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Land Use Control Policies and Population Distribution in America

By M. G. Woodroof III*

Population has recently emerged as one of the most controversial subjects on the American scene. As always in such cases of notable passing interests, the law and its ramifications in the areas of population control and distribution are becoming the subjects of close scrutiny. Governmental regulation of the areas of sexual behavior (presumably related to population generation), the dissemination of various forms of birth control information, and the highly emotional issue of abortion, has traditionally been pervasive, but subject to little public discussion. The modern controversies in these areas stem from the relaxation of traditional restrictions in some areas and the imposition of new restrictions in others.

Undoubtedly the present controversy regarding these areas of the law is a functional part of the general syndrome of controversy which has become endemic to our modern society. In the early 1950's, it was the international communist conspiracy; in the late 50's and early 60's, it was Sputnik and the missile gap; in the late 60's, it was law and order and campus unrest. Each of those problem areas was at the time designated as a threat likely to destroy our society. Each of them in fact engendered changes in our legal and societal structure, and in our life styles; after adjusting to the changes, however, we moved on to new considerations.

Viewed within this context, population control is one facet of the recently recognized social problem of the deterioration of our quality of life. Other controversies, similar to population control, which exist as facets of this general social problem are those surrounding the fields

* A.B., 1961, J.D., 1968, University of Kentucky; L.L.M., 1969, Washington University. Visiting Professor of Law, University of Kentucky; Associate Professor of Law, Drake University.
of environmental law and protection, consumerism, and certain sub-currents of the civil rights movement.

Recognition of the place of population control within this larger context enables us to achieve insights into the problem which would not likely be achieved through the less disciplined popular approach. One of the insights achieved through this contextual and analytical view of the population problem is that in regard to the quality of life, at least, the population problem at this time is not so much overpopulation itself, as it is a maldistribution of population. This maldistribution has caused dire consequences of an international scale; while potentially productive lands in some parts of the world lie fallow, other parts of the world (e.g., India) tragically fail to support population in excess of that justified by the area's productivity potential. Maldistribution of population within the United States has not yet reaped such tragic fruit, but it has played a part in creating the decline in the quality of life—a problem in itself with serious potential consequences.

Population maldistribution is both a quantitative and qualitative phenomenon. Quantitatively, the increased and increasing density of population in our nation's urban centers has profoundly affected our way of life. No one would suggest that no variations in population density should exist from area to area; such an even distribution of population would frustrate alike the desires of those seeking a rural existence and those seeking an urban existence. Nevertheless, many metropolitan areas are overcrowded, and attempts to mitigate the effects of this quantitative maldistribution of population have led to qualitative problems.

As the result of legal tools—especially zoning—which were designed and implemented to create distinct urban and rural amenities within the expanding urban environment, large segments of the urban population have been shunted aside. With life styles and resources adapted neither to the traditional city dweller sophistication nor to the newly created suburban quasi-rural gentry, blacks, the poor, and other members of minority groups have frequently been forced into a geographical subculture—not of their making, not responsive to their needs, and in sharp contrast to the professed values of our society. Thus, the quantitative and qualitative aspects of population maldis-

tribution are so closely interrelated that the entire problem may be discussed generically. Measures which affect either or both of these aspects must be evaluated individually in order to predict their effect upon the results of population distribution within our culture.

One of the causes of population maldistribution within the United States has been the operation of certain of our laws. An examination of those laws, with a view towards present and potential efforts to overcome these untoward population distributing effects, serves as the focus of this article.

**Nonlegal Factors Affecting Population Distribution**

The effect of various laws is but one of the many factors affecting population distribution within our country. Indeed, it is unlikely that most individuals would recognize that the operation of law has any discernable effect upon population trends. The most important factors which people feel induce them to locate in one place rather than another are "convenience," "economic necessity" and "generally more agreeable surroundings." Undoubtedly, the most important of these, measured in terms of effect upon mass population movements throughout our history, is economic necessity. Population migration has generally consisted of movement from areas of recognizably low or diminishing economic opportunity to other growing areas of higher or increasing opportunity. Recent population migrations include the widespread migration of rural residents to new and growing urban areas as a result of the declining agricultural opportunity accompanying increasing farm mechanization. A similar motivation—the expectation of greater job opportunities in northern urban areas—has lead to a widespread migration of blacks from the south to the north in recent years.

Distribution of population within metropolitan areas has similarly been rooted largely in economic considerations. But also significant

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3. C. & I. Taeuber, *The Changing Population of the United States* 100 (1958). A number of specific examples of economically induced population migrations come to mind. The western expansion of our nation in the years prior to 1900 was an obvious manifestation of this trend, with the accompanying "Oklahoma land rushes," "range wars," and other economic problems. The migration of midwesterners fleeing "the dust bowl" to California in the 1930's, as well as their rejection in their new home, were direct results of the economic desperation of the times. See J. Steinbeck, *The Grapes of Wrath* (1939).


5. Id. at 110.
in metropolitan areas have been the less precise, but nonetheless im-
portant, considerations of convenience and agreeability of surround-
ings. The traditional American life style has always placed a great
demand upon personal privacy, and those families within metropolitan
areas who have been economically successful have demanded fewer
persons per room, and a greater distance between neighbors.6 This
demand has been met by migration to the city's suburbs and has oc-
curred partly because of economic considerations.7

Such population migrations to the suburbs feed upon them-
selves in such a way as to increase the degree of the migration. The
presence of larger populations in the suburbs, for example, makes feas-
ible the expansion of services, such as electric power, water systems,
fire and police protection, sewers, transportation, and communication.
These increased services make the suburbs even more appealing to
potential migrators. At the same time, the demand for a large number
of customers for these services is such that migration will be encour-
aged by the business interests involved in providing these services.8

The same business effects of population migration to the suburbs
operate upon merchants. Retail trade establishments tend to follow
their markets to the peripheral areas of the city. Once again, the loca-
tion of these retail trade establishments in the suburbs creates em-
ployment in the suburbs and brings the potential employment close
to suburban residents to fulfill the great demand for employment which
might otherwise exist. A number of other considerations, unrelated
or only indirectly related to economic considerations, have also influ-
enced the flight to the suburbs. The development of the automobile
has been important in providing a mechanism for individuals to ex-

6. D. Bogue, Metropolitan Growth and the Conversion of Land to
Nonagricultural Uses (Scripps Foundation Studies in Population Distribution No. 11,
1956).

7. The cost of land in suburbs, for example, was traditionally lower than that in
the city, so that the presumably more agreeable surroundings inherent in "more space
per person" were economically feasible to a greater degree in the suburb than within the
city. This differential in land cost has diminished recently, but still exists to some
degree on a comparative level. Bogue, What We Need to Know About Decentralization
and the Growth of the Suburbs, in Needed Urban and Metropolitan Research 38, 40
(Scripps Foundation Study in Population Distribution No. 7) (1953). Even at the
lower prices found outside the city, the purchase of land for a suburban residence
would normally be beyond the economic means of most potential buyers. Expansion
of credit availability, however, has made it possible for more people to buy their own

tend the distance which they could feasibly interpose between their residence and their work, schools, shops, and other centers of activity. In addition, considerations of national defense have oftentimes induced certain industries to transfer their activities from the city core to the peripheral areas, again creating additional suburban employment opportunities.

Population distribution has also often been affected by the endemic operational pattern of the city. There are a number of city functions that are carried out in response to values common throughout the population and centered within the city's deteriorating areas. These functions are prized—not banned—as part of the urban structure and are normally bound together and located in particular areas of the city in order that the entire population might have access to them. "Red light" districts and concentrations of gambling activity, for example, are important parts of a city's functional organization. The presence of these functions in the city is necessary but at the same time makes the city an unpleasant place to live. Accordingly, the ideal is to move to an area close enough so that such services are available, but not so close that they will intrude themselves upon one's everyday life.

Other nonlegal factors which have affected population migration within metropolitan areas are the comparative quality of schools, the effect of weather (particularly pollution), the additional financial opportunities created by social security, the location of resources within the area to be exploited, and the social and cultural opportunities sought by potential migrators. Documentation of such factors will be foregone in this article, however, in favor of a detailed examination of the effect of legal factors upon population distribution.

Legal Factors Indirectly Affecting Population Distribution

There are a number of legal factors that affect population distribution. Among those which have recently been receiving attention are the various laws regarding welfare rights and indigency. An early, direct legislative approach to the indigency problem provided that it was unlawful to knowingly bring or assist in bringing indigent persons into the jurisdiction. A California statute of this type was found to be

9. Id. at 89, 40.
10. BOGUE, supra note 6.
11. Lohman, Knowledge Needed for Redevelopment and the Control of Slums and Blighted Areas, in NEEDED URBAN AND METROPOLITAN RESEARCH 28, supra note 7.
unconstitutional, as a barrier to interstate commerce, by the United States Supreme Court in 1941.\textsuperscript{12} Such direct effects as this, however, are not typical of the effects of the law upon population distribution in more recent years.

Laws providing and regulating rights to welfare assistance have traditionally been designed to operate with a pervasive effect upon the lifestyle and activities of the recipients involved. Welfare statutes drafted to limit the maximum amounts of welfare aid that any one family may receive, for example, have been found constitutionally permissible, regardless of other qualifications for increased assistance.\textsuperscript{13} Statutes more directly affecting population migration, however, such as those requiring a period of residency prior to qualification for benefits, have been determined invalid. In so deciding, the United States Supreme Court, in \textit{Shapiro v. Thompson},\textsuperscript{14} expressly considered the effect of such provisions upon population migration:

An indigent who desires to migrate . . . . find a new job and start a new life will doubtless hesitate if he knows that he must risk making the move without the possibility of falling back upon state welfare assistance during his first year of residence when his need may be most acute. . . . More fundamentally, a State may no more try to fence out those indigents who seek higher welfare benefits than it may try to fence out indigents generally.\textsuperscript{15}

The operation of the traditional property tax has also affected population distribution. Generally speaking, property taxation tends to be heaviest in the central city and lighter in the suburbs, being lightest in the well-to-do suburbs of medium age.\textsuperscript{16} This factor alone would tend to influence individuals in the central city to migrate to the suburbs.\textsuperscript{17} Moreover, property taxation generally penalizes vertical growth such as is required by the congestion in the central city, and subsidizes the horizontal expansion which is typical of suburbs.\textsuperscript{18} The most favorable property tax result (for the levying jurisdiction) is a net revenue gain, where gross revenue produced by the tax is greater than the

\begin{itemize}
  \item \textsuperscript{12} Edwards v. California, 314 U.S. 160, 173 (1941).
  \item \textsuperscript{15} 394 U.S. at 629, 631.
  \item \textsuperscript{16} J. Pickard, \textit{Taxation and Land Use in Metropolitan and Urban America} 11 (Urban Land Institute Monograph No. 12, 1966).
  \item \textsuperscript{17} W. Baman, \textit{The Property Tax and the Spatial Patterns of Growth within Urban Areas} 47 (Urban Land Institute Monograph # 16, 1969).
  \item \textsuperscript{18} Pickard, \textit{supra} note 16, at 9.
\end{itemize}
governmental cost attributable to the property taxed. This tax result is produced by property taxation of vacant land, industrial areas, shopping centers, and high rise apartment buildings. A net revenue loss, on the other hand, is likely to be produced from property taxation of single family residents or like areas.\(^{19}\) That these relations are described as "gains" and "losses," however, indicates that the taxes and burdens are not imposed upon the lands in proportion to services demanded, but rather operate to subsidize suburban areas at the expense of the more highly developed areas in the city. Accordingly, property taxation tends to heavily subsidize the development of horizontal expansion while penalizing the vertical growth typical of city cores. Property taxes, especially those on residential property, may also be empirically demonstrated to have operated regressively in terms of income classes.\(^{20}\) In addition, property tax is one of the most important determinants of residential growth; there is a negative relation between the effective property tax rate and growth in local areas.\(^{21}\) Despite its potential for beneficial regulation, however, the overall effect of the property tax has been to contribute instead to a deviation from optimal land use patterns. This is especially true in those outer portions of urban areas where the property tax encourages fiscal zoning for industrial enclaves and low density residences.\(^{22}\)

In spite of these important effects, however, property tax is not nearly so influential upon population distribution as is the federal income tax.\(^{23}\) The federal income tax strongly encourages home ownership in the suburbs over apartment renting or other urban living accommodations. Real property taxes are deductible from the income to be taxed by the federal government;\(^{24}\) interest on real estate mortgages is similarly deductible;\(^{25}\) realized appreciation in value of a residential dwelling is not under certain circumstances recognized as income;\(^{26}\) even to the extent that such realized increase in value is recognized as income it is eligible for favorable treatment as capital gains;\(^{27}\)

\(^{19}\) Note, Toward Optimal Land Use: Property Tax Policy and Land Use Policy, 55 Calif. L. Rev. 856, 869 (1967).
\(^{21}\) See Baman, supra note 17.
\(^{22}\) Netzer, supra note 20, at 19.
\(^{25}\) Id. § 163(a).
\(^{26}\) Id. §§ 121, 1034.
\(^{27}\) Id. § 1250(d)(7).
and the rental value of a building used by its owner for residential purposes does not constitute income.  

A final collateral effect of the operation of law upon population distribution in the past few years has resulted from various programs of urban development. These programs caused a departure of people from the development area, with an accompanying change in the locality which had to bear the costs of those forced to relocate. While federal law has required that persons displaced by programs of urban renewal be provided with adequate and safe housing in other locations, such provisions have traditionally been high in rhetoric and low in performance. In Norwalk CORE v. Norwalk Redevelopment Agency in which the plaintiffs claimed that Negro and Puerto Rican displacees of an urban renewal program were not assured relocation, the court responded with a statement that

[w]here the relocation standard set by Congress is met for those who have access to any housing in the community they can afford, but not for those who, by reason of their race, are denied free access to housing they can afford and must pay more for what they can get, the state action affirms the discrimination in the market. This is not equal protection of the law.

Hopefully, the displacees of such programs in the future will be treated in a way more commensurate with traditional principles of American justice. Nevertheless, the effects of these programs of urban redevelopment upon population distribution have been recognized and will continue to be significant.

Zoning Laws: The Major Distribution Tool

The effects of the laws just discussed have been described as "collateral" because these laws were designed to affect population distribution only incidentally, indirectly, or in reaction to other population trends. Zoning laws, on the other hand, have been enacted, developed, and implemented over the last half century with the overt purpose of regulating the distribution and life styles of particular segments of the population. The entire concept of zoning is exclusionary—certain uses of land are excluded from certain areas—and the power to negatively exclude includes the power to positively locate, by designating all areas except the subject area as exclusive. Because of this power to desig-

30. 395 F.2d 920 (2d Cir. 1968).
31. Id. at 931.
nate permissible land usage and the widespread use of this power, zoning laws have become the raison d'etre of practical analysis of population distribution and its manipulation.

The discriminatory consequences of population distribution were suddenly thrust into the public spotlight as a result of the 1971 California case of Serrano v. Priest\(^{32}\) which held that the California public school financing system—typical of such systems around the country in that it relied upon local property taxes as a financial base for the school district—was in violation of the equal protection clause of the constitution. The allotment of a greater amount of money for education to the children attending the schools of one district than to those in another district was common because of the fortuitous mix of residential and commercial properties in various school districts. Moreover, this fortuitous distribution throughout the state was partially shaped and greatly hardened by state action in the form of zoning ordinances and other governmental land use controls.\(^{33}\) Serrano represents a major breakthrough in the war against exclusive zoning practices.

After the experimentation in various municipalities of the United States in the early years of this century, zoning became firmly established in our social and legal fabric with the United States Supreme Court case, Village of Euclid v. Ambler Realty Co.,\(^{34}\) in 1926. The Euclid case was brought, as have been nearly all zoning cases, by a land owner the value of whose property was greatly reduced because of its classification. The focus of the case, which was won by the landowner at the district court level, was the degree to which private property rights should be protected from governmental interference.\(^{35}\)

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32. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).
33. Id. at 603-04, 487 P.2d at 1254, 96 Cal. Rptr. at 613-14.
34. 272 U.S. 365 (1926). This landmark case established the validity of a zoning classification, merging the doctrine of nuisance into the doctrine of police power. Under the principles of Euclidean zoning higher uses are those uses most greatly in need of protection from potential obnoxious neighboring activities, and lower uses are those uses presumably not in such great need of such protection. The highest uses include *inter alia*, large single family residential homes on large blocks in "nice" suburbs; lower uses include apartment houses or other multiple family dwellings, commercial shops and activities; and the lowest uses of all are industrial sites. Inasmuch as the backing required for each of these uses is economically based, population distribution under the system of Euclidean zoning is also dependent largely upon income level.
35. In the words of District Judge Westenhaver: "My conclusion is that the ordinance involved, as applied to plaintiff's property, is unconstitutional and void; that it takes plaintiff's property, if not for private, at least for public, use, without just
Even at that time, however, there was recognition of the fact that zoning was destined to have a pervasive effect upon population distribution. The controversy concerning private property rights would continue as a bone of contention in zoning cases from 1926 to the present, but so also would considerations of population distribution. In the words of District Judge Westenhaver, in his decision for the landowner in the *Euclid* case:

The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic.  

With the ultimate decision sustaining zoning, the stage was set. In the years to follow, the arguments that zoning regulations deprive individual citizens of private property without compensation, and induce a maldistribution of population, were heard again and again, but

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36. *Id.* at 316. One can only speculate as to why these arguments were unavailing before the United States Supreme Court. According to one commentator, "Justice Sutherland . . . was writing an opinion for the majority in Village of Euclid v. Ambler Realty Co., holding the zoning ordinance unconstitutional, when talks with his dissenting brethren (principally Stone, I believe) shook his convictions and led him to request a reargument, after which he changed his mind and the ordinance was upheld." McCormack, *A Law Clerk's Recollections*, 46 COLUM. L. REV. 710, 712 (1946). Justice Sutherland's opinion in the case, ultimately upholding the ordinance, did not include discussion of the merits of the legislation, but was rather merely an illustration of a view of law under which such legislation could withstand attacks on its constitutionality: "Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise." 272 U.S. at 387.
fell in nearly all cases upon deaf (or, at least, minority) ears.\textsuperscript{37} Zoning classification is a form of discrimination by definition, but throughout the intervening years since the \textit{Euclid} case, until very recently, the whims of the community government as reflected in zoning practices have been subject to very few restrictions in the form of judicial review, as a brief survey of some typical cases will quickly reveal.

Zoning ordinances prescribing minimum sizes of homes in areas of differing zoning classifications\textsuperscript{38} and changing a single family residential beach property to a classification which permitted apartment and hotel uses have been upheld after being subjected to only restrained judicial review.\textsuperscript{39} Moreover, an ordinance prohibiting the erection of multiple family dwellings within the municipality has been sustained\textsuperscript{40} on the ground that "it cannot be said that every municipality must provide for every use somewhere within its borders."\textsuperscript{41} Another court has upheld minimum lot and floor space requirements in a predominantly rural community to prevent \textit{future} overcrowding.\textsuperscript{42} Similarly, height and density limits for apartment houses have been upheld as reasonably calculated to prevent overcrowding, traffic congestion, and

\textsuperscript{37} See R. Anderson, \textit{American Law of Zoning} \S\ 2.22, at 93-100 (1968).
\textsuperscript{38} Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952).
\textsuperscript{39} City of Miami Beach v. Lackman, 71 So. 2d 148 (Fla. 1954), appeal dismissed, 348 U.S. 906 (1955).
\textsuperscript{40} Fanale v. Borough of Hasbrook Heights, 26 N.J. 320, 139 A.2d 749 (1958).
\textsuperscript{41} Id. at 325, 139 A.2d at 752. That statement demonstrates the lack of sensitivity to the problem of population maldistribution, as a result of zoning ordinances which is typical of traditional zoning cases. The contrary view was maintained throughout the years, but nearly always as a minority position. The contrary argument was beautifully stated in Vickers v. Township Comm. of Glouster, (in a dissent, of course) by Justice Hall: "In my opinion legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, (footnote omitted) or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendency and courts must not be hesitant to strike down purely selfish and undemocratic enactments. . . . It seems contradictory to sustain so readily legislative policy at the state level forbidding various kinds of discrimination in housing . . . and permitting the use of eminent domain and public funds to remove slums and provide decent living accommodations . . . and at the same time bless selfish zoning regulations which tend to have the effect of precluding people who now live in congested and undesirable city areas from obtaining housing within their means in open, attractive and healthy communities." 37 N.J. 232, 264, 181 A.2d 129, 147 (1962).
the destruction of the character of adjacent single family residential areas.43

In two recent cases,44 the courts have upheld zoning ordinances for aesthetics and environmental protection, even though the operation of these ordinances precluded plaintiffs, on economic grounds, from constructing low cost housing projects. The ordinances were found to be on their face not expressly in service of discrimination on racial, ethnic, or economic grounds. At the same time, however, zoning ordinances which exempt public housing projects have also been upheld on the basis that it is in the public interest to make allowances for public housing.45

There can be no real question concerning the validity of legal and technical arguments used to sustain zoning ordinances. The question is rather whether competing values must also be considered. So long as the effects of zoning activities upon private property rights and upon population maldistribution are largely ignored by the courts, sufficient justifications to support zoning enactments will be found. Recent cases indicate, however, that the presumption in favor of validity is not as strong as it once was.

New Trends in Zoning Litigation

The 1950's, that decade when governmental reform groups sprang up to fill the social void created by the passing of war, served naturally as a time during which the conflicting views of zoning could be spotlighted. On the one hand, this decade was probably the high water mark in zoning activity and public approval of and reliance upon

44. Southern Alameda Spanish Speaking Organizations v. City of Union City, 424 F.2d 291 (9th Cir. 1970); Confederacion de la Raza Unida v. City of Morgan Hill, 324 F. Supp. 895 (N.D. Cal. 1971).
45. Cameron v. Zoning Agent of Bellingham, 357 Mass. —, 260 N.E.2d 143 (1970). Forms of low cost housing frequently prohibited or regulated out of existence by zoning ordinances are mobile homes or mobile home parks. Generally speaking, courts have held that mobile home parks may be restricted under some circumstances bearing a reasonable relationship to zoning purposes. Town of Manchester v. Phillips, 243 Mass. 591, 180 N.E.2d 333 (1962). In Vickers v. Township Comm. of Glouster, 37 N.J 232, 181 A.2d 129 (1962), there was an action challenging the validity of zoning ordinances which effectively precluded trailer parks entirely from the township. In holding in favor of the ordinance, the court relied upon the traditional doctrine that a municipality does not have to provide for every use within its boundaries, and that it was not unreasonable for the township to consider problems of aesthetics and congestion presumably caused by trailer camps.
zoning operations; it was also during this period, however, that a new trend in zoning litigation developed, including an increased awareness of the problems generated by zoning. In accordance with the temper of the times, the private property argument was but moderately successful, but the argument concerning population maldistribution and unfairness began to fall upon increasingly receptive ears.

The progress in this regard has not been spectacular until very recently but has its roots during that early decade. In *Gust v. Township of Canton*, for example, a zoning ordinance prohibiting a mobile home park's operation anywhere within the boundaries of the township was held invalid on the basis that it bore no substantial relationship to the traditional police power considerations of the public health, safety, morals, and general welfare. The court found that

[*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.*]

Another area of land use activity which is frequently the subject of litigation is the operation of apartments or other multiple family dwellings. Zoning laws have traditionally operated to severely restrict these uses of land; recent litigation, however, has attacked these zoning ordinances. Typical of this trend is the *Girsh Appeal*, a case in which the subject zoning plan contained no provisions at all for apartment use districts. The court ruled that the township's failure to provide for apartments in the zoning plans was unconstitutional: "In refusing to allow apartment development as part of its zoning scheme, appellee has in effect decided to zone out the people who would be able to live in the township if apartments were available."

Increasingly, this discriminatory aspect of zoning operation is being recognized by the courts, not only in cases involving mobile home parks and apartment buildings but also in cases involving ordinary single family use restrictions. In *Molino v. Mayor and Council of the Borough of Glassboro* the holding of the court seems to establish a right to be free of economic discrimination. Plaintiffs contended that the subject zoning ordinance, requiring that 70 percent of the

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47. *Id.* at 439, 70 N.W.2d 774-75.
49. 437 Pa. at 242, 263 A.2d at 397.
apartments contain no more than one bedroom, was specifically designed to keep children out of the borough in order to prevent an increase in the school tax burden. The court, finding that this requirement precluded occupancy by moderate and low income families, decided that there exists a right to live as a family unit and held that the zoning power could not be used in this way to limit family size.51

Another frequent purpose of zoning is to provide limitations restricting group or communal living, an increasingly popular mode of residential living which consists of unrelated persons occupying a single residence.52 In Kirsh Holding Company v. Borough of Manasquan53 the admitted purpose of the zoning ordinance was to control or prohibit "obnoxious" behavior by eliminating group rentals of summer cottages to college students. The court struck down that zoning provision as unreasonable and arbitrary, finding that "zoning ordinances are not intended and cannot be expected to cure or prevent most anti-social conduct. . . ."54 The court went on to say that control of activities such as these must be rooted in appropriate police power ordinances.55

The Future of Zoning

It appears that the next big battle in the enforcement of civil rights within the United States will center around the need for changes

51. Id. at 203-04, 281 A.2d at 405. A similar approach was taken in National Land and Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965). In this case the township was in the path of population expansion and 30 percent of the township area was included in a zoning classification requiring four acre residential lots. While recognizing the power of municipalities to enact zoning regulations, the court noted that "at some point along the spectrum, however, the size of the lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference." Id. at 524, 215 A.2d at 608. That this private preference could not serve as a basis for economic discrimination was made clear: "A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic and otherwise, upon administration of public services and facilities, cannot be held valid. . . . It is clear, however, that the general welfare is not fostered or promoted by a zoning ordinance designed to be exclusive and exclusionary." Id. at 532-33, 215 A.2d at 612.

52. See Comment, Excluding the Commune from Suburbia: The Use of Zoning, for Social Control, 23 Hastings L.J. — (1972).


54. Id. at 243, 281 A.2d at 520.

55. Not all attacks upon zoning are successful, however, even at this late date. In the 1970 case of Palo Alto Tenants Union v. Morgan, 321 F. Supp. 908 (N.D. Cal. 1970), the plaintiffs argued that as members of a communal living group their right to freedom of association was violated and their life style was harrassed by enforcement of a city zoning ordinance prohibiting more than eight unrelated persons from occupy-
in restrictive zoning laws and their untoward collateral effects on population distribution. The most recent situation to create additional controversy in this regard is the need for the busing of school children. Any action of the United States Congress forbidding or restricting the use of busing for school integration will increase the internal pressure in large metropolitan areas to break through the zoning barricade that walls city dwellers from the suburbs. In the view of some city planners, the separation of city ghettos from the leafy suburbs is maintained primarily through the institution of zoning. Ordinances which make it impossible for city dwellers of medium or low income to buy homes out in the country near the migrating city factories must be repealed if the pattern is to change.\textsuperscript{56}

Increasing federal court tests may also be expected. An example is the current court test involving Ford Motor Company's purchase of 200 acres in Mahwah, New Jersey, a town of 10,500, for the relocation of its Newark facility employing 4200 workers. The workers found exclusionary zoning ordinances in Mahwah requiring them to buy lots of half acre or more, which, of course, only a few could afford.\textsuperscript{57} Another well known current test case involves the area known as Black Jack, Missouri,\textsuperscript{58} in which the federal government has actively intervened. Late in 1969, in reaction to rumors that Black Jack was scheduled to be the site of a federally assisted, low income, racially integrated housing project, area citizens obtained permission from the St. Louis County Council to incorporate Black Jack as a fourth class city with zoning authority. Immediately thereafter, Black Jack's newly created zoning board passed an ordinance banning all multiple family housing, including the proposed project. In reaction to the zoning ordinance, the Justice Department has brought suit against Black Jack, charging that the zoning action against the proposed housing project deprived prospective residents of their right to fair housing under Title VIII of the 1968 Civil Rights Act. Here, it appears, is the harbinger.

\textsuperscript{56} A recent move to open the suburbs is Senator Abraham A. Ribicoff's bill forbidding federal installations to move to suburbs which have refused to provide land for housing for workers. Strout, \textit{Rights Battle is Joined on Issue of Suburban Zoning}, Des Moines Sunday Register, Nov. 14, 1971, at 7-A.

\textsuperscript{57} \textit{See generally Newsweek}, Nov. 15, 1971, at 61, 69.

\textsuperscript{58} \textit{Id.}
Planned Unit Developments

In reaction to the increasing incidence and success of these attacks upon traditional zoning activities and in accordance with developing social trends, governmental advisors have shown an interest in the emerging concept of planned unit developments. Planned unit development zoning—involving "cluster zoning" techniques—should fill the need for properly designed communities from the standpoint of improved population distribution. These developments permit greater density in parts of the development in return for more open space. Generally speaking, courts have upheld requirements aimed at support of such developments and at improvement of the quality of life therein. The advantage of these developments lies in the economy of scale which can be achieved. This reduces the price per unit and thereby makes this form of housing available to a larger group of individuals, while maintaining sufficient open space for suburban living.

In one case testing the validity of cluster zoning, a zoning ordinance permitted a reduced block size in a subdivision in the event that appropriate land for parks, schools, etc., was dedicated. A New Jersey court held in Chrinko v. South Brunswick Planning Board that "such an ordinance reasonably advances the legislative purpose of securing open spaces, preventing overcrowding and undue concentration of population, and promoting the general welfare." Similarly, in Cheney v. Village 2 at New Hope, Inc. the Pennsylvania court upheld a change in zoning which allowed planned unit development in an area previously limited to low density developments, on the grounds of the recognized ineffectiveness of traditional zoning procedures. The court pointed out that the traditional approach to zoning laws operated reasonably well so long as residential development took place on a lot-by-lot basis, but that the increasing popularity of large residential developments made it apparent that land could be more efficiently used and more aesthetically planned if zoning requirements were focused on the entire development rather than upon an individual lot.

The Development of "New Towns" Under Federal Legislation

The ultimate in planned unit development is the creation of entire new towns where no population concentration previously existed. Be-

61. Id. at 630-31, 241 A.2d at 83.
cause of the difficulties involved in an undertaking of such massive scope, new town development has been encouraged by federal legislation.

On August 1, [1968] in the plaza of the new building of the Department of Housing and Urban Development [in Washington, D.C.], President Lyndon B. Johnson put his signature on the Housing and Urban Development Act of 1968. . . . In his address, the President said: "Today, we are going to put on the books of American law what I genuinely believe is the most farsighted, the most comprehensive, the most massive housing program in all American history."62


Title IV of the Housing and Urban Development Act of 1968 contains guarantees for financing new community land development. Called the New Communities Act of 1968,65 this title is designed to further the development of "new towns" in the United States. Hopefully, an examination of the act and subsequent actions under its authorization will enable us to determine the degree to which its provisions will be of actual practical value to the prospective new towns builder in the tradition of Columbia, Maryland, and Reston, Virginia. The general purpose of the act is to facilitate "the enlistment of private capital in new community development, to encourage the development of new communities. . . ."64 Some specific goals of the new communities are to be: provision of additions to the general housing supply,65 the spurring of innovations in housing,66 increasing the range of housing choice,67 encouraging a "diversified local home building industry,"68 and inducing, for reasons of economy, "new and improved technology" in construction.69 The encouragement of small builders is reiterated specifically in section 3908.

The proposed "enlistment of private capital" is to be accomplished via federal guarantees of "the bonds, debentures, notes, and other obli-

64. Id. § 3901.
65. Id. § 3901(3).
66. Id. § 3901(4).
67. Id. § 3901(5).
68. Id. § 3901(6).
69. Id. § 3901(7).
gations issued by new community developers to help finance new community development projects. The large initial investment, extended time before commencement of return, and irregular pattern of cash returns, are all specifically recognized as problems to be overcome by the developer; these problems will presumably be lessened by the proposed federal guarantees. Mere guarantees do not require federal expenditure, but some federal liability incurred as a result of defaults on guaranteed notes must be foreseen. This liability is to be met from a fund composed of receipts from fees and charges, receipts from security and subrogation rights, and subsequent authorizations and appropriations. In addition, in the event that this fund should prove insufficient, the issuance of federal debentures toward payment of guarantee is impliedly authorized. The program is intended to be self-supporting, however, and total guaranteed principal cannot exceed $500,000,000. Additionally, the total guaranteed principal with respect to a single new community cannot exceed the sum of $50,000,000.

Eligibility for the federal guarantee involves acceptance of the lender, the developer, the obligation to be guaranteed, and the development itself, by the Department of Housing and Urban Development or its designees. The eligibility of the new community development itself is spelled out in detail. In addition to the general feasibility requirements, the development plan must be consistent with an area

70. See id. § 3902.
73. See id. § 3906(b).
74. Id. § 3905.
75. Id. § 3906(d).
76. Id. § 3904(b).
77. Authority to approve the lender is delegated with full discretion to the secretary of the department (the secretary). See 42 U.S.C. § 3904(a)(2) (1970). The discretion of the secretary in regard to approval of the developer is similar and is limited only in that the developer cannot be a public body. Id. § 3904(a)(1). The guaranteed note, itself, is a bit more restricted; the primary limitation involves the percentage of the principal which may be represented by the note. Id. § 3904(a)(4). The amount of the note must not exceed 80 percent of the secretary's estimate of the value of the property after completion of the development, or the sum of 75 percent of the secretary's estimate of the value of the property before development plus 90 percent of his estimate of the cost of development, whichever is less. Id. Other limitations on the note, such as interest rate, id. § 3904(a)(5), maturity provisions, id. § 3904(a)(6), and security interests, id. § 3904(a)(7), are mentioned, but specific requirements are again vested in the discretion of the secretary.
78. Id. § 3903(1)-(2).
“comprehensive plan”\textsuperscript{79} and must “include a proper balance of housing for families of low and moderate income.”\textsuperscript{80} Moreover, no guarantee or commitment to guarantee may be made until the development plan “has received all governmental approvals required by State or local law or by the Secretary.”\textsuperscript{81} This requirement will be discussed in some detail in a later section.

**New Communities Act of 1968—Supplementary Grants**

In addition to the guarantee provisions of the act, there is provided a program of supplementary grants. Like the guarantee program, an emphasis here is upon “housing units for low and moderate income persons” which must “be made available.”\textsuperscript{82} Unlike the guarantee program, however, this system of supplementary grants is available (and limited to “[s]tate and local public bodies and agencies carrying out new community assistance projects.”\textsuperscript{83} Grants under this setup are limited to 20 percent of the total cost of the assistance project;\textsuperscript{84} this is different from the cost of the entire development. In addition, total federal contributions from all sources may not exceed 80 percent.\textsuperscript{85} A primary financial limitation exists, of course, in the sum of money available for the program. The act authorizes appropriations not to exceed $5,000,000 for the fiscal year ending June 30, 1969, and not to exceed $25,000,000 for the fiscal year ending June 30, 1970.\textsuperscript{86}

A final consideration which is determinative of the value of these programs is the use to which the available money may be put. The money provided under the New Communities Act must be used “to finance a program of land development . . . [and] all proceeds . . . [must be] expended pursuant to such a program.”\textsuperscript{87} “Land development” is defined as

\begin{itemize}
  \item \textsuperscript{79} Id. § 3903(4).
  \item \textsuperscript{80} Id. § 3903(3)(B).
  \item \textsuperscript{81} Id. § 3903(3)(A). The administration of the program is a function of the secretary of the department of housing and urban development, and the functions, powers, and duties to issue rules and regulations are vested in that office. \textit{Id.} § 3912. In the exercise of this power, he is also “authorized to establish and collect fees for guarantees.” \textit{Id.} § 3905. The act further provides that the secretary shall report to Congress concerning the proposed fees; this report shall be made on or before January 1, 1970. \textit{Id.}
  \item \textsuperscript{82} Id. § 3911(a).
  \item \textsuperscript{83} Id. (emphasis added).
  \item \textsuperscript{84} Id. § 3911(b).
  \item \textsuperscript{85} Id.
  \item \textsuperscript{86} Id. § 3911(d).
  \item \textsuperscript{87} Id. § 3904(a)(3).
\end{itemize}
the process of grading land, making, installing, or constructing water lines and water supply installations, sewer lines and sewage disposal installations, steam, gas, and electric lines and installations, roads, streets, curbs, gutters, sidewalks, storm drainage facilities, and other installations or work, whether on or off the site, which the Secretary deems necessary or desirable to prepare land for residential, commercial, industrial, or other uses, or to provide facilities for public or common use. The term "land development" shall not include any building unless it is (1) a building which is needed in connection with a water supply or sewage disposal installation or a steam, gas, or electric line or installation, or (2) a building, other than a school, which is to be owned and maintained jointly by the residents of the new community or is to be transferred to public ownership, but not prior to its completion.88

Housing and Urban Development Act of 1965

If the language quoted above sounds familiar, there is good reason. The act discussed above, with these limitations and definitions, is a direct descendent of title X of the Housing and Urban Development Act of 196589 and deviates little from the provisions of that earlier act. A brief examination of the operation of title X may add to our understanding of title IV.

Title X, the “Mortgage Insurance for Land Development” section of the 1965 act, provides for federal insurance of first mortgages entered into by land developers for the purpose of financing “improvements.”90 The effective operation of that act is the same in scope as the New Communities Act, and the definition quoted above seems to have been taken verbatim from the provisions of the earlier legislation. The 1965 act provides that “the term 'land development' means the process of making, installing, or constructing improvements,”91 and “improvements” is defined in the same language that the New Communities Act uses to define “land development.”92 This gross similarity in language cannot be coincidental.

88. Id. § 3914(a).
90. Id. § 1749bb.
91. Id. § 1749aa(e).
92. Id. § 1749aa(d) defines “improvements” as “waterlines and water supply installations, sewerlines and sewage disposal installations, steam, gas, and electric lines and installations, roads, streets, curbs, gutters, sidewalks, storm drainage facilities, and other installations or work, whether on or off the site, which the Secretary deems necessary or desirable to prepare land primarily for residential and related uses or to provide facilities for public or common use. Related uses may include industrial uses, with sites for such uses to be in proper proportion to the size and scope of the development. The term improvements shall not include any building unless it is (1) a build-
The eligibility of new community development for assistance under the Housing and Urban Development Act of 1965 was specifically provided by a 1966 amendment to that act. The standards imposed upon such developments as a condition of eligibility are also similar to the standards in the New Communities Act. Both the Housing and Urban Development Act, in general, and the new communities amendment to the act, in particular, require, like the New Communities Act of 1968, that the development plans be approved by all appropriate governmental planning units before assistance is granted.

Evaluation of Federal Legislation

The supplementary grants program of the New Communities Act presents several interesting questions which are crucial to an evaluation of the potential helpfulness of the grants. Inasmuch as the provision of a grant is dependent upon approval of a "guaranteed" project, for instance, there is the question whether this program, too, shall be limited to "land development," as defined in section 3914(a). Answer: probably not, based upon the provisions of section 3914(c), with its broad definition of "new community assistance projects," but this answer is not certain. Another question is whether the new community development as a whole must be approved for "guarantee" under the act prior to the allowance of a supplementary grant. The answer here, based upon the language of the act, is probably "yes." And if so, this rules out the obviously beneficial use of the grant in the initial planning stages of the development, inasmuch as the plans must be somewhat advanced prior to approval under the guarantee provisions. These and other similar important questions do not seem to have been clarified either by implementation, litigation, or departmental rules.

At present, however, these questions regarding the efficacy of the supplemental grant program are moot; there is no money available. The authorization is there, and the appropriation was anticipated, at

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93. *Id.* § 1749cc-1(a).
94. *Id.* § 1749cc(b)(1).
95. *Id.* § 1749cc-1(c).
least in some token amount, in the supplemental appropriations act for the Department of Housing and Urban Development during the second session of the 90th Congress.\textsuperscript{99} Unfortunately, that act contained no mention of the new communities program. Nor has this oversight been corrected; no money has yet been appropriated, by either the ninetieth or ensuing congresses.

Several unanswered questions concerning the guarantee provisions of the New Communities Act must also be faced. To prevent land prices from escalating, the developer must possess an interest in the land prior to presentation of his plan to the local agency. In addition, because the plan must be approved by the appropriate state and local governmental bodies before it becomes eligible for the program, the developer must possess an interest in the land prior to the federal guarantee. While the act itself does not specify that any particular land interest be held by the developer, it is unlikely that the most economically feasible method of land reservation—purchase of an option—would protect the developer throughout the drawn out approval process. Any reasonable option would likely expire in too little time. Thus, the program will likely be of little use to the developer to satisfy his most crippling need—money for initial acquisition of land.

The primary value of the program, therefore, will be for facilitation of the financing of the utilities and public amenities which must be constructed after acquisition of the land. Thus emerges the question whether this program can be utilized in addition to the Land Development Act (title X). Such a procedure is likely allowable inasmuch as the Land Development Act is predicated upon federal insurance of a "first mortgage," and the New Communities Act does not specify any such particular collateral except in relation to completed development value.\textsuperscript{100} Nevertheless, the total percentage limitation of federal contributions to the project\textsuperscript{101} will serve to diminish the value of compounding the two programs if this type of potential liability is considered a "contribution."\textsuperscript{102}

The Land Development Act is perhaps of greater value. Of primary interest are several provisions which affect the value of the act

\textsuperscript{102} See text accompanying note 85 supra.
as applied to a program of new community land development, particularly pertaining to acquisition. The Land Development Act requires that a substantial property interest be vested in the developer, this is to be expected in a "mortgage insurance" program. The regulations require, however, that the interest be vested at the time the mortgage is filed, and that the application for the federal insurance be submitted, at the earliest, when the mortgage is "about to be executed." Reasonable construction of these two requirements, along with the requirement for approval of local planning authorities, leads to the inevitable conclusion that, as a practical matter, the developer must own the land before submitting an application for the program. The result is that this program is of no help to a developer who lacks the gigantic sums required to proceed on his own with the initial land acquisition.

In summary, the Land Development Act has great potential value to lenders but is so constructed as to confer no benefit upon the developer who lacks the backing to obtain the necessary original financing without the act's assistance. The New Communities Act's guarantee provisions suffer similarly but are of potential value to the developer in "improving" the tract; again the value accrues only to the developer who has been able to acquire the land on the strength of his own capital or credit. The supplementary grants program, whatever its potential value under yet-to-be-issued regulations, is rendered useless at present by the absence of congressional appropriation of funds.

These three programs, therefore, despite the promise of their statutory form, are of almost no help to present new town developers. Hopefully, this situation will improve in the future, but the difficulties pointed out serve to illustrate that this legislation suffers from apathy at both the legislative and administrative levels. This indicates that the real answer to the new town developers' problems must be sought elsewhere.

Not only has federal legislation been implemented in order to encourage the creation of new towns, but state and local governments have also entered the picture. On the state and local levels, however, governmental action is not so likely to be manifested in the form of specific new towns legislation, as in the form of the complex interworking of state and local agencies in regulation of and cooperation

with a potential new town developer. This relationship has been demonstrated already in the development of two noted new towns: Columbia, Maryland, developed by James Rouse, and Reston, Virginia, developed by Robert E. Simon.

Local Agencies Affecting the Achievement of New Town Zoning

Various local agencies influence the design and development of new towns throughout the entire planning process. The direct control of those agencies over the actual design of the project is perhaps most pervasive in the area of environmental controls, however, because such direct coercive control over design and construction is the specific *raison d'être* of the zoning agencies in the community. These agencies must be satisfied before the plans can proceed.

Most states have zoning enabling legislation modeled after the Standard State Zoning Enabling Act. The developer, therefore, is inevitably faced with a triumvirate of boards: the local governing body, the planning commission and the board of adjustments. The purpose of the three separate bodies is to separate policy making from policy application. Policy-making rests with the governing body of the locality, and administration is given to the planning commission and the board of adjustment, both nonlegislative administrative agencies. In theory, the jurisdiction and authority of each of these three bodies is entirely different. Accordingly, the new town developer is initially faced with the problem of which body is authorized to approve his plans.

The board of adjustment is the agency intended to provide a safety valve from the rigidity of the general zoning ordinance. This function is to be accomplished through the granting of both variances and exceptions. One writer has suggested that the changes in lot

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106. D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 594 (1966) [hereinafter cited as MANDELKER].
107. *Id.* at 761.
108. A variance is an administrative departure from the standards of the zoning ordinance, justified by the existence of unique and individual hardship imposed by particular specific circumstances. Such a procedure is required to prevent the rigid application of the primary zoning provisions in such a fashion as to constitute a taking of property without due process of law, and therefore serves to protect the overall zoning law from the charge of unconstitutionality. An exception, on the other hand, is a use which is allowed in a district in which it would normally be precluded. It is based upon a determination that the use should be allowed in the district and is made subject to various limitations and conditions which will assure that no harm results from the exception. Examples of exceptions are a hospital in a residential district or a filling station in a light commercial district. *Id.*
size and frontage requirements which are involved in new town development should be made by the board of adjustment. However, this function, when exercised in the scope and context required for new towns or even for very large subdivision development, is clearly a planning function, rather than a mere adjustment function, and planning is not within the province of the board of adjustment.

The planning commission is designed to make the determinations which form the basis of the policy making activities of the local governing body. Planning commission advice, based on its intended expertise, is to be utilized by the governing body not only in regard to creation of a zoning scheme but also in regard to zoning amendments. The planning commission, therefore, is usually the agency which holds the hearings necessary to further planning activity. Nevertheless, the planning commission has no power of its own to directly change or influence zoning legislation or ordinances, and its advice need not necessarily be followed by the governing body. Indeed, often the advice is pointedly ignored as a matter of political spite.

At least two other serious problems are involved in the normal process whereby the planning commission holds hearings and then makes a recommendation to the governing body. The hearing process in the case of new town development is in reality a series of bargaining sessions. During these sessions the needs and aspirations of the planning commission and the developer are compromised and merged into a plan specifically tailored for the peculiarities of the individual situation. The developer, in the course of this process, must often make concessions which would normally render his project unfeasible, but which he allows because of counterbalancing concessions on the part of the planning commission. Nevertheless, he may then find that the governing body, when the final plan is presented for approval upon the joint recommendation of the developer and the planning commission, will accept the developer's concessions and reject the commission's concessions. Even assuming that such action may be in good faith and in ignorance of the give and take which has already occurred, the bargaining must begin again, while the developer's costs increase.

109. Urban Land Institute, Technical Bull. No. 52, Legal Aspects of Planned Unit Residential Development 38 (1965) [hereinafter cited as T.B. 52].
110. Id.
111. Mandelker, supra note 106, at 761.
112. T.B. 52, supra note 109, at 38.
114. Id.
Another problem of similar nature results from the fragmentation of local authority. The planning commission may accept deviations from the norm in the sewer requirements, for instance, upon the basis of carefully calculated considerations, only to learn at a later date that the health department refuses to accept the new arrangement. Other local departments, such as the town engineer, the department of public works, or the assessor's office, may refuse to accept departures from road, utility, or setback requirements. These local agencies usually operate with specific regulatory authority, and the careful planning of the developer and the planning commission in such cases is all for naught.\(^{116}\)

As has been pointed out, the local governing body must implement zoning changes in excess of those minor deviations delegated to the board of adjustment. But even here, the decision may not be final. The governing body may attempt to delegate this power to the planning commission through the provision of standards for the commission's guidance.\(^{118}\) Such a process has the merit of combining the hearing and acting functions in the same agency, but it also gives rise to several problems. It is almost a foregone conclusion that no specific standards will provide sufficient flexibility to allow accommodation of new town development;\(^{117}\) to the extent that the standards provided are general and imprecise, however, the delegation of power may be unconstitutional.\(^{118}\) Even if this delegation is found not subject to the restrictions of the federal Constitution, as has been argued,\(^{119}\) many state constitutions specifically require separation of powers.\(^{120}\) The effect of these requirements varies, however. In Virginia, the site of Reston, the constitutional requirement has been held not to require the imposition of specific predetermined standards;\(^{121}\) in Maryland, the still undecided controversy over this point has developed strong arguments on both sides.\(^{122}\)

A further complication in Maryland exists in the form of a requirement that all general laws in nonhome rule counties be passed by

115. Id.
116. T.B. 52, supra note 109, at 33.
117. Craig, Planned Unit Development as Seen from City Hall, 114 U. Pa. L. Rev. 127 (1965) [hereinafter cited as Craig].
118. T.B. 52, supra note 109, at 29.
119. Id., at 29 n.103.
120. NATIONAL LEAGUE OF CITIES, ADJUSTING MUNICIPAL BOUNDARIES (1966).
121. Id., Virginia Section.
122. T.B. 52, supra note 109, at 29-32.
the state legislature. Only regulatory ordinances are subject to passage by the local governing body. Moreover, all zoning changes not in accordance with predetermined standards, even when executed by the legislative body, are open to charges of unreasonableness (lack of substantive due process) and discrimination (lack of equal protection) under the Constitution.\textsuperscript{123} Furthermore, statutory limitations may require conformance with a pre-existing comprehensive zoning plan.\textsuperscript{124}

Robert E. Simon, in developing Reston, Virginia, took full advantage of the Virginia doctrine allowing delegation of power to the planning commission. The basic zoning for Reston was provided by an amendment known as the "Residential Planned Community"\textsuperscript{125} which Simon worked out with the planning commission over a two year period.\textsuperscript{126} The resulting zone for Reston may be viewed as a prototype of "Residential Planned Community" zoning:

1. Overall density must be 11 people per acre. Three density levels are specifically authorized, with the lowest required density being 3.8 people per acre, and the highest allowed density being 60 people per acre. The three provided levels are:
   - High density: 60 people per acre
   - Medium density: 14 people per acre
   - Low density: 3.8 people per acre

2. No fewer than 100 acres may be developed as a "Planned Residential Community." A minimum of 14\% of the total acreage must be reserved for governmental or industrial employers.

3. A variety of housing types will be permitted, including high-rise apartments, cluster houses, and individual detached dwellings.

4. Lawns and yard spaces may be consolidated into shared park land and recreational areas. The buildings may be planned to follow the natural contours of the land. A minimum of 100 acres must be set aside as open space.

5. Shopping, commercial, and recreational areas may be diver-

\textsuperscript{123} Id. at 20-32.
\textsuperscript{124} Craig, \textit{supra} note 117, at 128-29.
\textsuperscript{126} Id. at 2. The amendment was in part the result of the collaboration of the well known planning consultant Fred H. Blair, Jr. Hanke, \textit{Planned Unit Development and Land Use Intensity}, 114 U. Pa. L. Rev. 15 (1965). There was no real opposition because Reston was to be an integral part of pre-existent "Year 2000" plan for the Washington area, and Simon's own personal power was instrumental in coping with the fragmentation of authority problem; the County Road Department, County Water Authority, City of Fairfax, Virginia, Electric and Power Company, (Reston Letter, Vol. 1, No. 1 Feb. 1963, at 2) and the local sewer authority, (SIMON ENTERPRISES, \textit{THE RESTON STORY} (1963)) were all integrated into the development.
sified and spread throughout the area, so as to allow for such areas convenient to all homes.

(6) The "Master Plan" shall be approved by the governing body. Then each particular area shall be subject to approval of its "preliminary plan" by the Planning Commission. Planning Commission approval of the "final plan" of each area shall precede the commencement of any actual development. A standard three-step approval process is thus established.127

James Rouse, in the planning for Columbia, Maryland, faced a different set of circumstances but solved them in the same way: personal persuasiveness. The Maryland requirement for state legislative passage of all general laws of nonhome rule counties required careful cultivation of the Howard County delegation to the state legislature (two delegates and one senator),128 as well as the members of the board of county commissioners and the planning commission.129 The problems of fragmentation of authority were met, as at Reston, by the use of the developer's personality, playing upon these facts: all twelve county departments operated under the jurisdiction of the county commissioners;130 the only county agency not under that jurisdiction operated subject to the commissioners' approval on all major acts;131 and the chairman of the county commission also just happened to be an influential member of the Howard County School Board and the Howard County Planning Commission.132

Local Agencies Designed to Further and Protect New Town Design

Once the traditional zoning scheme has been overcome, the local government and the developer are faced with a new and paradoxical

129. Rouse Co., COLUMBIA, Vol. 1, No. 2, Spring 1966 [hereinafter cited as COLUMBIA No. 2]. The county commissioners were elected in 1963 upon a platform of "no more growth for Howard County," Anderson, A Brand New City for Maryland, HARPER'S, Nov. 1964, at 106 [hereinafter cited as Anderson], but succumbed to Rouse's vision of the inevitability of growth (COLUMBIA No. 3), attention to detail, charm, and personal accountability (Anderson). The latter factor, particularly, was of great importance in supporting the enormous personal influence which Rouse was able to exert. This personal influence led to the passage of a zoning amendment creating a "New Town District" in August 1965, Rouse Co., COLUMBIA, Vol. 1, No. 1, Winter 1966 [hereinafter cited as COLUMBIA No. 1], with approval of specific plans vested, via standards, in the Planning Commission (COLUMBIA No. 2).
130. Id.
131. COLUMBIA No. 1.
132. COLUMBIA No. 2.
problem. The machinery for protection of the old status quo having been destroyed, replacement machinery for protection of the new status quo must be designed and implemented. Rarely will the restrictions imposed upon the developer during the design-approval process be sufficient, standing alone, to control the growth which will follow in the development area. An additional text of regulatory ordinances, proposed by the developer may be required as a part of the project, but such a procedure may be termed (and condemned as) "contract zoning." A more feasible plan involves the use of covenants running with the land. Such a procedure need involve neither a new indigenous governmental unit nor the initially approving governmental unit.

This procedure was utilized in Reston, which maintains existence as a business, not a governmental entity. Normal utilities and governmental services are provided by the Fairfax County government, and the Reston "community centers" function to provide additional amenities on a private cooperative basis. The restrictive covenants impose upon the residents the jurisdiction of the community center and of the architectural review board which was designed to preserve the initial design standards. The county government, once approval for the project is given, forfeits the normal architectural control; this void must be filled by the implementation of a review procedure.

Columbia, about twice the size of Reston, was the subject of a much more ambitious governmental scheme. The initial plan was to incorporate the city and employ a city manager form of government. This government was to be called the community improvement district and was to be financed through a combination of ad valorem taxes and user charges for services. This setup was integral to the developer's approach to the county commission, which emphasized that Columbia would not seek its anticipated services at the tax expense of the remainder of Howard County. But the plan, involving a change in the general laws of the county, was subject to approval by the state legislature under the previously mentioned Maryland nonhome rule

133. Craig, supra note 117, at 129.
134. T.B. 52, supra note 109, at 39.
135. Id.
138. COMMUNITY RESEARCH AND DEVELOPMENT, INC., COLUMBIA: A NEW TOWN FOR HOWARD COUNTY, Nov. 12, 1964 [hereinafter cited as COLUMBIA, A NEW TOWN].
county authority provisions, and achieving a city charter has, thus far, presented an insurmountable problem. Governmental services, therefore, have continued at the county level. But a private government, the Columbia Association, patterned after earlier cooperative efforts and to a lesser degree after the Reston scheme, was created to provide amenities. This association obtained taxing power by covenant, and is composed of one elected representative for each 4,000 families. Its manager functions as a city manager.

As in Reston, architectural purity was protected by the formation of an architectural review board. Other agencies, such as the Columbia Horse Center, the Johns Hopkins Columbia Medical Facility, the Columbia Cooperative Ministry, and the Religious Facilities Corporation, were formed to provide certain specialized services integral to the planned life style. Still other agencies are involved on a consulting basis.

An additional consideration is important in connection with the entire process of establishing the environmental controls in Columbia and Reston. The human element was prominent, perhaps even paramount. In seeking to overcome the rigidities of the traditional zoning scheme, which office was approached (be it the board of adjustment, the planning commission, or the board of county commissioners) was less important than who was approached. The real basis for the zoning change which was finally achieved was the good will of the individuals in each case—Rouse at Columbia and Simon at Reston. Moreover, the dramatic governmental structures which were constructed for the democratic and static control of the growth anticipated in the new towns were so designed that the developers maintained tight con-

139. Id.
141. COLUMBIA, A NEW TOWN, supra note 139, at —.
142. COLUMBIA No. 2.
143. COLUMBIA No. 3.
144. COLUMBIA No. 2.
145. COLUMBIA No. 3.
146. Id.
147. COLUMBIA No. 1.
149. Anderson, supra note 130, at 106.
trol over their projects, despite the formal arrangements for indigenous representation.\textsuperscript{130}

In summary, therefore, the development of new towns does not differ from other of man’s endeavors; the formal structure of the power relationships becomes subordinate in practice to the operation of the men behind the system. This personal factor can hardly be overrated. Perhaps this is why it has been suggested that the real objective reaction to the effect of the efforts of Simon and Rouse will occur no sooner than ten years after the towns are built.\textsuperscript{151} Only at that time will the new towns emerge from under the protective guiding wings of their developers. Only then will it be possible to evaluate the degree to which these towns have been able to preserve an amiable environment and succeed where our present cities have failed so miserably.

**Conclusion**

Upon the basis of the considerations discussed in the above paragraphs, it seems likely that the creation of new towns may have far-reaching promise as a potential solution to some of the long run problems of population maldistribution. This combination of legal techniques has a great intrinsic advantage in that both the quantitative and qualitative aspects of maldistribution are affected, and each is subject to individual consideration and manipulation. At the same time, however, it would appear that the very complexity of the required legal framework, comprehensiveness of preplanning activity, and enormity of financial investment, which serve to make the creation of new towns so valuable, prevent the hasty implementation of these legal and social tools. For this reason it is unrealistic to expect any great short run relief from these sources.

Approximately the same assessment, somewhat mitigated in terms of obstacles and in terms of effects, is properly applicable to planned unit developments. Increasingly, such developments are being undertaken by practical land developers, and increasingly their products will become a pervasive force in the American housing market. Even though such projects are more quickly undertaken and completed than new towns, however, they not only provide much less housing than new towns, but also serve to primarily affect only the qualitative aspect of population maldistribution. The increased short run feasibility of

\textsuperscript{150} Columbia No. 1.

\textsuperscript{151} Anderson, \textit{supra} note 130, at 106.
such projects, therefore, is offset by a lessened short run effect. The
total result, of course, is cumulative and therefore potentially significant,
but like the new towns approach, only in the long run.

The real immediate hope, then, for improvement in the legal
framework as it relates to the generation and continuance of popula-
tion maldistribution, is likely to rest in overcoming the traditional zoning
laws and their effects\textsuperscript{152} through the utilization of the techniques pre-
viously discussed. Reform of the zoning laws is not only an absolute
necessity in order to achieve long run improvement in the social prob-
lems resulting from population maldistribution but would appear to be
the only hope for beneficial short run results while the larger war on
this injustice continues.

\textsuperscript{152} See generally R. Babcock, The Zoning Game (1966); J. Jacobs, The