extraterritorial zoning, this seemingly excellent product of the planner's imagination, is not so easy to market. Planning zealots, of course, are extreme advocates of extraterritorial zoning, since they realize that effective planning is important without it. On the other hand, those who at best are lukewarm about planning very likely will resist any attempt to impose the restrictions that effective planning necessitates, and those who are decidedly opposed to planning in any form or manner will carry their opposition into vigorous operation.²¹ Land values, of course, are affected by zoning. If a farmer could sell his land for industrial uses at five or ten times the price it could command if sold for residential lots, one can understand his unhappiness when he is limited to the latter choice.²² More-

²⁰ "Industry may wish the land but it is already too far developed with residences to make it profitable for industrial use. Or an inappropriate industry develops its tract and blights an adjacent area suited and needed for residential development. In either case the city suffers. It is understandable, then, that the city feels that it can fairly claim the right to control and direct the development of the land adjacent to its boundaries." HORACK AND NOLAN, *op. cit. supra* note 19.

²¹ During the last six months, several incidents have brought this opposition into sharp focus. A circular published by the Farmers and Fringe Area Citizens Committee, and widely distributed in Porter County, Indiana, read, in part, as follows: "City Fringe & County Zoning Are Communistic! We farmers and fringe area dwellers of Porter County, Indiana, humbly petition you city dwellers and business men to refrain from using the county and city zoning plans now proposed because they are so un-American and will take from us our freeholds: 1st, the controlling members of the commission are appointive and therefore if found corrupt or inept cannot be removed by elections; 2nd, you city citizens are put to added expense to support plan commissions, which in themselves can be unjust and full of graft . . . ; 5th, anything legal that we wish to do on the farm will cost us many hundreds of dollars more . . . ; 8th, we can trade elsewhere, if you insist on these zoning commissions." In Fowler, Indiana, approximately 150 farmers refused to leave a meeting of the city council until it agreed to refrain from zoning the fringe. In north Porter County, farmers threatened to and began withdrawing their accounts from local banks in protest over proposed fringe zoning. This information was taken from a communication to the author from Mr. Paul Miller, instructor in the Department of Geography and Geology, Valparaiso University, and planning consultant.

²² "... [F]armers . . . generally resist all urban zoning — and most rural zoning as well." HORACK AND NOLAN, *LAND USE CONTROLS* 100 (1955). In a

over, given a person who indulges in self-pity, or who is completely in favor of restriction except when it affects him, one can understand objection to limitations on freedom that are ostensibly for the good of the whole, especially when that good is to be found only in the nebulous future.

Before delving into the legal aspects of extraterritorial zoning, one other factor should be mentioned, that is, the effects of county or rural zoning. This type of zoning, properly understood and applied, has functions different from those of typical urban zoning.²³ Of course, it is not a perversion of its purpose if it is used in a manner complementary to urban zoning. Unless those charged with the responsibility of county zoning, however, are sympathetic with the objectives of urban zoning (something not very much in evidence at the moment), the likelihood of close cooperation is somewhat remote. It is more likely that county zoning will reflect the attitudes of rural residents (as undoubtedly it should in a democracy); if that attitude is one of hostility toward what they believe to be undue restriction, county zoning will very probably be of little aid to comprehensive planning and zoning.²⁴

These arguments are designed to sustain the conclusion that planning is desirable and that extraterritorial zoning is an important, indeed an indispensable, element of plan-

footnote, the authors observe that, "It is a strange paradox, but true, that farmers who depend so much upon cooperative action and the interchange of services and machinery, are uniformly opposed to cooperative action or public control when it relates to the land itself." *Ibid.*

²³ "... [A] true rural zoning ordinance attempts to protect and develop the proper uses of the soil. Rural zoning, of course, seeks to control non-agricultural uses as well. Thus, business and industry may be restricted to particular zones. Irrigation, drainage, and water conservation districts may be established independently of zoning. Soil conservation, erosion and flood control, forestry, and other natural resources districts are commonly established." HORACK AND NOLAN, *op. cit. supra* note 22. See also WARP, *Legal Status of Rural Zoning*, 36 ILL. L. REV. 153 (1941), and Wertheimer, *Constitutionality of Rural Zoning*, 26 CALIF. L. REV. 175 (1938).

²⁴ See essays by Solberg and Stout, *Planning and Zoning in Rural Areas*, in PLANNING 1953: PROCEEDINGS OF THE ANNUAL NATIONAL PLANNING CONFERENCE 163 (Solberg), 173 (Stout) (1953).

ning. No pretense is made that the arguments are all inclusive of the question; it is certain that they are incomplete. Since space does not permit further elaboration of them, and since they are, for the purposes of this paper, in the domain of *adiaphora*, I have presumed to consider them sufficient to sustain my basic assumption that extraterritorial zoning is good. On the basis on this assumption, I shall proceed to the real problem at hand — is this type of zoning consistent with the concepts of constitutional government in a democratic society, or, to be more realistic, will the courts *say* it is or is not consistent therewith?

II. ANTICIPATION OF JUDICIAL DECISION

There are no cases which have answered this question *directly*.²⁵ As a consequence, I have chosen to consider situations most nearly analogous, and, on the basis of the extant case law, to attempt to find a pattern of judicial thinking that might be invoked when questions of extraterritorial zoning are presented to the appellate tribunals. Obviously, any conclusions necessarily must be predictive, at best.

A few brief generalizations should suffice to set out the basic propositions relative to zoning extraterritorially. Zoning *qua* zoning is of relatively recent origin. According to one author, it had its beginnings in Germany less than three-quarters of a century ago.²⁶ As in other areas,²⁷ the United States was the rear guard of the European van. The first comprehensive zoning law in this country was enacted no earlier than 1916; its validity was sustained in 1920.²⁸

²⁵ The writer believes that this situation will be short-lived. The rumblings emanating from the hinterlands indicate the approach of an irresistible force to an immovable object. The collision will soon echo in appellate courts.

²⁶ 1 YOKLEY, ZONING LAW AND PRACTICE § 2 (2d ed. 1953).

²⁷ *E.g.*, social security and workmen's compensation.

²⁸ *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 128 N.E. 209 (1920).

It was just a bit over thirty years ago that the issue was presented to and decided by the Supreme Court of the United States.²⁹ Today a contention that the zoning power, of itself, is in contravention of constitutional guaranties is seldom made with any degree of seriousness. It is only application of the zoning power to particular circumstances that goads property owners into action, provides the courts with opportunities to define its limits, and precipitates refinements in the law.³⁰ Every zoning restriction must bear a relation to the proper objectives of the police power,³¹ since zoning can be sustained only by subsuming it under the police power. "The greatest good for the greatest number" is the clarion call, muted only by the rule of reasonableness.³² The second proposition is a double-barreled one: the police power is inherent in sovereignty,³³ and municipal corporations are not sovereign.³⁴ This means

²⁹ *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

³⁰ In the *Euclid* case, *supra* note 29, the Supreme Court gave notice that there were limitations to the exercise of the power. In *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), it held that the line, difficult to determine though it may be, had been overstepped.

³¹ Until a few years ago the majority of the cases limited the scope of the police power by reference to health, safety, morals and welfare, the traditional quartet of standards. Welfare, of course, can mean many things to many people. However, it was given a relatively narrow construction. Recent cases indicate a broadening concept of the police power, at least as it is understood in the context of zoning. See *Flora Realty and Investment Co. v. City of Ladue*, 362 Mo. 1025, 246 S.W.2d 771 (1951), *appeal dismissed*, 344 U.S. 802 (1952) (three acre lots); *Lionshead Lake, Inc. v. Wayne Township*, 10 N.J. 165, 89 A.2d 693 (1952) (minimum size house); *State ex rel. Saveland Park Holding Corp. v. Weiland*, 269 Wis. 262, 69 N.W.2d 217, *cert. denied*, 350 U.S. 841 (1955) (architectural conformity). See also Warp, *Legal Status of Rural Zoning*, 36 ILL. L. REV. 153, 164 (1941): "The police power extends beyond regulations designed to promote the public health, morals, safety, and welfare to so dealing with existing conditions as to bring out of them the greatest convenience or the greatest prosperity."

³² 1 YOKLEY, *ZONING LAW AND PRACTICE* § 2, 63 (2d ed. 1953). The word "reasonable" or its antithesis can cover a multitude of sins, e.g., it is "unreasonable" and therefore deprives a person of his property without due process of law; it is "unreasonable" and therefore denies a person equal protection of the laws.

³³ ROTTSCHAEFER, *CONSTITUTIONAL LAW* §§ 233-34 (1939).

³⁴ The municipal corporation is the "agent" of the state, empowered to carry out the functions of the state in, over, and for the area over which it has been given jurisdiction. This applies not only to the police power, but also to all "governmental" (as opposed to "proprietary") functions.

that local governments have no power to zone anything unless they have been explicitly authorized to do so by the legislature. The final basic tenet is that municipal corporations *usually* have no extraterritorial powers.³⁵

A. Annexation Analogy

Brief reference was made above to the courts' attitudes with respect to annexation of undeveloped lands. The power of annexation and its counterparts, dissolution and consolidation, it is true, are not lineal descendants of the police power. They are merely methods by which the sovereign determines to govern particular areas of its domain. Therefore, although the relationship is somewhat distant, there are several factors which could have an important bearing on the future of extraterritorial zoning. As stated above,³⁶ annexation statutes very often have a negative influence on planning. The requirements of these statutes very often preclude the primary city from annexing sufficient undeveloped lands to insure effective planning. Among these statutory limitations are requirements for consent by a majority of those living in the area to be annexed; a certain density of population; platted lands; and prohibitions against the annexation of lands used for agriculture or horticulture.³⁷ The courts, as a rule, have been quite scrupulous in insisting upon strict compliance with these statutory requirements.³⁸ The legislatures, of course, could ease these restrictions and thereby remove at least one obstruction from the road to effective

³⁵ *City of Sedalia ex rel. Ferguson v. Shell Petroleum Corp.*, 81 F.2d 193 (8th Cir. 1936); *Jones v. Hines*, 157 Ala. 624, 47 So. 739 (1908); *State v. Eason*, 114 N.C. 787, 19 S.E. 88 (1894); *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

³⁶ See pages 371-72.

³⁷ For a discussion of this problem as it affects planning, see FORDHAM, *A LARGER CONCEPT OF COMMUNITY* 27-33 (1956).

³⁸ *People ex rel. Pletcher v. City of Joliet*, 328 Ill. 126, 159 N.E. 206 (1927); *Sharkey v. City of Butte*, 52 Mont. 16, 155 Pac. 266 (1916); *Chicago, B. & Q.R.R. v. Nebraska City*, 53 Neb. 453, 73 N.W. 952 (1898); *Couch v. Marvin*, 67 Ore. 341, 136 Pac. 6 (1913).

planning.³⁹ This, however, would be no panacea, for the single word "reasonable" in the hands of the courts is still a formidable weapon. The leading case involving the interpretation of this requirement is *Vestal v. City of Little Rock*,⁴⁰ the doctrine of which is considered basic in annexation situations where the question of reasonableness is in issue. After announcing the guiding principles to be used in determining the propriety of extending city limits,⁴¹ the court said that city limits should not be extended to take in lands when they are used only for purposes of agriculture or horticulture, and are valuable on account of such use, or *when they are vacant and do not derive special value from their adaptability for city uses*. Thus, although the courts recognize the necessity for the annexation of a certain amount of undeveloped land,⁴² they often scrutinize very carefully the amount of land annexed, the possibility of benefit — or lack of it — to those residing in the area to be annexed, and the municipality's apparent land need and its motivation for annexing.⁴³

³⁹ The legislature is supreme in matters of local government, except as it is restricted by federal or state constitutional provisions. *Trenton v. New Jersey*, 262 U.S. 182 (1923); *Berlin v. Gorham*, 34 N.H. 266 (1856). As to supremacy in annexation matters, see *Hunter v. Pittsburgh*, 207 U.S. 161 (1907); *State v. Cincinnati*, 52 Ohio St. 419, 40 N.E. 508 (1895).

⁴⁰ 54 Ark. 321, 15 S.W. 891 (1891).

⁴¹ "... [C]ity limits may reasonably and properly be extended so as to take in contiguous lands (1) when they are platted and held for sale or use as town lots; (2) whether platted or not, if they are held to be bought on the market, and sold as town property, when they reach a value corresponding with the views of the owner; (3) when they furnish the abode for a densely settled community, or represent the actual growth of the town beyond its legal boundary; (4) when they are needed for any proper town purpose, as for the extension of its streets, or sewer, gas, or water system, or to supply places for the abode or business of its residents, or for the extension of the needed police regulation; and (5) when they are valuable by reason of their adaptability for prospective town uses." *Id.* at 892.

⁴² "A growing City . . . could hardly be expected to expand into territory already covered by houses." *Walker v. City of Pine Bluff*, 214 Ark. 127, 214 S.W.2d 510, 512 (1948). See also *A. M. Klemm & Son v. City of Winter Haven*, 141 Fla. 60, 192 So. 652 (1939), *appeal dismissed*, 309 U.S. 638 (1940); *Tod v. Houston*, 276 S.W. 419 (Tex. Com. App. 1925).

⁴³ *City of Sugar Creek v. Standard Oil of Indiana*, 163 F.2d 320 (8th Cir. 1947) (attempt to annex land, including plot on which oil company planned to build a multi-million dollar plant, although substantial amount of land

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In view of the courts' reluctance to recognize a municipality's power (aside from statutory compliance) of generous annexation, one may speculate that they will be no more beneficent when faced with the issue of extraterritorial zoning. From a negative point of view, it may be argued that zoning the fringe area is even more objectionable than annexing undeveloped land. In the case of the former, there is restriction without any immediate and tangible advantage, whereas in the case of the latter, those people living in the annexed area will realize some immediate benefits, including police and fire protection and other municipal services, and, of particular importance, a voice in the government of the municipality.⁴⁴ It is also significant that in those cases in which the courts have balked at the attempted annexation, the land area involved was considerably less than that which could be encompassed by an ordinance that would zone the fringe from the corporate limits for two or three miles in *all* directions.⁴⁵

still available within city limits); *Newport v. Owens*, 213 Ark. 517, 211 S.W.2d 438 (1948) (denying city's petition to annex 960 acres, 90 acres of which used for agriculture); *Hustead v. Village of Phillips*, 131 Neb. 303, 267 N.W. 919 (1936) (annexing farm land for revenue purposes); *Couch v. Martin*, 67 Ore. 341, 136 Pac. 6 (1913) (meager electorate not contemplated by statute); *State ex rel. Taylor v. Edison*, 76 Tex. 302, 13 S.W. 263 (1890) (attempt to annex twenty-eight square miles for school purposes; unjust to impose burdens of government without giving concomitant benefits). The authority of this case, however, is dubious, since the fact situation was so bizarre. In the twenty-five years from 1920 to 1945 the city had suffered a net loss in population of one hundred. Of the 534 acres within the corporate limits, 200 were occupied by Standard Oil, and of the remaining property only 36% had ever been used for business or residential purposes. The council met in secret session and read the ordinance three times in the one evening. The land sought to be annexed took in the rights of way of two railroads, a waterworks that did not service Sugar Creek, a suburban development absorbing the overflow from Kansas City, and bottom lands fit for nothing but grazing.

For a view considerably more liberal, see *Norfolk County v. Portsmouth*, 186 Va. 1032, 45 S.E.2d 136 (1947), in which the court gave a verbal spanking to suburbanites who take all of the advantages that the primary city has to offer, including means of livelihood, but want none of the responsibilities and burdens.

⁴⁴ Representation in the local government and its relation to extraterritorial zoning will be discussed in greater detail below.

⁴⁵ In *Newport v. Owens*, 213 Ark. 517, 211 S.W.2d 438 (1948), less than 10% of the area to be annexed was used for agricultural purposes, and the

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Although these arguments against extraterritorial zoning conceivably might be considered efficacious by some courts, I would suggest that they are lacking in persuasiveness. In many of those cases in which the courts have found the attempted annexation to be unreasonable, the emphasis, implicit and explicit, has been on the burden-benefit factor. The courts have been chary about sanctioning the balancing of an immediate burden of urban taxation with only the future prospect of urban conveniences — streets, sewers, water and gas facilities, and anything else that requires considerable time and expense to extend to the outer reaches of a municipality. Zoning, although restrictive, does not impose further burdens on those living in the fringe in the same sense that increased taxation does. The restrictions of fringe zoning, moreover, are considerably less drastic than the typical urban zoning ordinance which incidentally would become applicable to annexed lands.⁴⁶ In addition, annexation is premised upon the idea of *present* land need, while extraterritorial zoning is concerned with future need and development. There is, it would seem, a decided difference between annexation and all that it implies, when it is unnecessary for municipal expansion, either present or within the foreseeable future, and zoning, with its single restrictive — though perhaps burdensome — element designed to *protect* the *future* need of the municipality. Annexation is inescapably bound to “today” and should be governed accordingly; zoning should and must look ahead to “tomorrow,” unfettered by myopic thinking. Annexation and zoning are different concepts, designed to accomplish different ends, and the validity of one should not be made to depend upon principles applicable to the other.

entire tract was roughly only one and one-half square miles. Under a zoning ordinance, a city conceivably might control an area twenty times its size, or even more.

⁴⁶ *Boise City v. Better Homes, Inc.*, 72 Idaho 441, 243 P.2d 303 (1952); *City of Highland Park v. Calder*, 269 Ill. App. 255 (1932).

B. Taxation Analogy

In probing further for an answer, one may also analogize extraterritorial zoning to the power of municipal taxation. The generally accepted proposition is that municipalities have no power to tax beyond their corporate limits.⁴⁷ This usually is supported by some rather inarticulate contentions about denial of due process. The cases, however, do not seem to justify such an unqualified conclusion.⁴⁸ Those cases cited in the previous footnote are significant because all were decided solely on questions of existing statutory authority or of statutory interpretation. Indeed, there is respectable authority indicating the propriety of such extraterritorial taxation if the municipality has been given the necessary power. Of course, there are exceptions which will be referred to later.

In *Consolidated Fisheries Co. v. Marshall*,⁴⁹ it was held that a town had power to tax lessees of public lands over which the town had been given control by the legislature. The case turned on the interpretation of the statute. Since the constitutional issue was not raised, however, nor mentioned by the court, one may speculate that there was tacit recognition of the legislature's prerogative to grant such power to the city. In *Wible v. City of Bakersfield*,⁵⁰ a school district lay partly within and partly without the corporate limits. The court reasoned that the entire school district was within the corporate limits of the city for school purposes and was, therefore, subject to taxation

⁴⁷ This particular problem is governed in large measure by constitutional provisions requiring uniformity of taxation upon the same class of subjects within the territorial jurisdiction of the taxing authority.

⁴⁸ *Smith v. Amidon*, 102 Fla. 492, 136 So. 256 (1931) (statutory provision making excluded lands non-assessable); *Hardin v. Pavlat*, 130 Neb. 829, 266 N.W. 637 (1936) (in absence of statute, no power to levy taxes on property outside corporate limits); *City Stores Co. v. Philadelphia*, 376 Pa. 482, 103 A.2d 664 (1954) (denying power to tax on basis of statutory interpretation).

⁴⁹ 3 Terry 283 (Del. Super. Ct.), 32 A.2d 426 (1943), *aff'd*, 3 Terry (Del.) 532, 39 A.2d 413 (1944).

⁵⁰ 42 Cal. App. 77, 183 Pac. 291 (1919).

by the city for school purposes. An extremely liberal point of view emerged from an 1871 Virginia case.⁵¹ It involved taxation of lands lying within a one-half mile area beyond the corporate limits to assure the payment of interest to citizens of Lynchburg and other stockholders of a railroad servicing the vicinity. In answering the constitutionally-based challenge to extraterritorial taxation, the court said, "The legislature in the exercise of its discretion, chose to throw the town of Lynchburg, as it then stood, and the adjacent territory for half a mile around, on every side, into one district, for the purpose of this tax. It had a right to do so."⁵²

There is, however, another side to the coin. In *Hughes v. Town of Davenport*,⁵³ taxes had been levied on certain annexed lands. This property was subsequently detached because the annexation was found to be unreasonable. The court held that to permit the city to collect taxes on the excluded land would be to deny due process and equal protection of the law to the owners of the excluded land. Admittedly, this situation is somewhat different from the normal extraterritorial imposition of taxes, but the court's language was sufficiently broad to indicate a hostility toward this type of taxation.⁵⁴ Of course, if the state constitution specifically provides that municipalities' powers of taxation are limited to their territorial boundaries, there is little that the legislature can do, short of subterfuge.⁵⁵

⁵¹ *Langhorne v. Robinson*, 61 Va. (20 Gratt.)* 661 (1871).

⁵² *Id.* at* 669. The court added that the railroad was just as advantageous to those living beyond the city limits as to those living within them. The *Langhorne* case was cited with approval in *Whiting v. Town of West Point*, 88 Va. 905, 14 S.E. 698 (1892), and in *Kaufle v. Delaney*, 25 W. Va. 410 (1885). See also *Hardin v. Pavlat*, 130 Neb. 829, 266 N.W. 637 (1936), in which the court said that in the absence of a statute, cities have no authority to tax lands beyond their boundaries.

⁵³ 141 Fla. 382, 193 So. 291 (1940).

⁵⁴ To the same effect, see *Klich v. Miami Land & Development Co.*, 139 Fla. 794, 191 So. 41 (1939) and *Smith v. Amidon*, 102 Fla. 492, 136 So. 256 (1931).

⁵⁵ In *Pleasant Grove v. Holman*, 59 Utah 242, 202 Pac. 1096 (1921), a statute authorizing the city to "tax" users of water, whether within or

Probably the clearest, and perhaps the oldest statement, condemning extraterritorial taxation is found in a decision of the Supreme Court of Missouri.⁵⁶ In this case, the legislature had authorized the city to tax all real estate outside of and adjacent to the corporation for one-half mile. The court held that this was a violation of basic constitutional rights. After admitting the legislature's "uncontrolled power of taxation," the court said:

... [H]ere the attempt is to authorize a municipal corporation . . . arbitrarily, under the mask of a tax, to take annually from those who are without its jurisdiction a certain portion of their property lying within a half-mile of the corporate limits, which, we think, can not be done. . . . But no instance, it is believed, can be found where these corporations have been clothed with power to tax others not within their local jurisdiction, for their own local purposes; and if the legislature possess the power now claimed over private property, they ought to exercise it themselves, and not delegate it to those whose interest it is to abuse it.⁵⁷

It is significant that the court conceded the legislature's power to tax the property in question in the same manner as that attempted by the municipality, but denied its right to delegate that power "to those whose interest it is to abuse it."

What then does the analogy offer? There can be little argument against the proposition that a municipality has no inherent power either to tax or to zone extraterritorially. Assuming, however, that legislatures confer the power to

without the corporate limits, was found not to be in violation of such a provision. The court said this was an "assessment" not a "tax," and since it could be used only for water purposes, it did not come within the constitutional inhibition. *Quaere* whether such a constitutional provision could be rendered impotent by a grab-bag full of statutes authorizing "assessments."

⁵⁶ *Wells v. City of Weston*, 22 Mo. 384 (1856).

⁵⁷ *Id.* at 389. In *State ex rel. Hinson v. Nickerson*, 99 Neb. 517, 156 N.W. 1039 (1916), the court said that property "within the city" could be taxed for city purposes. By application of the maxim, *inclusio unius, exclusio alterius*, it might be concluded that there was an implied prohibition of extraterritorial taxation in the language of the court. Admittedly, this is somewhat speculative, inasmuch as this was another case of detached property.

zone extraterritorially, will the courts or counsel rely on extraterritorial taxing arguments? I have suggested that they might. The more important consideration is whether the courts will deem extraterritorial zoning sufficiently analogous to extraterritorial taxation to warrant the application of a single set of rules to both functions. In those jurisdictions in which the courts have found no fundamental constitutional rights violated by extraterritorial taxation, any opposition on the basis of this analogy will lead only to a dead end. If the legislature can establish a taxing district, including therein unincorporated lands, and charge the municipal government with its administration — the approach used by the court in the *Langhorne* case — then it would seem that it has equal power to create a zoning district to be administered in the same manner. The difficult cases — when the taxation analogy is used as the basis for the challenge to zoning — will be in those jurisdictions in which there is no specific constitutional prohibition against extraterritorial taxation, but where the courts either have found this to be a violation of fundamental rights — as in the *Wells* case — or have demonstrated an affinity for “due process” or “equal protection” arguments. In these cases, the basic issue would be the similarity or dissimilarity of the two functions, for the less similar they are in theory, operation, and effect, the less applicable the rules of one should be to the other.⁵⁸

It would seem that the dissimilarity is sufficient to permit those courts which condemn or would condemn extraterritorial taxation to sustain extraterritorial zoning and still be consistent. In the first place, zoning is an exercise of the police power, an inherent attribute of the sovereign, and the least limitable of its powers when not exercised

⁵⁸ In those states in which extraterritorial taxation is prohibited by specific constitutional provision, the similarity argument should be without merit, since the provision was intended to encompass one specific power, not an undefined number of others.

arbitrarily.⁵⁹ The taxing power, however, is not so illimitable.⁶⁰ The courts have been traditionally suspicious of the taxing power;⁶¹ the same suspect nature does not attach to the zoning power, as indicated by its immediate acceptance by a conservative Supreme Court,⁶² and by that Court's more recent swing towards liberalism in zoning matters.⁶³

When taxes are collected, there is a divestment of good, hard money, while the effect of a zoning ordinance, restrictive though it may be, usually is not quite so tangible nor obviously painful. Furthermore, as indicated in the discussion of annexation, the courts always are concerned, in tax cases of this kind, with the proper balance of the burden-benefit formula. In zoning cases, this aspect ordinarily does not — or at least should not — assume a position of any great import. The exercise of the police power has as its ultimate end the *collective* good and if, in the process of attainment, hardships are created for individuals, this is unfortunate, but necessary.⁶⁴ It might be argued that fringe zoning benefits no one since (1) the only effect it has on fringe dwellers is one of restriction; and (2) residents of the municipality are too far removed to be effected. But the idea that zoning must operate prospectively is too well recognized for an argument of this kind to be seriously considered.

If the above analysis is somewhat cursory, its super-

⁵⁹ *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

⁶⁰ A constitutional amendment was required to legitimize income taxation and the rule of strict construction is still applied universally.

⁶¹ “. . . [T]he power to tax involves the power to destroy. . . .” Chief Justice Marshall in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 159, 210 (1819).

⁶² *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

⁶³ For a general discussion of the recent trend in the Supreme Court, and its implications, see Williams, *Planning Law and Democratic Living*, 20 LAW AND CONTEMP. PROB. 317 (1955). For what is probably the most far-reaching opinion of the Supreme Court in this general area, see *Berman v. Parker*, 348 U.S. 26 (1954).

⁶⁴ *Northwestern Laundry v. Des Moines*, 239 U.S. 486 (1916); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915).

ficiality was deliberate. Although further reference will be made to the tax analogy, I believe there is little possibility that the conceptual raw material to be found in that area can be refined into very much of real value. The real pay dirt is in the police power stratum. After all, if zoning is an exercise of the police power, police power concepts more than likely will be the basis of all arguments concerning extraterritorial zoning. In this area there is considerably more of a concrete nature which can provide the base for the formulation of tentative conclusions.

C. Stretching The Police Power

Cases involving questions of the municipalities' exercise of the police power extraterritorially are many and varied. Examination of a few of these might indicate the type of reception the courts may be expected to give to extraterritorial zoning.

In *State v. Rice*,⁶⁵ the challenged ordinance made it unlawful to keep pigs within the city limits or for a quarter mile beyond. The charter provided that all ordinances of Greensboro enacted "... in the exercise of police powers given to it for sanitary purposes or for the protection of the property of the city, shall apply to the territory outside of said city limits within one mile of same in all directions."⁶⁶ The court's only concern was with the presence or absence of the necessary legislative authority giving the city jurisdiction to exercise police power over adjacent districts.⁶⁷ Cities frequently are given authority to enact health ordinances having extraterritorial effect. Preventing pollution of the city water supply is perhaps the most common example of this. In another North Carolina case,⁶⁸ an

⁶⁵ 158 N.C. 635, 74 S.E. 582 (1912).

⁶⁶ *Id.* at 582.

⁶⁷ For another case involving pigs, see *Jones v. Hines*, 157 Ala. 624, 47 So. 739 (1908).

⁶⁸ *State v. Eason*, 114 N.C. 787, 19 S.E. 88 (1894).

ordinance prohibited throwing dead fish into a river which formed the corporate limits of the town. The court recognized the unquestionable power of the legislature to extend the jurisdiction of the town for police purposes. In this case, the extension was very limited, since the purpose of the ordinance was satisfied by including no more than the width of the stream. In a Utah case,⁶⁹ however, an ordinance was sustained which prohibited the keeping of horses, pigs, cattle, and other animals near a stream for ten miles above the place where the water was taken for municipal drinking purposes.⁷⁰

It is not uncommon for municipalities to regulate businesses carried on within a certain distance beyond the corporate boundaries. This usually is done through the imposition of a license tax or through inspection measures. As in many other areas, extraterritorial regulation of the sale of alcoholic beverages rather generally has been upheld by the courts. In this latter type of case, the Indiana Supreme Court has acknowledged the power of the legislature to designate the limits over which the jurisdiction of municipal corporations shall extend, and conceded that its judgment is conclusive on the courts.⁷¹ Ordinances requiring the inspection or licensing of dairies and slaughterhouses located beyond the city limits, but marketing their products within the city, have achieved a like measure of success,⁷² although the courts insist that

⁶⁹ *Salt Lake City v. Young*, 45 Utah 349, 145 Pac. 1047 (1915).

⁷⁰ The question of extraterritorial power was not even discussed by the court. The enabling act empowered the city to construct water works and protect the supply from pollution. The court may have accepted the legislature's power to confer such authority without question. See also *Holmes v. City of Fayetteville*, 197 N.C. 740, 150 S.E. 624 (1929), and *Light v. City of Danville*, 168 Va. 181, 190 S.E. 276 (1937).

⁷¹ *Jourdan v. City of Evansville*, 163 Ind. 512, 72 N.E. 544 (1904).

⁷² *Chicago Packing and Provision Co. v. Chicago*, 88 Ill. 221 (1878) (slaughterhouse); *Harrison v. Baltimore*, 26 Md. (1 Gill) 264 (1843) (inspection and disinfection of ship); *State v. Nelson*, 66 Minn. 166, 68 N.W. 1066 (1896) (dairy); *Korth v. City of Portland*, 123 Ore. 180, 261 Pac. 895 (1927) (dairy).

there be express statutory authority for such regulation and control.⁷³ Where the municipality regulates businesses located beyond the corporate limits by taxation, the courts persist in their demand that these be police measures; if they have a relation to the police power objectives *and* they are supported by statutory authority, such ordinances usually are sustained.⁷⁴

There are many ways in which a municipality may attempt to act extraterritorially, both within and without the scope of the police power.⁷⁵ The perplexing problem is not so much *whether* the legislatures can confer extraterritorial powers on municipalities, but how much power may be conferred. More specifically, may legislatures authorize municipalities to exert broad extraterritorial zoning powers over relatively large areas of unincorporated lands? The cases indicate quite conclusively that there are no constitutional inhibitions precluding the legislatures from giving municipalities authority to exercise the police

⁷³ In the following cases, the attempt to exercise regulatory powers was denied because of the lack of statutory authorization. *Oakland v. Brock*, 8 Cal. 2d. 639, 67 P.2d 344 (1937) (slaughterhouse); *Dean Milk Co. v. Aurora*, 404 Ill. 331, 88 N.E.2d 827 (1949) (dairy); *Dean Milk Co. v. Waukegan*, 403 Ill. 597, 87 N.E.2d 751 (1949) (milk); *Chicago v. Cuda*, 403 Ill. 381, 86 N.E.2d 192 (1949) (requirement for weight certificate for solid fuel delivered in city); *City of Rockford v. Hey*, 366 Ill. 526, 9 N.E.2d 317 (1937) (ice cream).

⁷⁴ *White v. City of Decatur*, 225 Ala. 646, 144 So. 873 (1932); *Standard Chemical & Oil Co. v. City of Troy*, 201 Ala. 89, 77 So. 383 (1917). *Contra*, *City of Sedalia ex rel. Ferguson v. Shell Petroleum Corp.*, 81 F.2d 193 (8th Cir. 1936) (absence of statutory authority).

⁷⁵ *City of Argenta v. Keath*, 130 Ark. 334, 197 S.W. 686 (1917) (license fee for cars for hire passing through city invalid in absence of statutory authorization); *Harden v. Superior Court*, 44 Cal. 2d 630, 284 P.2d 9 (1944) (city not allowed to take property outside its territorial limits under eminent domain proceedings when the legislature had not granted such power); *City of Pueblo v. Flanders*, 122 Colo. 571, 225 P.2d 832 (1950) (fire protection allowed); *Des Plaines v. Boeckenhauer*, 383 Ill. 475, 50 N.E.2d 483 (1943) (sewer assessments disallowed); *St. Louis v. Lee*, 132 S.W.2d 1055 (Mo. App. 1939) (ordinance prescribing speed limit on interstate bridge invalid in absence of statutory authorization); *Central Lincoln Peoples' Util. Dist. v. Smith*, 170 Ore. 356, 133 P.2d 702 (1943) (distribution of electricity allowed); *Safe Way Motor Coach Co. v. City of Two Rivers*, 256 Wis. 35, 39 N.W.2d 847 (1949) (ordinance prescribing city route of busses invalid without statutory authorization).

power extraterritorially in a limited way.⁷⁶

One writer has taken the position that municipalities may operate beyond their limits without restriction if the legislatures grant such authority.⁷⁷ With all due respect, I question whether the cases support so unqualified a conclusion. I concede that the courts' language in some of the cases is sufficiently broad to suggest the absence of plethoric limitations on what the legislatures can do. For example, in *West Frankfort v. Fullop*,⁷⁸ the court said without qualification that it was competent for the legislature to confer extraterritorial powers upon municipalities, and when granted, such powers have extraterritorial effect. In a Nebraska case,⁷⁹ it was held that the number, nature, and duration of the powers conferred upon municipal corporations and the territory over which they should be exercised rests in the absolute discretion of the state legislature. The language of these cases — and there are others in which equally broad statements are made — standing alone, seems to point to tacit judicial acceptance of general extraterritorial zoning powers. However, it is vital to read these statements in the contexts in which they were made, for it is no secret that courts have an addiction for saying more in their opinions than is necessary to decide the case.

In addition, the more important fact to be remembered

⁷⁶ Even in those cases in which the power is denied, there is a negative acknowledgement that the legislatures can grant such power. "The authority of municipal corporations to exercise powers beyond their territorial limits must be derived from some statute . . ." *City of Argenta v. Keath*, 130 Ark. 344, 197 S.W. 686, 688 (1917). In *City of Sedalia ex rel. Ferguson v. Shell Petroleum Corp.*, 81 F.2d 193, 196 (8th Cir. 1936), the court said: "[A] municipal corporation's power ceases at municipal boundaries and cannot, without specific legislative authority, be exercised beyond its geographical limits."

⁷⁷ Bouwsma, *The Validity of Extraterritorial Municipal Zoning*, 8 VAND. L. REV. 806, 811 (1955). The author cites as his authority, *Central Lincoln Peoples' Util. Dist. v. Smith*, 170 Ore. 356, 133 P.2d 702 (1943). It should be noted that this case dealt with a public utility.

⁷⁸ 6 Ill.2d 609, 129 N.E.2d 682, 685 (1955).

⁷⁹ *Lang v. Sanitary Dist. of Norfolk*, 160 Neb. 754, 71 N.W.2d 608 (1955).

is that in *none* of the above cases was the scope of extraterritorial power — general or zoning — in issue. In fact, the powers the municipalities were attempting to exercise, with or without legislative authority, were quite limited in effect as compared to sweeping zoning powers, and usually were directed toward a specific thing, *i.e.*, liquor traffic, pig sties, pollution of the city's water supply, slaughterhouses, and dairies, etc. All of these, of course, are related to police power objectives; and if they have been sustained, so then perhaps should zoning. There is, however, the possibility that the courts might consider a comprehensive zoning ordinance that imposes general restrictions over land use in a wide area *in anticipation of possible future problems* quite differently from ordinances that are relatively narrow in scope and directed toward an existent and immediate problem. Police power restrictions antedated zoning by a considerable length of time, and the courts may not be entirely receptive to the contention that since specific extraterritorial restrictions have been sustained, extraterritorial zoning ordinances should be accorded the same respect and treatment.

There is some authority indicating that the courts may not be eager to approve extraterritorial zoning powers that are exercised on an extensive scale. Fifty years ago, the Supreme Court of Tennessee wrestled with the problem of extraterritoriality.⁸⁰ The enabling act covered considerably more than zoning. It authorized the city of Memphis to exercise *all* governmental and police powers for two miles beyond the corporate limits. Unfortunately, because of the extent of the powers involved, this decision is not as authoritative for zoning purposes as it might appear. Before beginning the demolition process, the court conceded it to be within the power of the legislature to authorize subordinate corporations to pass ordinances or laws hav-

⁸⁰ *Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798 (1907).

ing restricted effect beyond their limits. Note the word "restricted" — an omen. After this pacifying prologue, the court proceeded to destroy the legislation in language that bears repetition:

. . . [E]x necessitate a *limited* police power may be granted to municipalities over a *small* section of country surrounding their boundaries for their protection against nuisances, and to safeguard the health of the people residing in them; but even this is hard to justify on any principle other than that the municipality is in such matters the agent of the state itself for the protection of the people of the state. But that agency cannot be used as a basis for conferring power upon municipalities over territory outside of them *any further than bare necessity requires*. Certain it is that *there can be no justification for extending over an outside strip of country, two miles in width, or of any less width, all the governmental powers of the city, or even all the police powers of the city*. . . . The exercise of governmental powers over the people embraced within any area or territory, necessarily involves control to a very material degree over their person and property.⁸¹ (Emphasis added.)

Of course, it is readily admitted that in addition to the almost limitless powers conferred by the enabling act, the vintage of the *Malone* case saps it of a great deal of its virility.⁸² Zoning's nativity in the United States was yet a decade away, and it was two decades away from coming of age. But there are hints of the same attitude in more recent opinions. *Gust v. Township of Canton*⁸³ involved a township ordinance which prohibited the establishment of trailer parks anywhere in the township. The township, located in the Detroit metropolitan area, was bisected by

⁸¹ *Id.* at 806.

⁸² See also *Jones v. Hines*, 157 Ala. 624, 47 So. 739, 740 (1908), in which the court said, "While it is true that police powers may sometimes be given for a limited space around the city limits for special purposes, yet they must be specially given"

⁸³ 342 Mich. 436, 70 N.W.2d 772 (1955).

two railroads along which industries were being developed. The planners wanted to keep the area zoned for residential purposes in order to accommodate those who would be attracted by the industries. It was admitted by the planners that concentration of population in the vicinity was twenty to twenty-five years in the future (although there was some speculation that it might be sooner), but they were eager for the development to proceed in an orderly way. In invalidating the ordinance, the court said:

If the action of a township board in zoning property in a manner which would otherwise be arbitrary and unreasonable under present conditions is rendered valid by the fact that the board anticipates that in the future conditions will develop under which such zoning would not be arbitrary or unreasonable and believes that it will be conducive thereto, then the only limit on the board's powers in that regard would seem to be the measure of its expectations and beliefs. The extent of the owner's right to the free use of his property in the manner deemed best by him is not to be determined by such speculative standards. The test of validity is not whether the prohibition may at some time in the future bear a real and substantial relationship to the public health, safety, morals or general welfare, but whether it does so now.⁸⁴

This case is not entirely satisfactory for several reasons. First, the Supreme Court of Michigan has evinced a decided conservatism in zoning matters.⁸⁵ Secondly, the prohibition in the ordinance may have been somewhat more stringent than is typical of most fringe area ordinances. Finally, the "twenty to twenty-five year" factor seems to have been more than the court could swallow. Moreover, this is *not* an extraterritorial case at all; it is a simple case involving the question of reasonableness. Recognizing these shortcomings, and at the risk of doing ex-

⁸⁴ *Id.* at 774.

⁸⁵ See *Senefsky v. Lawler*, 307 Mich. 728, 12 N.W.2d 387 (1943), and *Frischkorn Constr. Co. v. Lambert*, 315 Mich. 556, 24 N.W.2d 209 (1946).

actly that which I criticized previously, it is suggested that some of the language of the court is pertinent to the problem of extraterritorial zoning. The court viewed with ill-concealed distaste the "speculative standards" of "expectations and beliefs" as the only limitations on the exercise of the zoning power. Fringe zoning is cut from the same sheet, although the piece is perhaps smaller. Of equal significance is the statement that the prohibition to be valid must bear a substantial relationship to present police power objectives. Possible future relationship was considered insufficient. The weasel words are "substantial relationship . . . now." Does a municipal zoning ordinance restricting an area two or three miles away from the city limits bear a "substantial relationship now"? One might very well find that it does not!

The rather adverse picture toward extraterritorial zoning described thus far is not without its antithesis. There is evidence tending to support fringe zoning which is equal to or more formidable than that condemning it. In *Standard Chemical & Oil Co. v. City of Troy*,⁸⁶ the court said, in language broad enough to include zoning, that it may be necessary for a city to exert its police powers beyond the city limits in order to insure the health, safety, morals and general welfare of the municipality. A recent North Carolina case⁸⁷ may contain a further hint as to the ultimate fate of extraterritorial zoning. Here the defendant was charged with violating an ordinance of the city of Winston-Salem that had zoned residential an area lying beyond the city limits. When the ordinance was adopted there was no statutory authority for extraterritorial zoning. The legislature subsequently amended the statute extending municipalities' jurisdiction for zoning purposes, but the city did not re-enact its ordinance. It was held that the ordi-

⁸⁶ 201 Ala. 89, 77 So. 383 (1917).

⁸⁷ *State v. Owen*, 242 N.C. 525, 88 S.E.2d 832 (1955).

nance, originally invalid because enacted without statutory authority, was not activated automatically by the amendment. Nothing was said regarding the validity of an extraterritorial zoning ordinance enacted pursuant to statutory authority, but the court's language and its apparent unconcern with that issue might be taken as an implicit recognition of its validity. The court's emphasis was on the subsequent inert character of the ordinance, but there was an indirect invitation to enact a valid ordinance on the basis of the amended statute. In confining itself to the statement that a municipal ordinance invalid under an enabling act existing at the time of its enactment is not validated by mere amendment of the statute, so that an ordinance might be validly enacted, the court may have been implying that it would deal charitably with authorized extraterritorial zoning ordinances.

D. *Extraterritorial Subdivision Control*

Another avenue of approach to a determination of the validity of extraterritorial zoning is to examine the treatment accorded its companion, extraterritorial subdivision control.⁸⁸ Space does not permit a detailed discussion of subdivision control and its relation to zoning,⁸⁹ but the language of some of the cases may be helpful in detecting an attitude that might bear on the outcome of extraterri-

⁸⁸ For an excellent discussion on subdivision control, see Melli, *Subdivision Control in Wisconsin*, WIS. L. REV. 389 (1953), and Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L. J. 544 (1952-53). Both articles contain complete citations to subdivision control legislation.

⁸⁹ Superficially, subdivision controls are designed to prevent fraud (reasonable assurance to the purchaser that he is getting the amount of land he bargained for), and to insure the existence of an adequate street system, parks, sewers, etc. It has little to do with land use. Under many of the statutes, the controls apply only when the land is platted. In other words, they are conditions precedent to the recording of the plat, but there are few restrictions against selling parcels by metes and bounds. And, of course, without zoning restrictions, the purchaser can put the land to whatever use he chooses. For a more refined distinction, see Note, *Land Subdivision Control*, 65 HARV. L. REV. 1226 (1952).

torial zoning issues. In a 1920 case,⁹⁰ the Connecticut Supreme Court took a far-sighted view of subdivision control. It called attention to existing eyesores, narrow streets and other characteristics of urban communities, and attributed all of them to a lack of planning. It recognized the inimical effect of these factors on the public health, safety, morals and welfare, and concluded that without planning controls, unscrupulous promoters would profit at the expense of the community's welfare. In *Prudential Co-Op. Realty Co. v. Youngstown*,⁹¹ in which subdivision control with the additive of extraterritoriality was involved, the court was even more blunt in saying: "... [T]he statement that narrow streets and other obstructions without limit may be established by suburban owners, and that the Legislature is powerless to intervene, is a travesty on justice and government."⁹² The court added that a city has a vital interest in the area immediately surrounding it, since it will grow outward. This type of control faced its most recent test in the Illinois Supreme Court.⁹³ After paying proper homage to the time-honored doctrine that municipalities enjoy no extraterritorial powers, the court blandly stated that if the legislature sees fit to confer special extraterritorial powers on municipalities, the courts will recognize and give effect to those powers.⁹⁴

Since there is some kinship, at least on the extraterritorial level, between subdivision controls (which appear to have weathered the storm),⁹⁵ and zoning (which still is

⁹⁰ *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354 (1920). However, this case did not involve extraterritorial control.

⁹¹ 118 Ohio St. 204, 160 N.E. 695 (1928).

⁹² *Id.* at 698.

⁹³ *Petterson v. City of Naperville*, 9 Ill.2d 233, 137 N.E. 2d 371 (1956).

⁹⁴ A similar case in which the court refused to discuss the constitutional issue is *Peterson v. Vasak*, 162 Neb. 498, 76 N.W.2d 420 (1956).

⁹⁵ For a collection of cases touching all phases of subdivision control, see Annot., 11 A.L.R.2d 524 (1950).

dragging anchor), one may speculate that the courts are in the process of becoming more liberal in their approach to the concepts of planning, an attitude which forecasts calm seas for zoning cases of the future.⁹⁶ There is some evidence, however, of the courts' reluctance to face these problems on a realistic basis, which can do little else than envelop them in a cloud of uncertainty. For example, in *Ridgefield Land Co. v. Detroit*,⁹⁷ the court sustained a subdivision control ordinance by predicating it upon the idea that plat recording is a privilege to be enjoyed by the subdivider only upon compliance with reasonable conditions. It is quite evident that this type of approach will be of little value to the resolution of extraterritorial zoning issues.

III. LACK OF REPRESENTATION OBJECTION

Thus far the discussion has centered on what the courts' reaction to the general idea of extraterritorial zoning might be, while only limited reference has been made to the reasons underlying this anticipated reaction. The pattern would be incomplete without developing more fully the legal bases for objections to fringe zoning and indicating how receptive the courts may be expected to be to arguments based on these objections. Although many of the pertinent cases abound in meaningless generalities, there are others in which the courts expressed, with a relatively high degree of clarity, the reasons for their decisions.

Aside from the practical obstructions in the path to successful fringe zoning,⁹⁸ one of the serious legal impediments probably will be the lack of representation argu-

⁹⁶ See, however, HORACK AND NOLAN, *LAND USE CONTROLS* 203 (1955): "As statutes extended authority to local legislative bodies to determine the quality and intensity of land use, the standards imposed by judicial review became more exact."

⁹⁷ 241 Mich. 468, 217 N.W. 58 (1928).

⁹⁸ See note 21 *supra*.

ment that appears in both extraterritorial tax and police regulation cases.⁹⁹ Since the courts seem to consider this argument synonymous with the constitutional objections of lack of due process and lack of consent by the governed, no effort has been made to treat them differently.

In an Alabama case¹⁰⁰ — to invoke the tax analogy again — the court, although sustaining an extraterritorial licensing ordinance, took precautions to add a caveat. The legislature, it said, is without power to authorize the levy of a tax for revenue on businesses or occupations not carried on within the corporate limits, since this would amount to taxation without representation and the taking of private property without due process. Conceding that an ordinary intramural zoning restriction is tantamount to “taking” only when it is unreasonable, the argument of non-representation might seem to apply with equal force and merit to any exercise of extraterritorial zoning powers. The Florida Supreme Court used language essentially the same, although in the more general phraseology of “due process” and “equal protection.”¹⁰¹ Further, the strong statement of the *Wells* case¹⁰² quoted earlier,¹⁰³ reflects a decided antipathy towards permitting municipal control unless there is commensurate municipal benefit.

Leaving the extraterritorial taxing problem for the moment, the same unfavorable attitude can be discovered in cases involving extraterritorial police regulations. In *Smeltzer v. Messer*,¹⁰⁴ the issue of fringe zoning was squarely before the Kentucky appellate court. Through

⁹⁹ *Robinson v. Norfolk*, 108 Va. 14, 60 S.E. 762 (1908); *Brown v. City of Cle Elum*, 145 Wash. 588, 261 Pac. 112 (1927). In the latter case, a constitutional provision was interpreted as a prohibition against the exercise of the police power extraterritorially. There was a dissenting opinion.

¹⁰⁰ *White v. City of Decatur*, 225 Ala. 646, 144 So. 873 (1932).

¹⁰¹ *Hughes v. Town of Davenport*, 141 Fla. 382, 193 So. 291 (1940). However, this was a case of detached land.

¹⁰² *Wells v. City of Weston*, 22 Mo. 384 (1856).

¹⁰³ See page 383.

¹⁰⁴ 311 Ky. 692, 225 S.W.2d 96 (1949).

strategic maneuvers, the court managed a successful out-flanking operation, emerged unscathed, and decided almost nothing. The fringe, over which the city attempted to exert its zoning powers (with statutory authorization), included lands situated in two adjoining counties. Inasmuch as it had been decided in an earlier case¹⁰⁵ that cities could not annex lands in other counties, the court felt that *its use was not so reasonably related to the city's development as to fall within the purview of the statutes*.¹⁰⁶ In the general confusion, extraterritorial zoning may have gained or lost a little ground — I am not sure which. On the loss side, the court said:

The above principles (doctrine of intraterritoriality and strict construction of the police power) are significant in this case because the city's action, if sustained, seriously impairs the rights of a person owning property beyond its limits who has no voice in its legislative policies, and who receives no legally recognizable benefit to such property from the city government.¹⁰⁷

I realize that instead of being inimical to extraterritorial zoning, this statement, because it was made in the county-line-barrier context, might turn out to be the contrary. The use of the present tense, however, confuses and concerns me. Had the court said "who never will have, or never can have" instead of "who has," and had it said "who never will receive, or who never can receive" instead

¹⁰⁵ *Town of Elsmere v. Tanner*, 245 Ky. 376, 53 S.W.2d 522 (1932).

¹⁰⁶ Consider the implications of the combined effect of these two cases. Artificial boundaries are barriers to effective planning. In the absence of research, the writer can only guess that a substantial number of cities are situated on or near county lines. In any jurisdiction following the rule of the *Tanner* case, this would mean that cities so situated could be developed in an orderly and rational way up to a point, and then — chaos! Certainly, a line existing only in the imagination is not going to inhibit the citizenry from occupying the land on either side. Indeed, freedom from the threat of annexation and other controls would act as a catalyst for just such a movement. This is another illustration of the depressing effect of some of our annexation laws and the interpretation given to them by the courts. See also FORDHAM, *A LARGER CONCEPT OF COMMUNITY* 27 (1956).

¹⁰⁷ 225 S.W.2d at 97-98.

of "who receives," it would have been consistent with its county-line position. But as it is written, it could be considered sweeping enough to include all extraterritorial zoning. Perhaps I am grasping at straws. It may have been nothing more than a slip of the pen.

The strongest language that forebodes ill for extraterritorial zoning is found in the inconoclastic *Malone* case.¹⁰⁸ The court said:

The control in the present instance is given, not to any one chosen or elected by the people over whom they are to exercise dominion, but to the officers of a foreign body, chosen for the service of that body, and not for the people to be affected by the powers given.

This is the representation argument in its most precipitate form. After speaking about the special legislation aspect of the case (the power had been given to Memphis only), the court went on:

But upon the general question we do not hesitate to say that the Legislature has no more power to take the property of one man and give it to a corporation, municipal or otherwise, than it has to give his property to another citizen; and no more has it power to impose burdens upon the citizen in favor of a municipal corporation of which he is not a member than it has to impose burdens upon him in behalf of another man who has rendered to him no equivalent.¹⁰⁹

But immediately preceding the last quoted sentence, the court said:

We need not consider whether the Legislature would have the power to impose such burdens upon the people living near to all of the other cities and towns of the state, since such general legislation would immediately produce an uprising which would insure its repeal.¹¹⁰

¹⁰⁸ *Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798, 806 (1907).

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

This latter statement, it is suggested, effectively emasculated the lack-of-representation argument.

If there is any great merit to the representation argument, I fail to appreciate it. Granted that there shall be no government without the consent of the governed, the argument is enhanced but little, since the governed have given their consent through their representation in the legislature.¹¹¹ The difference between legislative authorization for a particular purpose, such as regulating liquor sales beyond the corporate boundaries, on the one hand, and authority to exert a more general power, such as zoning, on the other, is one of degree only, at least so far as the representation question is concerned. If the former is not in violation of fundamental rights, the latter should be considered of equal compatibility. There is some judicial support for this position. In a Connecticut case,¹¹² the cost of maintaining a bridge built by virtue of a legislative enactment was placed upon the towns benefited thereby. In answer to the contention that this was taxation without representation, the court said that all those affected were sufficiently represented in the legislature.¹¹³

A side door approach to this problem of representation is premised on the axiom that the legislature is supreme in matters of local government, a doctrine qualified only by constitutional limitations. This flanking operation is best illustrated by the *Langhorne* case.¹¹⁴ In answer to the representation argument, the court said:

¹¹¹ The claimed "right" to local self-government has been successfully relegated to a mythological status. See McBain, *The Doctrine of an Inherent Right of Local Self-Government*, 16 COLUM. L. REV. 190, 299 (1916). This claimed "right" is so closely allied to the representation argument that one might consider the rejection of one as tantamount to a rejection of the other.

¹¹² *State ex. rel. Bulkeley v. Williams*, 68 Conn. 131, 35 Atl. 24 (1896).

¹¹³ *Id.* at 29. It added that this action was not prohibited by anything in the doctrine of the right of local self-government.

¹¹⁴ *Langhorne v. Robinson*, 61 Va. (20 Gratt.) 661 (1871).

The whole power of taxation belonged . . . to the Legislature; a city or county had none, except such as the Legislature might choose to give it. . . . [T]he power of local taxation has usually been conferred upon those municipal bodies or their officers. Where the power . . . has been delegated to such local authorities, they may, in strictness of language, be said to be the 'representatives' of the people, by whom the tax is imposed, within the language of the Bill of Rights And yet, in a legal sense, the tax in any such case is imposed by the representatives of the people in the Legislature; the power . . . being exercised . . . by those to whom they have seen fit to delegate it.

When the power to impose a tax is thus delegated to local authorities, they do not exercise their power under the authority which belongs to them as local officers. They exercise only the special authority delegated to them by the Legislature, in the particular case, and for the particular purpose. On principle, I can imagine no reason why the power might not as well be delegated to any other persons, in the discretion of the Legislature. The members of the Legislature are the representatives of the people¹¹⁵

Addressing itself more directly to the extraterritorial feature of the act, the court continued:

This superadded authority is distinct from, and independent of, their general authority as municipal officers of the city; as much so as if they had not been the same persons. When they exercise this special and superadded authority, they do not do so . . . as the common council of Lynchburg, but as a body of men to whom a special authority has been delegated by the Legislature.¹¹⁶

This approach is admirably suited to the zoning problem. The city councils could be considered as the delegates of the legislature for the purpose of zoning a district to include the particular municipality and as much of the fringe area as the legislature deems proper and necessary. This would logically stop any argument based on lack of

¹¹⁵ *Id.* at 664-65.

¹¹⁶ *Id.* at 669.

representation,¹¹⁷ for it is extremely doubtful that the legislature's right to exercise the police power for zoning purposes, and the further right (given proper standards) to delegate it would be questioned.

Another approach, closely akin to that just discussed, has been suggested.¹¹⁸ It is predicated upon the accepted notion that the situs and extent of a municipality's boundaries are within the absolute discretion of the legislature. Exercising this discretion, the legislature can — and does — establish multiple limits within which the city may operate for particular purposes. For example, there can be one boundary for political purposes, another for schools, and still another for streets and sewers. Using this approach, it can be argued that the legislature can establish the municipality's corporate limits for zoning purposes at a

¹¹⁷ This suggested approach as applied to the zoning problem is not original.

"If the extraterritorial police authority conferred upon a local unit goes beyond the achievement of the objectives of that unit can it be sustained on the theory that the state has simply seen fit to employ it in the discharge of that part of the state's total governmental responsibility?" FORDHAM, *LOCAL GOVERNMENT LAW* 140 (1949). The *Langhorne* case was severely limited, if not overruled, by *Robinson v. Norfolk*, 108 Va. 14, 60 S.E. 762 (1908). It was held that the *Langhorne* case was decided on the basis of the Constitution of 1830 which did not include the provision that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." *Id.* at 763. This provision, contained in the Constitution of 1851, was interpreted as precluding the type of taxation that was sustained in the *Langhorne* case. In the writer's opinion, however, this is not necessarily an abrogation of the *Langhorne* approach to the representation argument. There are meritorious arguments in opposition to the view of the *Robinson* case. Does such a constitutional limitation imply that the boundaries of a taxing district be coincidental with those of a political district? Is it not possible that people living within and without the corporate boundaries might be of the same class, at least for some purposes? See also the dissent in *Brown v. City of Cle Elum*, 145 Wash. 588, 261 Pac. 112 (1927).

¹¹⁸ See Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475 (1926). The author suggests that a municipality has multiple boundaries. It is a "bundle of jurisdictions." *Id.* at 479. He says of extraterritorial powers, "... [W]e may look upon the extension of power as either an extension of the municipal boundaries for one or more purposes, or as a legislative act giving a limited extraterritorial effect to municipal regulation, or as a direct conferment of extraterritorial power upon a city." *Id.* at 577.

point different from its limits for political purposes.

All things considered, it is quite unlikely that the courts will give much credence to arguments based on lack of representation or due process.¹¹⁹ The amount of water that has passed under the bridge since the *Malone*¹²⁰ and *Wells*¹²¹ cases has washed away much of whatever starch they may have had originally. As has been indicated, the courts in recent years have shown a marked liberality when considering questions of zoning. There is no good reason why this trend should stop suddenly at the corporate boundaries. In the *Smeltzer* case,¹²² the court observed cautiously "that any municipality has an interest in its approaches . . . [when] it may reasonably be contemplated that such territory will eventually become a part of the city."¹²³ It added that future expansion of a city's territorial limits is a basic consideration in the intention of the legislature when enacting planning and zoning statutes.¹²⁴ Practical considerations aside,¹²⁵ the concept of extraterritorial zoning, *as such*, should not find the courts hostile. This obviously does not imply, however, that

¹¹⁹ It is possible that not everyone shares the writer's optimism. Some of the planning and zoning acts provide for fringe representation. For example, the Indiana Planning Act was amended in 1953 to provide for the appointment to the city planning commission of two residents of the extraterritorial fringe. IND. ANN. STAT. §53-734a (Burns 1951). Several considerations may have motivated the amendment, viz., the desire to enable cities to acquire first-hand information from fringe dwellers; the feeling that representation on the planning commission might make fringe zoning more palatable; and anticipation of the statute being challenged on due process grounds. If it was the last of these, I suggest that the amendment is next to worthless. Although the fringe representatives have voting power as members of the commission, there is still no representation at all in the final zoning authority, the city council.

¹²⁰ *Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798 (1907).

¹²¹ *Wells v. City of Weston*, 22 Mo. 384 (1856).

¹²² *Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949).

¹²³ *Id.* at 97.

¹²⁴ *Ibid.*

¹²⁵ I.e., the active opposition of fringe dwellers, which could be intensive enough and sufficiently sustained to preclude effective fringe zoning.

the power of either the legislature or the municipality will be unlimited. It does mean that the law relative to what is and what is not permissible will be developed by a case to case process through the media of variances, exceptions and amendments, all of which are encompassed by the word "reasonable."

IV. MODIFICATION OF "REASONABLE AND SUBSTANTIAL RELATION" STANDARD

Two questions very probably will occupy the center of the court's attention in extraterritorial zoning cases of the future: how much restriction may the city impose, and how far may it extend its influence and still meet the test of reasonableness? In the absence of any cases directly in point, I shall again resort to analogies.

The phrase found in nearly every case in which the zoning ordinance is called into question is that it must bear a reasonable and substantial relation to the public health, safety, morals or general welfare.¹²⁶ The type of case which is most nearly similar to extraterritorial zoning involves zoning of undeveloped land. As a general proposition, the courts have been relatively charitable toward attempts to zone undeveloped lands. There are some exceptions, but these appear in cases in which there was no showing that the area was in the process of development or that there would be any development in the foreseeable future.¹²⁷ The Supreme Court of Mississippi established three criteria for determining the validity of zoning ordinances restricting rural lands to residential purposes.¹²⁸ It said that the area, to be so restricted, must be a residential section manifested by the actual presence

¹²⁶ 1 YOKLEY, ZONING LAW AND PRACTICE § 32 (2d ed. 1953).

¹²⁷ *Arverne Bay Const. Co. v. Thatcher*, 278 N.Y. 222, 15 N.E.2d 587 (1938).

¹²⁸ *Frederic v. Board of Supervisors*, 197 Miss. 561, 20 So. 2d 92, *sugg. of error overruled*, 20 So. 2d 671 (1945).

of enough inhabited residences to show a fair demand that it continue to be restricted to residential uses, or it must have been supplied with sufficient improved roads, water supply and lighting connections so that the lots will sell for residential purposes at reasonable prices. If neither of these are present, the ordinance will be valid if public authorities have adopted a comprehensive plan to furnish such conveniences within a reasonably short time.¹²⁹ In direct contrast is an Iowa case,¹³⁰ in which it was held that a district may be zoned for residential purposes to the exclusion of industry, although it is only sparsely settled and adapted for industrial uses. A similarly liberal point of view was taken by the Supreme Court of California, holding that slow development of a district in the use for which it has been zoned is not determinative of the reasonableness of the zoning restrictions.¹³¹ The court stated that one of the objectives of zoning regulations is to guide the future development of residential areas; therefore, to be effective, these "regulations must necessarily look to the future . . ."¹³² The same sentiment was expressed in a federal decision eighteen years earlier,¹³³ in which land — approximately 400 acres — located seven miles from the heart of Los Angeles had been restricted to residential uses. Although the property was used primarily for agricultural purposes, a few expensive residences had been built, and adjacent land had been equipped with streets and sewers. Evidence strongly indicated the presence of oil on the property. The land was worth about \$10,000 an acre for residential purposes, as compared to millions if it proved to be oil-producing. The court, in sustaining the ordinance, said that zoning ordinances look to future development of the

¹²⁹ *Id.* at 94.

¹³⁰ *Anderson v. Jester*, 206 Iowa 452, 221 N.W. 354 (1928).

¹³¹ *Lockard v. Los Angeles*, 33 Cal. 2d 453, 202 P.2d 38, 45-46 (1949).

¹³² *Id.* at 46.

¹³³ *Marblehead Land Co. v. Los Angeles*, 47 F.2d 528 (9th Cir. 1931).

city, rather than to a protection of a pre-existing status.¹³⁴ Thus the ordinance was upheld in the face of three seemingly compelling arguments opposed to it — distance, the rural nature of the district, and the tremendous differential in land value.¹³⁵

The optimism that might be generated by the seeming liberality of the courts in sustaining zoning of undeveloped lands should be tempered with caution. There are, I believe, some pertinent factors that cannot be overlooked. In the first place, the test of "reasonableness" is only one of the elements of extraterritorial zoning. The courts could very well consider zoning of unincorporated areas as being quite different from zoning annexed lands, although they both may be rural in character. Annexation assumes necessity, and necessity presupposes development within the reasonably foreseeable future. The courts always have been decidedly antipathetic toward speculation.¹³⁶ Secondly, but directly related, the amount of land encompassed by an extraterritorial zoning ordinance can be infinitely greater than that involved in most cases in which ordinances zoning undeveloped lands were challenged. Development of land situated on the three-mile periphery of the extraterritorial jurisdiction of a municipality is in the rather remote future. This would be especially true of a small or medium-sized city, unless there was an indication of a coming boom in oil, steel or uranium. There is a striking example of this in northwestern Indiana. For about a year, at least one of the nation's steel companies has been buying up land at the southern tip of Lake

¹³⁴ *Id.* at 531.

¹³⁵ For similar holdings on the eastern seaboard, see *Ellicott v. Baltimore*, 180 Md. 176, 23 A.2d 649 (1942); *Wilbur v. City of Newton*, 302 Mass. 38, 18 N.E.2d 365 (1938); *West Bros. Brick Co. v. City of Alexandria*, 169 Va. 271, 192 S.E. 881, *appeal dismissed*, 302 U.S. 658 (1937); and from the Supreme Court of the United States, *Zahn v. Board of Public Works*, 274 U.S. 325 (1927).

¹³⁶ A precise application of this is found in *Gust v. Township of Canton*, 342 Mich. 436, 70 N.W.2d 772 (1955).

Michigan (rumor has it that others are similarly occupied). Ogden Dunes, one of several small, residential communities situated on the lake shore, has a municipal area of about 500 acres and a population of approximately 700. If it exerts its extraterritorial zoning power — something it is threatening to do — it will control 8000 acres, and effectively eliminate the “threat” of having a steel mill in its back yard. Whether it is reasonable for a small town to control an area sixteen times its size is the type of question with which the courts will be faced. They apparently have not considered it unreasonable for a city to restrict itself almost entirely to residential uses.¹³⁷ It might be argued that it is necessary for a town to keep a large steel mill at a substantial distance from its corporate boundaries in order to preserve the residential character of the community. Moreover, since industrial development will attract large numbers of people to the area, it is probable that the city will enjoy a rapid growth. Viewing the problem from this point of view, the restriction of so much territory may seem reasonable. But if other nearby towns, similarly situated and of the same character and attitude, exert like controls over their fringe areas, literally all of the land will be pre-empted to the total exclusion of industry.¹³⁸ In such case, the likelihood of substantial development, let alone rapid development, becomes remote indeed, and the controls take on the aura of unreasonableness. The situation is dilemmatic, for I believe that the courts would be guilty of parochialism if they were to view the problems in total isolation from one another.

In order to legitimize the concept of extraterritorial

¹³⁷ Cf. *The Roman Catholic Welfare Corp. v. City of Piedmont*, 278 P.2d 943 (Cal. App. 2d), *aff'd* 45 Cal. 2d 325, 289 P.2d 438 (1955); *Borough of Cresskill v. Borough of Dumont*, 28 N.J. Super. 26, 100 A.2d 182 (L. 1953).

¹³⁸ This particular area is ideally suited for industrial uses in view of its proximity to rail transportation and the Great Lakes, the latter being of particular importance with the opening of the St. Lawrence Seaway.

zoning, the courts very probably will have to formulate new criteria of reasonableness. These will require a greater emphasis on foresight and development *in futuro*, with the concomitant acceptance of opinions and advice of experts, speculative though they may be.¹³⁹ It is conceivable that the courts might look askance at a statute which gives two or three mile extraterritorial jurisdiction to all cities regardless of their size or classification. The relationship between present size and future growth of a large city may be quite different from that of a small town. Predicting future development of an area circumscribed by a line three miles beyond the corporate limits may be entirely reasonable when a large city is the generating center of the expansion, but it may be altogether unreasonable when a hamlet is the nucleus.

It is not so much the type of control that is important in establishing the line of demarcation. A pig sty, a slaughterhouse, or a tavern, all located just beyond the corporate limits, may be just as deleterious to the public health, morals, safety and welfare of a small town as to a large city. It is rather the permissible extent of the territory over which control is exercised that will require further clarification. It is important to remember that in most of the cases in which extraterritorial police regulations were sustained, the uses regulated or prohibited had, or would have had, a present inimical effect, whereas extraterritorial zoning purposes to control something which might in the future have such an effect if the municipality grows to the projected size. The courts may insist that the statutes reflect some relationship between the size of the municipality and its extraterritorial zoning jurisdiction.¹⁴⁰ Even though the old idea that

¹³⁹ *Gust v. Township of Canton*, 342 Mich. 436, 70 N.W.2d 772 (1955).

¹⁴⁰ Of course, the city is not compelled to zone to the full extent of its extraterritorial jurisdiction. For example, the enabling act in Indiana provides "for the development of the city and such contiguous unincorporated area outside the city as, in the judgment of the commission, bears reasonable

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zoning must bear a real and substantial relation to police power objectives "now" is being discarded in favor of the newer theory that, to be effective, zoning must look to the future, it is relatively certain that the courts are not going to sanction extraterritorial restriction on the basis of a prophecy that a village will be a thriving metropolis a century hence. Their decisions may very well be determined by the answers to the questions — how far and how fast? This may necessitate scaling the extraterritorial jurisdiction to the class or population of municipalities — two miles for cities of the first class, a quarter mile for towns of less than 3000 population, for example. Whether or not this can be worked out practically can be left to the planners.

It is true, of course, that the regulations of land use in the urban fringe very often are considerably less restrictive than they are in the municipality itself. It is common to preserve the *status quo*, which usually means agricultural and residential uses.¹⁴¹ The courts may be more inclined to sustain an ordinance which permits rather liberal land use than they would be if the ordinance were comparable to those in effect within the municipality. The disappointed farmer, however, who is precluded from selling his land at a high price, will take little comfort from the fact that he can either continue farming or sell his land for house lots. How much restriction is reasonable restriction within the ambit of the police power, very probably will be determined by application of the accepted standards, qualified negatively by the element of extraterritoriality and its various facets, and positively by the coming of age of foresightedness.

relation to the development of the city." IND. ANN. STAT. § 53-734 (Burns 1951).

¹⁴¹ "In a city ordinance it usually means a district from which industrial or business uses are excluded, where any type of residential structure may be erected, and where any agricultural or horticultural activity . . . may be pursued. In general, it is a district of few restrictions." HORACK AND NOLAN, LAND USE CONTROLS 99 (1955).

V. CONCLUSION

The legality of extraterritorial zoning, generally and specifically, is only a single part in the vast machine of planning and, at the moment, appears to be a most vital part. Although there are probably other devices for accomplishing the same ends,¹⁴² the planners seem to be particularly attracted to extraterritorial zoning. I suggest that they have a good case for establishing its legality as a general proposition. Nevertheless courts may be expected to find specific ordinances invalid on the grounds of unreasonableness, just as they have in the past found all other types of zoning ordinances invalid for the same reasons.

No attempt has been made to build a case for or against the need for, or the desirability of, extraterritorial zoning. This is primarily the job of the planner. Nor has the discussion so much as touched on the seemingly infinite number of problems that the whole planning process can spawn — jurisdiction;¹⁴³ the interrelation of city, township, county, metropolitan and regional planning;¹⁴⁴ the effect of natural and artificial boundaries, to name only a few. Each of these, in turn, will add its own progeny to the family tree. No one pretends that these problems will

¹⁴² Dean Fordham is not overly-impressed with the idea of extraterritorial zoning. No doubt his excellent ideas for achieving the ultimate in planning will be considered by some as being quite iconoclastic. See FORDHAM, *A LARGER CONCEPT OF COMMUNITY* 21-33 (1956). See also Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475 (1926).

¹⁴³ In addition to the urban-rural conflict, Professors Horack and Nolan suggest two others — that arising when two or more cities expand their jurisdictional controls so that each seeks to exercise control over the same land, and that arising when two cities have a common boundry, but each has a different policy as to the development of the land situated on its side of the land. HORACK AND NOLAN, *LAND USE CONTROLS*, c.2 at 58.

¹⁴⁴ A bill introduced into the last session of the Indiana Legislature provides for area planning. It permits joinder of townships with adjacent cities or counties and seems aimed primarily at counties that are unwilling or unable to provide county-wide planning organizations. At this writing, the bill's future was still in doubt.

solve themselves. Consequently, a few well-chosen test cases would do much to clear the air of some of the grosser forms of uncertainty. Perhaps the dearth of cases reflects a universal assumption of the validity of extraterritorial zoning. If this is so, I may have been unduly cautious in some of my conclusions as to what the courts might be expected to do. I have no quarrel with the proposition that fringe zoning, as such, is legal. Indeed, I believe it almost a certainty that only a very few conservative courts, if any, will find the idea repugnant to their conceptions of constitutional guaranties. But even in the face of this conclusion, I believe that planners and local governmental bodies would feel considerably more secure if they could proceed with the confidence that their basic ideas, at least, had been judicially sanctioned.

Far more important and far more uncertain is the question of reasonable fringe zoning. As stated above,¹⁴⁵ the present tests and standards will require some remodeling to bring them into contemporary design. The concept of extraterritorial zoning is, for all practical purposes, a new and, in a sense, a drastic innovation. Assuming that it is desirable, its acceptance in principle alone will be insufficient. To make it work properly and efficiently will require new guideposts, adapted to serve the ends of extraterritorial zoning within the framework of democratic living. The best quality guideposts are those fashioned by the courts from the raw materials of actual cases. Permitting — or should it be said, compelling — the zoning authorities to drift about unguided may invite adverse consequences, both practical and legal. Fringe residents may be driven to chronic antagonism by the extreme or irrational zoning of overly enthusiastic planners. They could, by striking whenever and wherever a vulnerable spot appeared, disrupt the whole process. A set of principles may not entirely calm the troubled water, but it

¹⁴⁵ See pages 407-09.

will at least provide a rudder for the ship.

When these cases reach the appellate level, the courts will have to shift gears if salutary accomplishments are to be made. Their legal thinking must mesh with that of the community in general and of the planners in particular. Ideas shrouded in parochialism will have nothing other than a stifling effect. Also to be abandoned is the notion that because something is old it is therefore good. The courts would do well to remember in this area that their primary concern, and that of the planners, is not the solution of today's problems but the prevention of tomorrow's. The new concepts of the community, including extraterritorial zoning, have far outdistanced *stare decisis*.¹⁴⁶ During the past decade in particular, they have made, and in the future will continue to make, great demands on the creativity and ingenuity of the appellate court judges.¹⁴⁷ On the whole, the courts have responded well to the challenge,¹⁴⁸ in some instances, perhaps too well.¹⁴⁹ The progress and the good of the community are important, but so also are the rights of the individual. No one with any objectivity wants the state to crash ahead oblivious of where or upon whom it steps. Nor does anyone have license to hinder, needlessly and unreasonably, the progress of the community. The courts would be guilty

¹⁴⁶ See essays by Babcock, Haar and Horack, *Emerging Legal Issues in Zoning*, in *PLANNING 1954: PROCEEDINGS OF THE ANNUAL PLANNING CONFERENCE*, 133 (Babcock), 138 (Haar), 146 (Horack) (1954).

¹⁴⁷ "... [W]e can exercise a quality of foresight which deserves a better characterization than 'expediency.' Each generation must meet its own problems. What it owes to the next is to act with all the foresight and imagination it can muster." *FORDHAM, A LARGER CONCEPT OF COMMUNITY* 7 (1956).

¹⁴⁸ See Johnson, *Constitutional Law and Community Planning*, 20 *LAW & CONTEMP. PROB.* 199 (1955).

¹⁴⁹ Williams, *Planning Law and Democratic Living*, 20 *LAW & CONTEMP. PROB.* 317 (1955). The author is disturbed by the trend. He feels that in our eagerness to achieve democratic living through planning, we may be battling toward a Pyrrhic victory.

of disservice if they were to unduly favor, advertently or inadvertently, clumsily or blindly, the one over the other. Striking a delicate balance between these two conflicting interests is an intricate maneuver, and it is this that will tax the energies and mental acumen of the judges. The most that can be expected of them is that they will succeed; the least is that they will try.

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