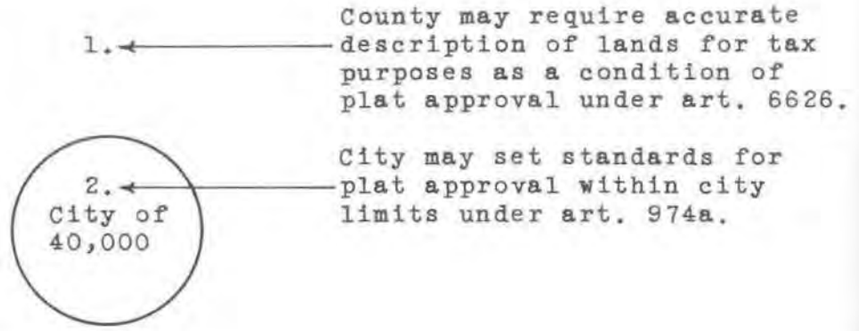
FIGURE 2

SUBDIVISION CONTROL AFTER 1937 AMENDMENT TO ARTICLE 6626

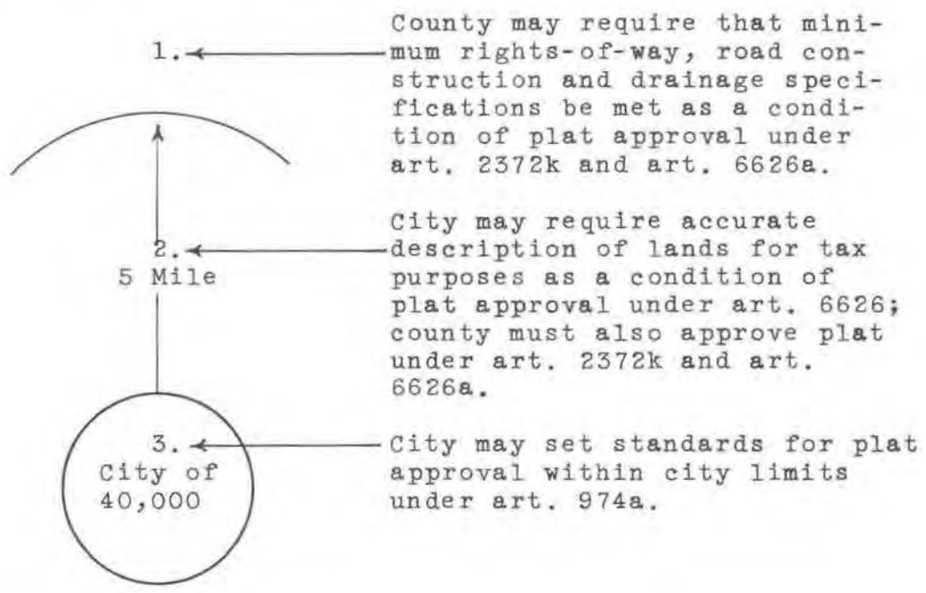


In Trawalter v. Schaefer, the court held that the 1931 amendment to art. 6626 repealed the extraterritorial control which cities had previously enjoyed under art. 974a. This decision shifted subdivision control over land within the five mile radius from cities to the county. However, the court declared in Commissioners' Court v. Jester, that plat approval requirements under art. 6626 did not give the county broad powers to establish and apply substantive standards to the subdivision. Instead, the court held that a subdivider could require the county to approve his plat if the lots were sufficiently described that they could be located for taxation purposes. From 1931 until 1951, neither cities nor counties could legally impose substantive standards on new subdivisions outside of city limits.

In 1951, the legislature passed art. 2372k which applied only to counties of 190,000 or greater population. This Act authorized counties to require 60 foot rights-of-way for subdivision streets; to establish and endorce reasonable street construction and drainage standards; and to require that subdividers post bonds to insure that paving requirements are met as to subdivisions outside city limits. These requirements could be applied as a condition of plat approval for recordation in the county records. See Figure 3.

FIGURE 3

SUBDIVISION CONTROL AFTER ARTICLE 2372k, ARTICLE 6626a AND 1951 AMENDMENT TO ARTICLE 6626



Also in 1951, art. 6626 was amended to reinvest cities with power to approve subdivision plats for lands within five miles of their city limits. However, cities were not clearly granted power to set substantive standards as to such lands. Instead, the Amendment to art. 6626 indicates that cities gained within the five mile ring the same power that counties had, namely to determine that the lots can be located for taxation purposes. Thus, cities acquired little if any real regulatory power by the 1951 amendment.

In 1957, the legislature passed art. 6626a, which gave counties of less than 190,000 population powers similar to those which art. 2372k granted counties with greater than 190,000 population. This act contained a puzzling declaration that it would not change the rights of Home Rule Charter cities to regulate, zone and restrict subdivisions within a five mile radius of their corporate limits, a provision which was repealed in 1961. Texas cities, whether

home rule or general law, have never had power to zone beyond their corporate limits, and in 1957 had no power to regulate subdivisions outside their corporate limits, except to determine that the lots could be located for taxation purposes.

As to subdivisions within the five mile ring, both the city and the county must note their plat approval--the city under art. 6626 and the county under art. 6626a or 2372k. The city must approve if the land can be located for taxation.

In 1961, the legislature passed art. 970a, which constitutes the last installment in the confusing continuum of Texas subdivision regulation. Art. 970a establishes municipal annexation procedures for Texas cities. A key provision creates a ring of extraterritorial jurisdiction ranging from one-half mile to five miles beyond the city limits, depending upon city size. Within this area of extraterritorial jurisdiction, the protected city may prevent new cities from incorporating. Section 4 of the Act allows the governing body of a city to extend its subdivision regulations into its area of extraterritorial jurisdiction. Presumably, a city may apply the full range of plat approval powers under art. 974a. Although unable to punish violations of its regulations, the city may enjoin violations by court action. See Figure 4.

Thus, under art. 970a cities have regained some of the control which they lost when art. 6626 repealed the extraterritorial provision of art. 974a.

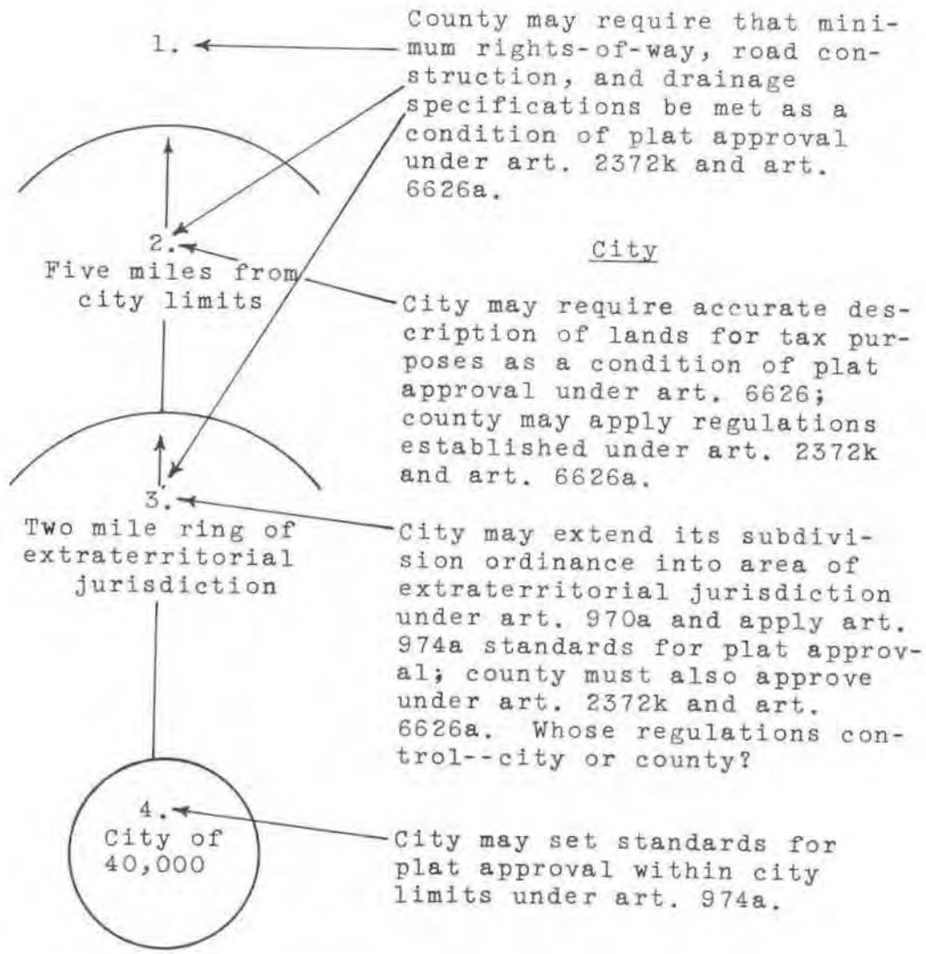
The confusion remains, however. Neither cities nor counties know how to operate under the present system. Counties may want to apply modern standards to new subdivisions, including a requirement that utilities be provided, that utility lines be placed underground, that minimum lot requirements be observed, and that adequate parks and recreational facilities be provided for lot buyers. There is no authority for such regulation by counties in the present system.

Houston-Harris County Subdivision Regulation. An an example of confused operations under the existing subdivision control system, consider the regulations imposed by the City of Houston and Harris County upon subdivisions located within the five mile ring of extraterritorial jurisdiction. Houston's City Planning Commission, acting under the powers granted by art. 974a, has established a set of subdivision regulations. Arguably, no city council action is required to make these regulations

effective as to lands within the city limits. However, if the city wishes to impose standards for the general welfare, then it must pass an ordinance as provided by the article.

FIGURE 4

SUBDIVISION CONTROL AFTER PASSAGE OF ART. 970a (CURRENT)



Under art. 6626, it is necessary for a subdivider within the five mile ring to get the approval of the city

to record his plat. The regulations applied by the City of Houston extend to paving, street layout, street names, utility easements, minimum lot size, drainage, and other matters traditionally covered by subdivision regulation under art. 974a. This regulation could be justified if Council had passed an ordinance establishing general regulations and an ordinance extending its control powers as authorized by art. 970a because Houston qualifies for five mile extraterritorial jurisdiction under art. 970a. However, city council has passed no ordinance establishing nor extending its regulations.

Apparently, then, the City of Houston can lawfully exercise only the subdivision control powers granted it under art. 6626. These powers are minimal, requiring that the city sign the plat if the subdivided lands can be located for taxation purposes. It therefore appears that the extensive regulations which Houston applies to subdivisions within the five mile ring of extraterritorial jurisdiction are unauthorized by law.

Plats for subdivisions within the five mile ring must also be approved by Harris County, as authorized by art. 2372k. The County has established general subdivision regulations which control street design, construction and drainage. However, for subdivisions within Houston's extraterritorial jurisdiction, the county regulations state that Houston's regulations will apply. Houston's regulations extend to minimum lot sizes and block lengths, and conformity with Houston's street system.

Inasmuch as the county's approval powers are limited to street width, design, paving and drainage, the county is apparently acting beyond its delegated power when it requires conformity with Houston's detailed regulations as a condition of subdivision plat approval. In light of Houston's failure to extend its subdivision regulations by ordinance under art. 970a, and the limited scope of plat approval power possessed by Harris County, a major part of the Harris County regulatory process appears to be invalid.

If Houston and Harris County regulatory system is not authorized by law, then a developer could probably challenge it in court and force the approval authorities to sign his plat upon showing that the land could be located on the tax rolls and met the county's standards as to street design, construction, and drainage. However, developers are unlikely to do this.

Developers must deal with city officials and departments on a continuing basis; most are not likely to

jeopardize their good will by bringing a law suit. Of equal concern is the cost of suing a governmental body. A subdivider's direct cost of suit would be substantial, but probably not as great as the cost of interest on his idle development. It is far easier for most developers to give in and follow the regular course than to contest the city's power.

The actual control system in Houston's extraterritorial jurisdiction then, is based not so much on legal authority as on practical bargaining ability. In such an ambiguous setting the city sometimes loses. Realizing that its legal position is weak, Houston's planning commission may sometimes back down on its plat approval demands if a developer appears ready to challenge the system. This can result in uneven enforcement of subdivision regulations among developers, with a result that the cost of subdividing is higher for those who obey the rules than for those who balk and threaten to sue. If this situation were codified, e.g., if the city had a set of regulations which on their face applied more harshly to one developer than to another, the regulations would violate the Equal Protection provisions of the Constitution. Not codified, the regulations are just as violative of developers rights, but the violation is hidden and less likely to be challenged.

It is clear that the City of Houston should have extraterritorial jurisdiction over subdivisions at least five miles outside the City limits. It is not clear why City Council refuses to pass an implementing ordinance which would legalize the City's activities. However, it may be in some measure due to the confusion created by the conflicting legislative acts and judicial decisions which cause the City's inaction.

Red Flag Subdivisions. In addition to the confusing jurisdictional overlap between cities and counties, there is the continuing problem of red flag subdividers who simply ignore the entire regulatory system. By conveying their subdivision lots by metes and bounds descriptions, red flag subdividers avoid any necessity to record subdivision plats. Without plat recordation, there is no control point at which a city or county will come into contact with the new subdivision. Hence, there is no regulation.

Red flag subdivisions are a problem the day they are developed; and their problems increase daily in severity. These developments are deficient in basic amenities, and sometimes even lack access to utilities. They will be sold to buyers who will someday demand that standard services be provided. In today's urbanizing areas, there is

no excuse for allowing substandard subdivisions to be foisted off upon the public. Some red flag subdivisions are sold to buyers on "contracts for deed," which have been held not to be covered by the present regulatory system, and which are likely to have the lowest standards of all.

There are no real penalties in the present system which would cause developers to take subdivision regulation seriously, even if counties and cities sought to exercise tight regulation over new developments.

Recommendations Concerning Subdivision Control in Unincorporated Areas. Clearly needing authority to regulate new subdivisions, cities and counties use methods which are sometimes authorized and sometimes not. Although one cannot blame a governmental unit for sometimes exceeding its lawful power in an effort to protect its citizens, respect for government declines when it consistently violates it own limits of power. Conversely, local governments are themselves discouraged and frustrated when their regulations are lawfully ignored by red flag subdividers.

Texas has a patchwork of subdivision control regulations which needs to be revised and unified. Cities must have full authority to control development in their paths of natural growth. Counties or some other governmental entity must be able to establish reasonable regulations over developments in unincorporated areas. A rapidly urbanizing state such as Texas cannot afford the economic waste which comes from substandard developments which must be renewed by governmental funds in order to bring them up to the community standard.

Flood Plain Management

The Problem. Many sections of Texas are located in flood prone areas, where major rivers and streams overflow, causing extensive damage to developed land. On the Gulf Coast, the danger of river and bayou flooding is compounded by the seasonal threat of hurricane rains and coastal water incroachment.

When land development occurs in flood prone areas, monetary damage from flooding increases. It is bad enough when farm land floods, ruining the season's crops and drowning livestock. However, damage is much higher when flood lands are developed for urban purposes and waters run several feet deep through newly built houses.

The likelihood of flooding increases when urbanization occurs, inasmuch as the absorption capability of undeveloped lands is diminished by installation of concrete streets and construction of houses. Because the aim of a drainage system in any new subdivision is to get water away as quickly as possible, runoff is dumped into storm sewers without a chance for absorption. Rapid runoff intensifies flood problems for older additions downstream which once were safe from flooding.

Two Solutions. There are two ways for government to respond to the problems of flood damage. One way is for the community to suffer the development of private lands in flood prone areas, and then to use governmental taxing power to pay for and install flood control measures. The second way is simply to prevent private developers from building in flood prone areas.

Texas' First Response to Flood Problems. Giving a high priority to the rights of private landowners to develop their lands as they see fit, Texas initially chose the first method--of allowing uncontrolled development. Texas then empowered counties and flood control districts to spend money and condemn land to control floods and prevent damage in the newly developed areas. Accordingly, counties are authorized to condemn and acquire fee interests, easements and rights-of-way, and to dig canals, drains, levees, and other improvements for flood control and drainage purposes. Counties may also contract with other governmental units for joint acquisition and maintenance of flood control properties. The State has authorized counties to levy taxes to support flood control activities.

For some time, designated counties have worked closely with specially created flood control districts charged with administering and financing flood control improvements. In Harris County, the identity between the county and its flood control district is complete, inasmuch as commissioners' court is the governing body for the flood control district. The district has power to acquire land, hire flood control managers and employees, devise plans and issue bonds to finance improvements.

Coordinating their activities with the federally financed Army Corps of Engineers, the Harris County Flood Control district has responded to the flood control demands of great portions of the low lying Harris County properties. According to one observer, the Harris County flood control district is not self-motivated. It responds to substantial demands for flood control by holding a bond election to finance control efforts in the flood areas. If the election

passes, the bonds are sold and the improvements made; if not, then no further action is taken.

Zoning to Regulate Flood Plain Development as a Less Costly Alternative. A less costly method for preventing flood damage is identifying those sections which are flood prone, and preventing development which would be damaged by high waters or which would aggravate the flooding problem. If government prevents development in flood prone areas by taking title to land, then it must pay landowners the market value for property which is taken. If, however, government prevents development by exercising its police power to regulate private activity for the protection of the health, safety and welfare of the community, then no payment need be made. Such regulation would take the form of zoning to prevent urban development in flood prone areas.

Some profit motivated owners of undeveloped lands and private land developers would prefer that government allow development upon low-lying lands, and then spend money to prevent flood damage. They claim that zoning to prevent urban development would amount to an unconstitutional taking of their private property, would depress residential building activity, and would raise the cost of housing. Their pleas concerning constitutional rights are more emotional than legal. Flood plain zoning has become an accepted practice and will probably withstand constitutional challenge.

Private developers' pleas that flood plain development keeps housing costs down may not be convincing to a homebuyer whose house has just washed away. Private insurance coverage is not normally available for damage from rising water. Homeowners therefore bear the entire loss, and have no practical way to protect themselves. It may be argued that potential homebuyers should check the drainage system and determine whether a subdivision is likely to flood. Unfortunately, buyers are not well enough advised to do this. They trust the appearance of solidarity and honor of participants in the housing transaction: developer, builder, financial institutions, F. H. A., and government. They assume that housing placed on the market will be fit for its obvious purposes--to live in.

Federal Incentives for Flood Plain Management. In an effort to avoid future damage from flood plain dedevelopment, and to provide insurance for persons living in flood prone areas, Congress passed the National Flood Insurance Act of 1968. Federal subsidies make insurance available to cover damage caused by rising water, but only

if the locality has an adequate flood plain management program. In addition to identifying flood prone areas and planning to avoid flood losses, the locality must regulate land uses to prevent unwise development of flood plains.

Texas' Second Response to Flood Problems. In 1969, Texas passed two statutes authorizing flood plain management, to allow local governments to qualify for flood insurance.

Art. 8280-13 states broadly that all political subdivisions, including counties, river authorities, conservation and reclamation districts, water districts, and cities, are authorized to take all necessary and reasonable actions to comply with the requirements of the National Flood Insurance Program. Specific authority is granted to make land use adjustments to constrict the development of land which is exposed to flood damage; guide development of proposed construction away from flood areas; assist in minimizing flood damage; make studies; engage in flood plain management; and declare property to be in violation of local laws, regulations or ordinances intended to discourage or otherwise restrict land development or occupancy in flood-prone areas; and adopt permanent land use and control measures with enforcement provisions.

Art. 1581e-1 authorizes counties bordering the Gulf Coast or its tidewater limits to enact and enforce regulations which regulate, restrict or control the management and use of land, structures, and other development in flood areas in such a manner as to reduce the danger of damage caused by flood loss. Express authority is given to require floodproofing of structures, minimum elevations, specifications for drainage in flood prone areas.

Neither statute specifies a penalty for violation of the flood plain regulations.

The broad terms of the statutes clearly authorize a city or county to refuse to approve subdivision plats for subdivisions in flood-prone areas unless protective measures are taken to reduce the danger of flood damage. By reasonable interpretation, counties are authorized by the articles to identify flood plains and to restrict them to appropriate land uses by zoning regulations.

Galveston County Acts; Harris County Does Not. Galveston County has adopted flood plain regulations which establish flood hazard areas at the 100 year flood mark and set building restrictions for construction therein. The regulations include floor elevation standards, sewer

standards, and adopt a portion of the Southern Standard Building Code. A permit system is established, with a Building Official empowered to administer the regulations, and a Board of Adjustment to hear appeals and grant variances. Commissioners' court punishes violations for contempt, with a maximum fine of $25.00 or one day in jail.

In contrast with Galveston County's immediate and effective implementation of its flood plain management powers, Harris County has not acted with an organized program, even though new subdivisions are being developed in areas which are prone to flooding.

How Far Can a County Stretch Its Flood Plain Zoning Power? The type of regulation undertaken by Galveston County appears to be well within the statute's authorization. More questionably, a Gulf Coast county could assert that development situated anywhere in the county has some impact upon flood prone areas, and then undertake comprehensive land use zoning of all county lands. Regulations might include minimum lot sizes on the rationale that water absorption is affected by lot coverages; street layout on the basis that drainage problems caused by street systems must be anticipated and controlled; drainage systems, including septic tank regulations because of their obvious connection with flood plain management; and even open space requirements because of absorption factors. On the other hand, developers could reasonably argue that such regulations applied county-wide would not bear sufficient relation to the flood plain interests set out in the act, and that the county has no power to engage in general zoning outside of the low lying plains.

If counties or another governmental agency were granted general power to zone land in unincorporated areas, the flood plain management program could be more easily implemented as a part of the overall land use plan.

Waste Disposal Management

The Problem. Eveyone wants his garbage picked up, but nobody wants it put down nearby. The pollution generated by an increasing population creates a national, and even world problem. Particularly in urban areas, local governments barely manage to stay one landfill garbage site ahead of the ever increasing supply of residential and commercial refuse.

In an attempt to avoid offending city voters, a city government may try to locate its disposal sites outside

the city, or even outside the county. Waste disposal involves a number of concerns and a corresponding number of regulatory agencies. The Texas Air Control Board is involved because burning the accumulated waste creates air pollution; the Water Quality Board is involved because disposal can easily pollute the State's waters; the Texas Department of Health is involved because improper disposal of waste can create immediate and critical disease problems. More than anyone, local governments are involved because they must respond to the necessity that waste be collected, treated and disposed. Cities have long engaged in waste disposal because private disposal by burning, and dumping would have disastrous consequences for the public health. Even private septic tanks are intolerable in densely populated urban areas.

The disposal problem extends beyond conventional city boundaries. When newly developed recreational areas open up, city residents rush in to take advantage of fishing, boating and fresh air over the week-end. They may build a second home, which needs ordinary sanitary services. During its week-end sojourn, a city family brings pounds of litter which will be left for the visited government to pick up.

County Authority for Waste Disposal Management. Recognizing the necessity for providing waste disposal on a broader basis than previously allowed, Texas in 1969 authorized counties to engage in solid waste disposal management. County activity is coordinated with the Texas Air Control Board, Texas Water Quality Board, and Texas State Department of Health. The Water Quality Board may supercede county action if it wishes. Any county wishing to engage in solid waste disposal management may set up a program for collecting and disposing of solid waste. The county may require that disposal sites be licensed. The Act prohibits persons from violating the regulations by engaging in unauthorized collection, storage, handling or disposal of solid waste. Violations are punishable by civil penalties of up to $1,000 per day per violation.

Polk County Acts. As an example of implementation under the Act, Polk County has undertaken solid waste disposal management. Located within easy driving range of Houston, Polk County contains a booming recreational area surrounding Lake Livingston. A study showed that existing disposal systems were inadequate. County residents produced 10,000 tons of refuse per year which were not collected by any governmental agency. Hundreds of thousands of recreational visitors brought their litter to Polk County and Lake Livingston and left it there. Recreational subdivisions

which were developed on and near the lake likewise were not served by governmental collection systems.

The county selected a sanitary landfill method of disposal and prohibited open burning and dumping of solid waste. A licensing procedure for disposal sites was established, and regulations were passed concerning site operation.

County Power to Regulate Sewage Facilities. Closely related to their ability to engage in solid waste disposal, counties may also coordinate with the Texas Water Quality Board to regulate private sewage facilities including septic tanks. If Commissioners' Court determines that private sewage facilities in an area within the county threaten to pollute water or to injure health, then they may hold hearings and issue orders and regulations to abate or prevent the pollution. The county may issue the same type orders which the Water Quality Board issues. However, before county orders take effect, the Water Quality Board must give its written approval. After a county establishes a licensing system, no person may install or use a private sewage facility without obtaining a license. Substantial penalties are provided for violation.

A Need for a Regional Approach. It is good that counties have been given power to engage in waste disposal management. However, counties are no more immune from political considerations in waste disposal than are cities. No county commissioner will want the new landfill site to be in his precinct. Some counties may not use their waste management and regulation powers until the public health is impaired.

Waste disposal problems must be faced--by the State if local authorities do not respond. Waste disposal must be considered to be part of an overall land use management system.

Perhaps waste disposal is a matter which can best be handled on an area-wide basis. Regional Planning Commissions have power to contract with member governments to provide services such as waste disposal. Given additional powers to condemn land for disposal sites and to regulate both private and governmental activities, RPC's could work out a disposal system on a broad geographical basis and insure consistency with regional planning goals. These commissions, as presently constituted, are less visible politically than are city and county governments. Assumedly, they could handle the unpleasant jobs of waste disposal on a businesslike basis with less election concern.

Road and Highway Control

Planning. Texas counties held general responsibility for planning, constructing and maintaining roads and highways until 1923, when power to plan and control state highways passed to the Texas Highway Department. Today, although they are subordinate to the Department in highway planning, counties are very active in road and highway matters.

When there is no conflict with State Highway planning, counties may plan and construct highways in unincorporated areas. To support their road construction and maintenance program, counties may issue tax supported road bonds. Counties spend two thirds of their budget on road related activities.

Even when state highway planning pre-empts county plans, counties may influence the state's decision as to particular location of highways within the county. Counties handle right-of-way acquisition for state highways, and bear 50% of the cost of right-of-way acquisition for state highways. If a county were to refuse to participate in acquiring right-of-way for an unpopular highway, the Highway Department would have to pursue condemnation through the attorney general's office.

As an example of likely county involvement in state highway planning, consider recent planning recommendations made to Chambers County. State planning proposes a new highway cutting through the county at about its mid-point, linking a major interstate highway with the Gulf Coast. A planning team determined that the highway would better suit the county's long run plans if it were located farther to the west, near a presently developed industrial complex and projected residential building areas. By using its ability to influence state planning, Chambers County may, if it chooses, persuade the state to modify its plans to fit the county's needs.

Subdivision Streets. In rapidly urbanizing areas, most new county mileage comes from dedication of streets in unincorporated areas. Counties have power to establish street design, construction and drainage standards in unincorporated areas as a condition of plat approval. The county may require a bond to insure construction per specifications. If the subdivision does not meet county standards, the county may refuse to accept dedication and future maintenance.

Although most standard subdivisions meet the county requirements, "red flag" subdivisions may be developed without plat approval. Accordingly, red flag subdivision streets are not dedicated to the county, and the county does not maintain them. Such subdivisions are often developed for recreational uses or for lower income buyers. Although recreational lot buyers can probably afford to maintain their street system, the lack of county maintenance in a low income subdivision may serve to aggrevate the problems which already face the residents and increase their irritation at government and the "system" which provided them substandard housing. Withholding maintenance from substandard subdivisions punished the innocent buyers of subdivision property--not the subdivider who violated the requirements.

County Control over Streets within Incorporated Cities. With the consent of the affected city, a county may locate and maintain roads inside the city. Generally, if a city does not consent, the county may not enter. In some cases, however, a county may extend a road through a city over the city's objection.

By a 1913 Act, Harris County was given special power to control roads in the county which connect with main roads leading into Houston. In 1965, Harris County proposed to extend a Houston street into a Houston suburb, The City of Piney Point Village. The street, designated a county road, was constructed up to the boundary of Piney Point. Piney Point consented to extension of the street and the county acquired right- of- way within the city. Piney Point then attempted to withdraw that consent. With its abrupt termination at the Piney Point boundary, the road earned a local title "The Road to Nowhere." A lawsuit resulted to determine whether the county or city had the power to determine road placement. The Texas court held that Harris County, because of the special Act, had power to impose its road system upon Piney Point. The court did not decide whether the County could also impose its will upon the City of Houston.

Although not necessary to its holding, the court also stated that Piney Point was bound by its consent earlier given, and that it was estopped to withdraw its approval after the County had extended money in reliance thereupon.

Road Maintenance. In Harris County, more than 3,000 miles, an estimated 85% of total county mileage, are maintained by the county. Each commissioner manages roads within his precinct. Commissioners' court allocates moneys

on a formula basis for this purpose. Within this precinct, a commissioner exercises considerable control over new construction as well as maintenance. This control may cause yet another chapter to be written in the case of the "road to nowhere": the Harris county commissioner who strongly backed the extension into Piney Point was defeated for re-election by a candidate who opposed the extension. Yet another lawsuit may be forthcoming if the new commissioner decides not to carry out the plans to extend the street within his precinct.

With power to disburse funds on road maintenance, commissioners acquire a strong grass roots political base which manifests itself at election time. However, the time which commissioners devote to road matters may be disproportionate to their function as managers of the entire business of the county.

Although handling maintenance on a precinct basis may be the county norm, there is another method which makes road management a county-wide matter. Under the Optional County Road Law of 1947, counties may call for an election to determine whether a unitary system of road management will be adopted. If the voters agree, then a single road engineer will manage all county roads, and commissioners' court sets priorities for road construction and maintenance on a county wide basis.

County judges may be more likely than county commissioners to favor a unitary system. The county judge sits for the county as a whole, and does not have a precinct. In addition to lacking a precinct power base, some county judges sense frustration at the lack of attention to county business by commissioners who devote all of their time to maintaining their roads and precinct political connections.

For an urbanizing county, the unit system for road management seems to make more sense than a precinct system. In as populous a county as Harris County, the commissioners need to concern themselves with other matters which are at least as urgent as road repair. Road maintenance is an engineering and administrative problem which probably does not need the detailed supervision of an elected policy maker.

Acquisition and Operation of Parks and Other Recreational Lands

Counties are authorized to acquire park lands, to make park improvements and to operate parks. Counties may act singly, or they may join with cities, towns and villages in park activities. One might assume that counties would establish a parks and recreation plan for county residents, and buy lands for parks on a systematic basis to implement the plan. This may happen in some counties. However, it is more likely that, as in Harris County, park acquisition is more a product of accident and occasional inspiration. Harris County has become owner of park lands through gifts, use of federal lands, use of flood control lands, and by purchase of land and construction of a spectacular domed stadium. Although the County has had no systematic parks acquisition program, Commissioners' Court has recently authorized employment of a parks director.

Subdivision Parks in Unincorporated Areas. Good planning requires that a certain amount of open space be available to subdivision residents; quality developers will therefore provide and improve green space for their developments. However, if the developer retains ownership of his subdivision park, he must pay taxes and maintain it. If, on the other hand, he dedicates the park to the county, the land will remain open, the county will maintain the park, the developer pays no taxes on the parkland, and the developer gets a federal income tax deduction for the value of the land which he donates. In Harris County, a number of parks have been donated voluntarily by subdividers to the county to serve the needs of lot buyers in the development.

If new developments need parkland, arguably, counties should require dedication of appropriate lands as a condition of plat approval. Currently, counties lack power to impose this requirement. For subdivisions developed within a city's extraterritorial jurisdiction, the city requirements can be made to apply and this may include a requirement for park dedication.

Surplus Federal Lands. Counties may have other opportunities for increasing their supply of recreational land. In Harris County, the U. S. government acquired a large tract of land to prevent downstream flooding in and around Houston. The Army Corps of Engineers leased 21,000 acres of this land to the county for 99 years at no cost.

Flood Control Lands. The Harris County Flood Control District acquired a flood control easement along

the banks of Buffalo Bayou for flood control purposes. The county declared the land to be a public park and passed regulations concerning its use. In one section of the park, the owner of a nearby apartment project offered to build a public tennis court on a portion of the lands. The county accepted. Although the primary users of the courts will be apartment dwellers from the benefitted project, the courts are open to the public as well. Thus, the public obtained a park and obtained public improvements at no additional taxpayer cost.

The Harris County Domed Stadium. The Harris County Domed Stadium is one of the most spectacular examples of county park operation. Planning began in 1958 for an indoor, air conditioned county stadium which could be used for baseball, football, exhibition, and other events. The completed, roofed stadium was opened for the public in 1966. It covers 9.14 acres of land, with an outer diameter of 710 feet. The clear span of the dome is 642 feet. The roof height is 202 feet. The stadium uses 6,000 lbs. of air conditioning to cool approximately 50,000 spectator seats.

In order to finance construction of the stadium, Harris County issued about $32,000,000 in revenue bonds, to be repaid over a 40 year period. The county then executed a lease to the Houston Sports Association at an annual rental sufficient to pay debt service on the bonds to final retirement.

An expenditure of this type has an enormous impact upon land use. The area around the Harris County Domed Stadium acquired new value for hotel and motel use, for recreational use related to the stadium, and more recently for a projected office development. A major amusement park is now located just south of the Domed Stadium. The complex of new roads which serve the stadium also afforded opportunities to nearby landowners for new investments.

Use of Landfills as Parks. As counties get into the waste disposal business, additional opportunities for park acquisition appear. With the power of eminent domain, the county can acquire a landfill site and use it for disposal purposes. Eventually, however, the landfill will be exhausted in its capacity to accept new waste, and the county must find a new site. After appropriate improvements the old site may be used for county park purposes or exchanged for other lands more suited for parks purposes.

A Parks Policy. Most Texas counties have probably not undertaken serious, planned recreational lands programs.

In a state which is essentially rural, public open space is not a high priority item. However, as urbanization occurs, demands increase for recreational space. In an expanding urban area, lands in unincorporated areas could be acquired in advance of projected urbanization. If government waits until there is a demand for open space lands, then the cost of acquiring park land is likely to be too high to carry out a significant program. Counties should clearly be empowered to require park dedication as a condition of subdivision plat approval.

Some areas of the State are developing substantial recreational attraction. In such areas, a governmental agency other than the county should insure availability of public parks to prevent monopolization of available space by private landowners. This is particularly true around new water reservoirs which have been created by State agencies. The users of regional parklands are persons from outside the county whose presence will be more of a burden to the local county government than an asset. Accordingly, responsibility for parks having regional or state benefit should fall upon a state agency.

Recommended Alternatives for County Control

Particularly in rapidly developing areas, the county government or some other control entity needs power to control the location and quality of private developments. This control is essential to protect the environmental quality of the land, protect purchasers, and provide adequate services to new developments.

Urban sprawl is intensified by the absence of county control, because developers seek out land in unincorporated areas where they do not have to obey city building codes and zoning ordinances. When a city annexes a county subdivision, vacant land in the incorporated areas become less desirable for speculative building, and the developers move farther out, adding to the leapfrog character of urban development.

Without land use control authority, Texas counties must suffer whatever use or misuse of land occurs, or piece together a fragile control system through their powers to approve subdivision plats, locate county roads, license private sewage systems and provide services. To their credit, some counties have stretched their inadequate control powers to the limit of their legal authority and even beyond.

Clearly, some counties would like to have power to place meaningful standards on subdivisions within the county, and to prohibit "red flag" subdivisions. In many counties, commissioners' court probably does not want to administer county-wide land use regulations such as zoning and building standards.

One reasonable approach is to enable counties to pass zoning ordinances for unincorporated areas, to establish building standards for new construction, and to place meaningful regulations on new subdivisions. Those counties which feel immediate pressure from nearby urban areas would be able to control new development if they chose to do so. Rural counties probably would not bother to pass regulations.

It is unfortunate that Texas counties are not active in land use planning and control. They are extensive in geographical coverage, i.e., every acre of Texas is located in some county. Counties are larger than their largest cities and usually extend beyond their boundaries on all sides. Counties could plan for and control growth well beyond the boundaries of those cities. Counties are small enough that citizens generally know the location of their county boundaries and the identity of their county officials. Rationally, counties should be significant participants in Texas land use planning and policy implementation. However, a troublesome caveat is that it may be unrealistic to expect existing county governments to play a significant role. Lacking a tradition of land use planning, and seeking the local monetary benefits which come from extensive private development, county officials might refuse to apply controls if they were granted, choosing instead to let the "market" control land uses.

If counties in rapidly urbanizing areas do not pass effective control measures to prevent substandard developments, it may be necessary to empower the State to designate such developments as "Areas of Critical Concern" and apply controls from the state level. This approach would emphasize local choice for counties to apply local controls consistent with rational state development policy. Allowing the state to step in when the local government defaults would prevent long term harm to the state's overall development pattern.

VII. CITY LAND USE PLANNING AND CONTROL POWERS

From the early days of governmental control over land use, cities have been by far the most enthusiastic regulators. Before zoning, cities controlled the location of slaughterhouses and other noxious uses by classifying them as "nuisances." Zoning ordinances and subdivision regulations reflect a further refinement in fulfilling the desires of urban communities to keep their neighborhoods pleasant.

Local governments tend to be very self-centered in their use of land use controls. It does not matter to affluent suburban residents that their large lot zoning system effectively prohibits poor people from living there; in fact, a close examination of motives might uncover that they aim to achieve that exact result. Similarly, zoning and other control laws may be used to prevent location of power plants which the region requires, but which nobody wants nearby. Only recently have federal and state responsibilities been identified which go beyond the purely local aspect of land use control. However, the acts which would inject a broader concern about land use control note very carefully that at least 90 percent of all land use decisions will continue to be made at the local level. This chapter is the most detailed portion of the survey, because it focuses on the area in which this 90 percent of control activity lies.

In describing what cities do to control land uses, it is useful to look first at city formation. Unincorporated communities have no government power. Even incorporated communities have no power beyond that which the state delegates by statute or constitutional provision. The chapter therefore begins by describing the process by which communities incorporate and progress to general law and home rule powers. It then describes the specific powers available to general law cities and to home rule cities, including zoning, subdivision control, building codes, and housing codes.

Wherever available, specific examples of city activity under a given enabling act will be included. Because of the size of the State and the variety of activity,

these examples are incomplete to show the full range of local government activity.

City Formation and Powers

When a community exceeds a population of 200, it may incorporate by following a statutory procedure. At least twenty inhabitants file an application with the county judge stating the boundaries, name and plat of the proposed town. The judge orders an election on the issue of "corporation" or "no corporation." If a majority vote to incorporate, the county judge enters upon the records of commissioners court that the town is incorporated. The judge then orders an election for mayor, marshall and five aldermen. The aldermen have power to pass ordinances, levy taxes, control town streets, prevent nuisances, and assess fines for violation of the town ordinances.

When a town reaches a population of 600, it may adopt Title 28 of the Texas statutes, and assume all of the powers of a general law city, including the power to pass ordinances for the general welfare of the community. Cities generally may choose a mayor-council, commission or city-manager form of government.

When a city reaches 5,000 population, it may become a home rule city. Home rule cities draw their powers from a charter adopted by the citizens pursuant to constitutional statutory authority for home rule. By charter provision, they determine the form of government they will have.

According to the generally accepted principles of "Dillion's Rule," cities have no inherent powers of self-government. Therefore, when a city acts in a governmental capacity, it must find its power stated or reasonably implied in an enabling statute or in the constitution of the state. Texas statutes spell out specific powers for towns, general law cities and home rule cities. Although in theory home rule cities draw power from their charters and have a broader potential range of governmental authority than general law cities, the practical interpretation of home rule power has not differed too much from that applied to general law cities. It is therefore important for home rule cities to find specific legislative authority when they operate in an uncharter area.

City Planning Structure

The Role of City Council and the Mayor

Unless a different form of government is chosen, city council is the legislative body and the mayor is the chief administrative official of the city. Council sits in formal session and passes ordinances. One ordinance may set the speed limit on Elm Street at 25 miles per hour; another may declare that fireworks shall not be stored within the city limits. By ordinance, council may declare spitting on the sidewalk to be unlawful and subject to a $50.00 fine. Turning to land use, the city may pass an ordinance establishing a building code and subdivision regulations. After heated hearings, council may pass a zoning ordinance establishing districts and regulating the location of residences, businesses and industries. Council may amend the zoning ordinance and all other ordinances, following the same formalities required for their initial passage.

The mayor is the chief executive of the city and administers the ordinances which council has passed. He also cuts ribbons to open new freeways; represents the city at far away meetings and welcomes astronauts at the Fourth of July parade. The mayor deals with the Chief of Police, oversees the building inspector and zoning officials in their official acts, and works with the planning agencies responsible for city planning.

The City Planning Commission

Cities may establish a city planning commission to advise the city on long range planning matters. The members of the city planning commission are appointed by city council or by the method set out in the charter. Planning commission memberships may include city officials, but are ideally made up of citizens who, by position in the community, training and inclination will be able to visualize and understand the city's future. The planning commission makes recommendations which should influence the city's response to development activity.

In Texas, the city planning commission is statutorily assigned the duty of approving subdivision plats within the city's area of control. Typically, the planning commission would consider the local needs for subdivision regulations for plat approval. Council should then enact an ordinance establishing these standards for all new

subdivisions. After these rules for new subdivisions have been established, the planning commission receives plats from subdividers, passes them to the city planning department for review to see that they meet the requirements of the ordinance, and upon recommendations of the city planning department, either approves or rejects the plats.

The City Planning Department

Unlike the city planning commission which meets a couple of times a month to do its policy thinking, the city planning department is staffed by full-time city employees. The city planning department in a large city is headed by a professional urban planner, trained for his job in a major university and with several years' experience. He has on his staff a number of draftsmen, engineers, landscape architects, and perhaps a sociologist, an economist, and other professional planners. The city planning department operates under the mayor and administers the planning function for the city. It does the actual work of applying city standards to the plats submitted by subdividers to the city planning commission for approval. It considers changes in the zoning ordinance and makes recommendations to the planning commission.

The city planning department assists the planning commission, mayor, and council decide where public improvements, highways, and other city financed activities should be placed. The city planning department deals with urban renewal agencies, public housing officials, highway engineers, drainage engineers, and the hundreds of other persons who come into contact with the city in connection with private or public land use matters.

City planning is a young profession, and its members have gone through several philosophical growth phases--from a time when city planning was considered to be a branch of landscape architecture to a time when they may now be considered public administrators. Whatever the limits of the discipline may be, its ranks are growing and its decisions are becoming more significant.

City Authority to Spend Money for Planning and to Engage in Joint Municipal Planning with Nearby Cities

Although cities had been engaged in planning activities for some time prior to 1957, the legislature in that year specifically authorized cities to spend public

funds for compiling statistics, conducting studies and formulating plans relative to the future growth and development of the city.

The statute also authorized cities to conduct joint planning with other municipalities situated nearby. Municipalities may create a joint planning commission and employ persons to design a master plan for the joint planning area. The plans may cover highway design, street layout, park layout, school areas, residential, business and commercial areas, and water reservoirs.

City Street System: The Core of Land Use Planning and Control

People who live in cities depend more upon the street system than any other governmentally provided service. Without streets, citizens could not get from home to work. Basic sanitary services are totally related to the street system--garbage trucks use the streets and the sanitary sewers are installed as an integral part of the street system. People tell locations by street names and numbers. Fire and police protection would be impossible without a street system.

City planners could give up their other powers and still control land development patterns by regulating street layout. Major thoroughfares almost invaribly attract commercial uses, with or without zoning. Narrow interior streets are limited to residential uses, with or without zoning. Major intersections attract heavy commercial uses. A freeway system can be used to disperse urbanization or to concentrate it in strip development.

Although street planning is not as colorful a topic as land use zoning, it is at least as effective as a determinant of land use patterns.

Regulation of Access to Streets

Cities are authorized to control their streets, alleys, and public grounds. They may remove obstructions, and open, close, widen, improve, and regulate city streets. Cities may regulate utilities and other franchise holders who use city streets for line and traffic purposes.

Notwithstanding the general grant of power to open and close streets, cities may not close a street under circumstances where landowners' rights of access would be

impaired. The city may however condemn the landowner's right of access and pay him for the value of the interest taken. If a landowner is not totally deprived of access, the city may regulate vehicular access to public streets in the interest of safety. For example, in 1956, San Antonio refused to allow a driveway access across a busy sidewalk to service a ten story parking garage. The garage had access onto another street. The Texas Supreme Court upheld that city action, holding that the regulation was reasonable, and that the landowner was not deprived of property without due process.

Houston regulates access to its public streets to apply standards to certain types of land development. A Private Street Ordinance requires that developers who use public street access for projects containing four or more residential units or two or more business, commercial or industrial establishments must make a plat of their project and submit it to the city planning commission. The planning commission determines whether the proposed development conforms to the city's street and alley system, has adequate utility service, and provides access for fire-fighting equipment. If the development passes scrutiny, the planning commission approves the plat, which is then recorded in the county records. A permit may then be issued for the project. If the commission rejects the plat, the city will not issue a building permit and utilities cannot be lawfully connected to the project. The Houston ordinance stretches its street access powers rather far to accomplish objectives which could be approached directly through a standard zoning system. However, it appears to provide a locally satisfactory method of establishing performance standards for new apartment and commercial developments.

Extension of City Streets and Preservation of Design Integrity

Subdivision Streets. Most new city streets are laid out and built by private subdividers to accommodate new residential developments at the city's fringe. It is essential that the established street pattern be observed in all privately developed areas which will eventually become part of the city. Otherwise, city streets would become a hodge podge of dead-ends, jogs, duplicated and changing names, varying widths, and generally confused internal circulation. Cities control the street system through their subdivision plat approval process. Most private land developers obey the state's subdivision control approval prior to making lot sales. The city planning

commission will check the developers' plats for conformity with the city's street plans. Cities customarily require that developers follow city standards concerning design, layout, naming, numbering, paving, and that the streets be dedicated to the city. If the city planning commission approves the plat, the developer can record it and sell lots by lot and block number. If the city does not approve, then the developer cannot record his plat, and his lots may not be served by city utilities. He is forbidden to sell lots which refer to an unrecorded plat. The city probably will refuse to accept dedication of unapproved streets and refuse to maintain them. Cities may extend their subdivision regulations into their area of extraterritorial jurisdiction if they wish.

Developers may not be able to get financing for their subdivision without plat approval by the city. Accordingly, most middle income developments go through the plat approval process and have street systems which conform to the city system. However, red flag developers may avoid the city's control system. The street systems may be totally inadequate and not conform to the city system. Occasionally, middle income subdivisions are developed without plat approval because the subdivisions cannot meet the drainage requirements set by the city for plat approval. Although they are likely to be paved, street systems in these subdivisions may be as erratic as in the low income developments.

Cities can require improvement and dedication of interior streets as a condition of plat approval. However, the city must ordinarily bear at least a portion of the cost of major thoroughfares which serve the general public. If a private developer had 300 acres in the path of a proposed freeway, the city could require as a condition of plat approval that the developer pave and dedicate interior streets to the city free of cost. Inasmuch as the primary function of interior streets is to serve the subdivision residents, it is appropriate that they pay the cost. Public benefit from paving interior streets is incidental.

Although the city must pay for improving its major thoroughfares, a city planning commission nevertheless negotiates with the developer to donate the land for the thoroughfare right-of-way. Thus the city benefits its total street extension function by allowing private landowners to develop at the urbanized fringe and thereby subject their land to the city's street and thoroughfare pattern.

For several years, Corpus Christi attempted to use its subdivision plat approval powers to require that landowners dedicate land needed for street purposes, even though they did not subdivide. This system was challenged in 1968, when the Unitarian Church applied for a building permit to build a church on its own land. The city required a plat of the property, and the church complied. The city then approved the permit, conditioned upon the church dedicating the city a strip of land 25 feet by 630 feet for the purpose of widening an easement so an existing street could be extended. The church sued to force the city to issue the permit. The court held for the church, stating that, although the city could require a building permit and plat, the city could not require the church to donate the right-of-way. The donation requirement violated State and federal guarantees against taking private property without just compensation.

The case does not affect the right of a city to require subdividers to improve and dedicate streets as a condition of plat approval. The court pointed out that the Unitarian Church was not subdividing its lot, and therefore did not fall under the subdivision regulation system.

When the city cannot acquire its streets through dedications from subdividers, it must purchase the right-of-way and pay for street improvements. When the city paves a street, it will attempt to recoup most of the cost by assessing adjacent landowners for their proportionate share of benefit from the improvement.

Even with the ability to assess landowners, the city may find that direct acquisition of right-of-way and street improvement is expensive. In some cases, landowners build structures in the path of projected streets, and the city must pay the total value of land and building. The city would prefer to prohibit landowners from building in the paths of projected street extension. This would reduce the cost of right-of-way acquisition, inasmuch as landowner's compensation would be based only upon the value of land taken, and not the added value of improvements.

Houston once tried to reserve the paths of projected streets by denying permits for buildings located within the planned right-of-way. In 1956, a Houston property owner, Kirschke, applied for a permit to build a garage in the pathway of a projected street. The city refused, and Kirschke sued for damages caused by the city's refusal. Although the court held that the city was not

liable for misperforming a governmental act, it clearly stated that under the circumstances alleged the property owner was entitled to a building permit.

Authority to Establish Building Lines. According to an official with the city planning department, Houston now uses its authority to establish building lines to prevent construction in extensions of city streets. Texas cities are authorized to establish building lines on any public street or highway within the city. After a resolution or ordinance has been passed establishing a building line on a street, landowners may not build between the line and the street. The statute assumes that the city will condemn the easement for its building lines and pay the landowner for the property taken. The city may allow up to twenty-five years for removal of structures which were placed on the land prior to the establishment of building lines.

Inasmuch as the purpose of the building lines statute is to enable the city to widen existing streets without having to tear down buildings, Houston may be acting beyond its authority when it extends lines beyond the existing right-of-way. It is not clear whether the city followed the building line procedure in the Kirschke case.

The city planning official indicated that Houston had not concerned itself with protecting street extensions during the last several years, inasmuch as the city has adopted a flexible attitude toward street layout. Preplanning on a detailed basis occasionally required the city to buy rights-of-way which could otherwise have been acquired without cost through subdivision dedication. The city does maintain a master street plan which it uses for subdivision plat approval purposes.

Official Map Power

Several states have adopted an official map act, enabling cities to establish binding street plans for lands lying beyond the established city streets. According to the street reservation section of the Standard City Planning Enabling Act, the official street plan reserves the indicated streets and requires compensation to the landowner. The city pays additional compensation when the street is taken. The Standard Act's street reservation provision binds the municipality not to accept, lay out or authorize utility connection to streets unless they are shown on the master plan or an approved subdivision plat.

The city may, however, specially approve streets which depart from the plat. Texas and most other states rejected the street reservation provisions of the Standard Act. The requirement that compensation be paid at the outset made the system too costly to implement.

Some states adopted an alternative official map act which allows cities to reserve future streets and parks on an official map, without paying compensation until the streets are actually taken. After adoption of the plan, the city refuses to grant building permits in the mapped areas. Landowners who show that they cannot earn a fair return on land without building thereupon may apply for hardship variances from the city. The variance procedure allows landowners to use their property under conditions which protect the city's interest in its street plan. Instead of authorizing variances, some states limit the time during which a city may reserve the streets without paying compensation.

Constitutionality of the official map acts was upheld as to streets. However, a Pennsylvania court held that a city may not constitutionally reserve private lands for park purposes without paying for the land. The court apparently placed a higher value upon streets than upon park purposes.

Recommendations

Texas should adopt an official map act which would allow cities to protect extensions of major streets. As the Kirschke case indicates, the city's cost may be increased manifold if construction occurs before the city takes the property. It may often make no substantial difference to a property owner whether he places a building in the exact path of a projected street or in another location. If, on the other hand, application of the street reservation would prevent the property owner from realizing any income from his land, then the city could issue variances allowing profitable use of the land which would not cause the city long run disadvantages.

Use of the building line method of reserving major street extensions is cumbersome and expensive. Absent some formal system established by an official map act, cities are likely to employ an unofficial, perhaps illegal, procedure to prevent construction of buildings which will simply have to be torn down within a short time. Kirschke's claim for damages represented a very real loss to him, and the city's act was without legal authority. At the end of

the appeals process, Kirschke won a hollow victory: the court said he was right, and the city must issue a permit. But the profit he lost was gone forever. A formal system which provides a variance procedure would serve the interests of the city and landowners far better than an informal system which protects neither party adequately.

Zoning

The most familiar aspect of zoning is its capability to keep offending land uses out of protected residential districts. Other features, such as setback lines, minimum lot sizes, off-street parking requirements, and height limitations, come as virtual by-products when a city enacts a zoning ordinance. The focus on land use separation is understandable, because that is what causes most cities to turn to zoning controls.

New York passed its pioneer zoning ordinance in partial response to the fears of Fifth Avenue merchants that the garment district was about to intrude upon their elegant sidewalks. Perhaps less money is involved, but the fears are just as real when middle income residents of Texas communities discover that a vacant lot down the street has become a mobile home park, and that an oil company plans to build a filling station on a corner lot nearby. The local residents are helpless to prevent these unwanted intrusions. Their appeals that the trailer park owner and the oil company should desist on behalf of the community interest are likely to be unheeded if the potential investments represent the "highest and best uses," i.e., those most profitable to the landowner.

The residents' appeal to the common law will be equally unavailing. If the lots are not subject to subdivision restrictions which prevent the offending uses, then the trailer park owner and the oil company have a common law right to whatever legal use they chose. The residents therefore can turn only to organized government to keep the unwanted trailers and gas pumps out of their neighborhood. At this point, zoning becomes a political issue in the community. Some residents will argue against adopting a zoning ordinance on grounds that government should not control people's "natural right" to use their land as they see fit, and that "market forces" should determine land use. Some of these advocates of nonzoning have underlying motives in that they own property which they fear might be less valuable in a zoned community.

Zoning advocates are likely to talk about the advantages of a "planned community" which zoning supposedly will bring. Underlying these prozoning abstractions are equally hidden motives--fears that the mobile home residents may be of a lower socioeconomic class, that they may be minority, and that the filling station is an eyesore which lowers their property values.

The Growth of Zoning as a Land Use Control Device

As a governmental institution, zoning is fairly young. During the nation's frontier days, the emphasis was upon settling the wilderness and creating commercial and industrial centers. The ability of private landowners to make a profit out of land use helped achieve this goal. Early settlers were less concerned about the precise location of the general store than that one be nearby. Although the location of a livery stable might cause some discomfort to nearby landowners, there was enough space that the stable or the residents could achieve some "natural" separation. Perhaps the olfactory senses of early settlers were not as well refined as those of today, inasmuch as the smell of at least one horse was a necessary part of frontier transportation.

If local land uses became too offensive to a given pioneer, there was always more land further west where none but Indian uses would bother him. The most publicized land use conflict may have been between the cattle ranchers and the sheepherders, or the "sod-busters" who put up fences to protect their crops. These land use conflicts were seldom brought to court because disputes could be resolved more efficiently by combat.

When industrial communities in the northern and eastern portions of the nation reached a saturation point, with people living in tightly packed tenements and smelly industries located nearby, the necessity for a control system appeared. If industry, e.g., a slaughterhouse, stank too much, the neighbors enlisted the courts for a rudimentary type of land use zoning. By bringing a nuisance action against the offending user, nearby landowners asked a judge to decide whether the defendant was making a reasonable use of his land. If the judge decided that the use was unreasonable, he could assess damages against the defendant and even require that he cease the use.

Getting judicial decisions on land use matters through individual nuisance actions was a fairly expensive

and haphazard process, however, and citizens soon began to enlist the legislative power of their local communities to combat offensive land uses. States empowered cities to define and regulate nuisances, and local governments used the nuisance control power to regulate slaughterhouses, explosives storage, and other uses which caused great discomfort to the sensibilities of local residents. Courts tended to uphold reasonable regulation by the cities over landowners complaints that their constitutional rights to property were being infringed.

Land use controls became more refined when government turned its attention to the residential living situation of its people. New York passed tenement laws setting standards for multiple family dwellings in the late 1880's. By the early 1900's, cities were enacting zoning ordinances designed to prevent commercial and industrial encroachment into residential districts.

Zoning and land use control became a national policy concern in 1926 when the United States Department of Commerce published A Standard Zoning Enabling Act with recommendations that the various states enact it and related model acts. In 1927 Texas passed a zoning enabling act substantially following the federally recommended guidelines. Many Texas cities adopted local zoning ordinances authorized under the act. In 1954 the federal government increased its pressure for local land use control by requiring "workable program certification" as a condition of grants under the federal urban renewal act. Zoning was administratively required as an element of a workable program. In order to get federal funds, many Texas cities adopted zoning ordinances which otherwise would have not. However, Houston, the State's largest city, resolutely refused to follow the trend.

Early zoning advocates hoped that rational planning of land uses would solve some of the problems which attended the growth of most major metropolitan areas. In this respect, zoning may have been greatly oversold. It is doubtful that urban planners even have the foresight to determine what the proper composition of a given neighborhood should be over a long planning period. Zoning's strongest supporters are the single family homeowners--and the system has served their cause well.

Critics, however, point to the sprawl of "tickytacky" subdivision houses created by zoning's single family bias. The uniformity of setback requirements, minimum lot sizes, sideyard restrictions, height restrictions and even architectural control are applied with governmental force,

and it is no surprise that each subdivision house looks much like its neighbor. This criticism may focus too exclusively upon zoning. Other factors are just as conducive to urban sprawl and look-alike: heavy reliance upon automobile transportation, an enormous demand for single family housing, F.H.A. density regulations, city subdivision control systems, the lending practices of financial institutions and federal tax incentives which encourage home ownership. Economics of scale and mass production techniques have also contributed to urban sprawl. All of these forces push new residential developments toward the same low density result which comes from single family zoning.

Recently, constitutional attacks have been made upon zoning and other exclusionary tactics which keep the poor and minority groups out of suburban cities. The targets of the attacks are regulations such as total prohibition of apartments in a city, restrictions which require minimum sizes for houses and minimum lot size requirements which sometimes extend to five or ten acres. On the other hand, some observers feel that zoning may be used to reduce peripheral land development to the point of ringing large cities with greenbelts consisting of land zoned for agricultural purposes only.

One critic states that zoning merely slows down desirable commercial redevelopment of areas and increases the cost of housing in the zoned community. His study of unzoned Houston noted the ease with which major rebuilding projects could be accomplished when compared with strictly zoned communities. The price and availability of housing in Houston reflect the highly competitive market, unencumbered by long delays for zoning approval for new projects.

The Houston experience notwithstanding, zoning is a fact of urban life that is likely to remain. The material which follows will examine the legal structure and operation of zoning laws and practices, with particular emphasis upon Texas.

Constitutional Authority for Land Use Zoning

Zoning prevents landowners from using their property in the manner which they might otherwise choose. Unlike cases in which government takes land by eminent domain and must pay compensation, zoning is a regulatory act, and government does not pay landowners for monetary losses caused by zoning. Losses from zoning can be

substantial. For example, land worth $2.00 per square foot if zoned for commercial purposes may be worth only 50¢ per square foot if it is zoned residential. A landowner complained that land use regulation amounted to a "taking" of property in violation of the 14th amendment to the United States Constitution. Some early decisions did hold zoning to be unconstitutional. But, in the 1926 case of Village of Euclid v. Ambler Realty, the United States Supreme Court accepted the argument that zoning was a reasonable method of protecting the city from the unhealthy aspects of unplanned growth, and held zoning to be a valid exercise of police power.

The general constitutional standards for the police power are that the goal sought must be legitimate; the means be reasonable; and the means be reasonably adapted to achieving the specific goal. The stated goals of zoning are to lessen congestion in the streets, secure safety from fire and panic, provide adequate light and air, avoid undue concentrations of population, and facilitate provision of city services. The Supreme Court declared these to be legitimate goals which justify the city in restricting privately owned land. Because zoning was upheld as a constitutional exercise of the police power and not eminent domain, the city need not pay landowners for their losses.

Even though zoning as a land use control device gained the Court's approval, some acts performed in the name of zoning may not withstand court scrutiny. In Nectow v. City of Cambridge, the United States Supreme Court declared that zoning as applied to an individual lot must be reasonable, or the ordinance will be declared unconstitutional as to that particular owner. Thus, cities cannot zone so restrictively that a landowner cannot put his property to any profitable use. Under the Equal Protection clause, cities are not allowed to be arbitrary in their classification of particular lots. Although the United States Supreme Court has not been active in zoning matters since 1928, state courts have heard thousands of cases contesting whether particular ordinances and zoning amendments are constitutional as applied to particular situations. In some states, courts have virtually set themselves up as a "super board of zoning appeals," substituting their own city planning ideas for those of the local authorities. But in other jurisdictions, an attitude of "anything goes" has developed, in which any local activity short of outright confiscation has been approved.

A Description of the Zoning Process

A municipality, drawing its power from the state enabling act, may determine that it wishes to control land uses within its boundaries. The legislative body of the city (ordinarily city council) then appoints a zoning commission. The zoning commission, with or without expert assistance, studies the local land use situation and makes recommendations concerning appropriate uses and the location of districts.

The commission may turn its attention first to the residential interests which probably prompted its creation. It will identify single family areas, duplex areas, and higher density residential areas, and recommend that they be zoned as such. Zoning recommendations would also include regulations concerning set-back lines, minimum lot sizes, side yard requirements, maximum building height, and the maximum percentages of a lot which can be built upon.

The commission would identify the established commercial area of the municipality and recommend that it be zoned accordingly. In the commercial zones, the commission may recommend certain districts for low volume, light commercial uses and other areas for higher intensity commercial activities. Various types of commercial uses would be identified and provisions made for their inclusion in certain commercial zones but not in others. In the commercial districts, limitations would be set on building size and height and a formula established to determine maximum floor area allowed for buildings, calculated upon a multiple of the lot size on which the building sits.

Another major zone which the commission would identify is the industrial district. Considering existing land uses, availability of transportation and proximity of residential areas, the commission will designate appropriate districts for industrial purposes and recommend standards for the district.

In the early years of zoning development, the commission probably would recommend a "cumulative" system of zoning districts. By the cumulative method, all residential uses are permissible in commercial and industrial districts; commercial uses are permissible in industrial districts; and industrial uses are the only activities which are restricted to their own district. However, in modern zoning practice a more sophisticated method of allocating land uses has developed. Specific uses are identified as permissible in given districts, and a detailed

listing is displayed on a "grid" showing uses and districts in which those uses will be allowed.

Zoning ordinances may establish performance standards for certain types of uses wherever they may be located. For example, a certain number of off-street parking spaces may be required for office buildings, and industrial plants may have to meet noise level standards as well as district location standards.

The zoning commission must hold public hearings to receive citizen reaction to its efforts. After its study and hearings, the zoning commission reports to city council. The commission presents its land use map showing the proposed zones along with a statement of the land use restrictions which it recommends for those districts. City council then considers the proposal made by the zoning commission and holds public hearings. Council, acting as a legislative body may then pass a zoning ordinance declaring land use restrictions appropriate to the various districts established on the zoning map. The final ordinance may be identical to that proposed by the commission, or it may differ from it.

After the effective date of the ordinance, property owners may not construct any structure or put the property to any use which conflicts with the zoning ordinance applicable to their district.

There are several methods of enforcing the ordinance. An automatic technique operates through the building permit office. The city requires that landowners secure building permits before they build or substantially remodel. When a landowner applies for a building permit the building official checks to see that the proposed structure meets the requirements of the zoning ordinance. If it does, then the official issues the building permit; otherwise, he refuses to issue the permit.

Landowners who build in violation of the zoning ordinance are subject to criminal penalties for committing a misdemeanor. The city may enjoin landowners from continuing uses which violate the ordinance. If the city does not act on its own initiative, neighboring landowners may sue to enjoin the violation.

Nonconforming Uses

Prior to zoning, much land in a city will have been built upon and dedicated for certain uses. To a large

extent, the original zoning scheme will follow the general land use trends established by private developments. However, there are occasional variations in the private development pattern, as when a filling station stands in a zone which is designated "residential only" by the ordinance. These uses, established prior to the application of the zoning ordinance, are called "nonconforming" uses.

It is generally assumed that nonconforming uses which are not common law nuisances, must be permitted to continue, even though the newly enacted zoning ordinance declares them unlawful. Because landowners made investments in their property prior to the zoning ordinance, it would be unreasonable and probably unconstitutional to require immediate termination of established uses. Nonconforming uses generally are not protected unless the property is actually devoted to the use in question prior to passage of the ordinance. Thus, a landowner who merely secures a building permit prior to the time a zoning ordinance becomes effective, is not entitled to nonconforming use treatment.

Because nonconforming uses are not consistent with the long term aims spelled out in the zoning ordinance, the cities' general attitude is that they should eventually be terminated. There has been considerable growth in the law applying to nonconforming uses and their termination. In the early days of zoning, it was assumed that established nonconforming uses must be suffered so long as the landowners chose to continue them. However, some limitations were established, beginning with the idea that the city could prevent nonconforming uses from being expanded. Thus, any such use could be restricted to the structure and land area which it initially occupied. It was also established that when a property owner abandoned the nonconforming use, the property would thereafter be subject to the ordinary operation of the zoning ordinance. Another common limitation was that if the building were destroyed by fire or other causes, then the landowner would be prohibited from rebuilding in a way that departed from the zoning ordinance.

Recently, bold attempts to eliminate nonconforming uses have received judicial approval, including the requirement that nonconforming uses be phased out over some period of time. To withstand scrutiny by the courts, the time allowed must be reasonable in light of the investment which the landowner has in the property and the reasonable economic life of the property itself.

In two recent cases, Texas courts allowed cities to terminate nonconforming uses after a period of reasonable amortization. In 1970, the city of Garland passed an ordinance which set a one-year amortization period for a self-service gasoline service station. The land on which the station was situated sold in 1968 for $20,000; equipment was valued at about $4,000.00. The station had earned the landowner about $22,500 profit since its construction in 1967. Upon these facts, the Texas Court of Civil Appeals held that the one-year termination order was reasonable and proper, noting that the landowner had recovered many times his investment in equipment during the time the station was operated as a nonconforming use.

When it adopted its zoning ordinance in 1940, the city of University Park set a twenty-five year limit on all nonconforming commercial uses in residential districts. When the time limit was up, landowners objected to terminating their uses and appealed to the courts. In a 1972 opinion, the Texas Supreme Court held that the phase-out provision is valid and the time allowed for amortization is reasonable. Reasonableness of the time limit is to be measured as of the time the ordinance is passed--not the time when it takes effect. Accordingly, Texas cities may legitimately phase out nonconforming uses.

Role of the Board of Adjustment

Zoning ordinances may establish Boards of Adjustment. The Board consists of five members and performs three primary functions: hearing appeals, issuing permits for special exceptions, and allowing variances.

Appeals. In performing their day-to-day duties, administrative personnel such as building officials may act contrary to the established zoning ordinance. The Board of Adjustment hears and decides landowners' appeals from these administrative malfunctions. A model appeal situation arises when a landowner applies to build a structure which meets the zoning requirements, but the building inspector refuses to give him a permit. The landowner must appeal to the Board before going to court to force the city to issue the permit.

In order to overturn the official's decision, the landowner must receive the concurring votes of at least four members of the Board. If he succeeds before the Board, the order of the zoning official may be reversed or modified as is appropriate. If the landowner loses, then he

may petition to a court within ten days after the Board action. The court may review the Board's action and issue appropriate orders. On many appeal matters, the issues may be questions of law, e.g., interpretations of the words of the ordinance and applications of the ordinance to the facts. In such case, the Board's decision may not be entitled to the presumptive validity which it would have in situations where the board exercises discretion.

Special Exceptions. Boards of Adjustment may grant special exceptions to the zoning ordinance. Special exceptions refer to specifically named uses which the ordinance permits within certain zoning districts, but which because of their peculiar nature require some supervision in placement and planning. For example, a zoning ordinance may allow private schools to be situated within a residential zone. However, considerations of traffic, student safety, noise, adequate playground space, and other matters peculiarly applicable to schools could cause a city to require that a school present its plans to the Board of Adjustment for approval. The Board of Adjustment would review the application. If satisfied that the private school adequately provides for traffic safety and other needs, then the Board would grant a special exception permit.

In its 1937 zoning ordinance, the city of West University Place required special exception permits for the following uses: state or municipal buildings, aviation fields, public utility plants, sewerage disposal or treatment plants, garbage disposal plants, riding academies, commercial greenhouses, athletic fields, amusement parks, commercial bathhouses, commercial radio transmitting stations, philanthropic institutions, hospitals and sanitariums.

Each of the named uses presents some locational problem which should be supervised. For example, airports should not be allowed unless adequate open space is appropriately zoned to prevent interference with the air traffic; athletic fields and amusement parks should be allowed only if there is adequate parking for their patrons and if nearby residences are shielded from their bright lights and noise.

The Board of Adjustment acts in a discretionary capacity when it considers special exceptions. If the Board's action is supported by substantial evidence on the record as a whole, a reviewing court will uphold it and not substitute its own judgment for that of the Board. The general procedural requirements for appeal to a court are

similar to those described for appeals from acts by administrative officials.

Variances. Boards of Adjustment grant variances to allow landowners to depart from the strict requirements of zoning ordinances. Variances are often confused with special exceptions and zoning amendments. However, according to accepted zoning law, variances should be issued only in a narrowly defined category of cases and should not be used as a substitute for special exception or zoning amendment situations.

Variances may properly be granted only to relieve specific landowners from unnecessary hardship which would result if the zoning ordinance were strictly applied. For example, if a newly enacted zoning ordinance requires minimum lots of 60 x 100 feet in a residential zone, then the owner of an existing 50 x 100 foot lot may not legally build on his property. The hardship to the landowner is so severe that he can probably convince a court that, as applied to his land, the ordinance is unconstitutional. Furthermore, a ten foot variance would not be detrimental to the general policy of the zoning system.

Under these circumstances, the landowner may apply to the Board of Adjustment for a variance allowing him to build. He may qualify for a variance by showing that strict enforcement of the ordinance would cause him unnecessary hardship and that a variance allowing him to build a house would not be detrimental to the zoning system.

Variances differ from special exceptions in that special exceptions refer to uses which are specifically permitted by the ordinance, but require supervision as to location and planning. An applicant for a special exception need not show hardship to qualify for a permit. Variances, on the other hand, may be properly granted only to persons who show hardship. Variances permit landowners to violate the technical provisions of the ordinance in order to be relieved of the hardship.

States differ on whether the Board may properly grant use variances. Texas courts are reasonably clear in holding that variances may be granted only as to minor details of location and construction, and that Boards of Adjustment cannot lawfully grant use variances. However, many city officials do not understand the distinction between variances and zoning amendments. These cities allow their Boards of Adjustment to change the zoning system unlawfully by issuing use variances.

For example, the owner of a corner lot in a residential district may seek city approval to use his land for commercial purposes. The landowner's proper course is to go to city council and ask for a zoning amendment changing the land use map. Only the legislative body, i.e., city council, is empowered to determine district land use regulations. Council could pass a zoning amendment placing the corner lot in a commercial zone. Although the procedure may be subject to the claim of "spot zoning," the proper legislative agency has acted. Unfortunately, in many cities, the landowner would go, not to the council, but to the Board of Adjustment. He would argue to the Board that the residential use designation causes him hardship and ask for a variance. The Board might respond by granting a permit allowing the applicant to use the property for commercial purposes.

If the Board grants a variance allowing a use different from that specified by the zoning ordinance, it has acted unlawfully. The Board of Adjustment is an administrative body established under the zoning ordinance. It has no legislative power. Only the legislative body, city council, can modify district boundary lines and change the use designation for a tract of land. If the neighbors appeal from the Board's action, the court will hold the permit to be invalid.

No statistics are available concerning the number of illegal variances which are granted by Texas Boards of Adjustment. Boards do not ordinarily keep a written record of their proceedings; therefore, there is no record to refer to in determining whether actually action is lawful or unlawful. One expert estimates that, nationwide, 50 percent of all rulings by Boards of Adjustment are illegal. The staggering impact of Board action, whether legal or not, is indicated by a report that from 1926 to 1937, the Cincinnati Board granted 1,493 variances out of 1,940 requests; from 1933-1937, Philadelphia granted 400 variances out of 4,800 applications; and from 1923 to 1953, Chicago granted 4,260 variances. It unlikely that any Texas city would generate such a large number of variance applications. However, there are indications that a substantial number of Texas cities do grant unlawful use variances.

The reaction of Texas courts to use variances is clear. In Harrington v. Board of Adjustment of City of Alamo Heights, the court held that neither the legislature nor city council could delegate power to the Board to change the zoning map of the city and create new business districts beyond those established by council.

In another case, San Antonio's Board permitted a kosher butcher to kill chickens in his butcher shop on grounds that strict enforcement of the ordinance would create undue hardship. In striking down the variance, the court noted that use decisions are properly made by council, not the Board.

A landowner does not acquire vested rights under an illegally granted variance. In 1933, the Board of Adjustment of the city of University Park granted a use variance allowing a landowner to build a filling station in violation of the district's use designation. When the city later required termination of the use, the owner claimed the station was a lawful nonconforming use properly built under the permit. The court held that because the original permit was void, no rights accrued thereunder.

The law which pertains to special exceptions, variances, and zoning amendments is complex. Cities and city officials do not understand the concepts and the functions which council and Boards of Adjustment respectively should perform. The zoning enabling act is quite vague. Texas courts, on the other hand, have a clear idea about the distinction, and they hold cities to strict conformity with the law. A new, simplified conceptual system which more nearly conforms to actual practice would be helpful. The proposed model acts should be examined to determine how the present confusion could be eliminated.

When a Board of Adjustment grants or refuses to grant a variance in a proper case, the disappointed applicant or the contesting neighbors may petition a court for review in the manner described for special exceptions. The enabling act authorizes the Board of Adjustment to issue such variances "as will not be contrary to the public interest." This language indicates that the Board may exercise lawful discretion in determining whether the policy of the local ordinance will be compromised by granting a requested variance. However, the Board cannot use its discretion to take away a landowner's constitutional right to make some use of his property. The landowner who cannot build upon his 50 x 100 foot lot may be entitled to a variance as a matter of law, because otherwise the ordinance would take his property without due process.

Requirement of a Comprehensive Plan

The zoning enabling act requires that the city's zoning ordinance be "in accordance with a comprehensive plan. Because the city's power to zone depends upon the authority granted through the state's zoning enabling act, it is essential that cities follow the requirements of the Act precisely.

What is meant by "in accordance with a comprehensive plan?" There are several reasonable alternative meanings, e.g.: (1) that the zoning ordinance cover the entire city and not be restricted to a few sections; (2) that the zoning ordinance must follow careful study and planning by the zoning commission or other qualified agencies which consider a wide range of factors which influence the city's development; or (3) that the requirement means very little, and the zoning ordinance as passed will be assumed to be a rational manifestation of a plan contemplated by the governing body. Several Texas cases have affirmed the necessity of a comprehensive plan, without specification as to its requirements.

To the extent that "in accordance with a comprehensive plan" means that the entire geographic area of the city must be covered by the zoning ordinance, certain problems are presented. The city of Houston has not passed a zoning ordinance, partly because it has not received a concensus from its citizens favoring such an ordinance. However, there are sections of the city where zoning would be highly favored by the residents. The presence within Houston's city limits of small municipalities with tight, very restrictive zoning, evidences the desire of middle class affluent areas to have this type of land use control. If it were possible for Houston to pass a zoning ordinance which would apply only to those neighborhoods where there is local demand then the city might do so. To the extent that zoning represents a method of arbitrating neighborhood land use conflicts, small area zoning makes sense. To the extent that zoning represents an effective instrument for controlling long range development in all sectors, small district zoning would not be desirable.

Probably the people who wrote the Zoning Enabling Act had in mind that zoning would be a two-step process. The first step would be a planning step. The second step would be to implement the plan through zoning. If such a procedure is followed, and if the product has citywide coverage, then comprehensive plan requirements have clearly been satisfied. However, in practice, zoning is not always orderly. Zoning is often a reaction to an immediately felt need to prevent some type of undesirable land development, such as mobile homes, filling stations or apartment projects. Therefore it is not unusual for a local governing

body to pass a zoning ordinance based on current land uses without going through an extensive preplanning study.

Is such a one-step zoning procedure "in accordance with a comprehensive plan?" To some extent the ordinance itself reflects planning decisions that have been made by the legislative policy-makers. One area does not get zoned residential, and another commercial without some thought behind the action. The fact that the plan is not spelled out in advance does not necessarily indicate that the final zoning system is haphazard. A zoning ordinance which in its final statement appears rational, and which has been adopted according to the procedures set out in the statute, is not likely to fail the "comprehensive plan" standard.

Nowadays, comprehensive planning is probably less important in determining initial validity of zoning ordinances than in judging modifications of a city's original zoning scheme. Judges may assume that a city's original zoning ordinance manifests a "comprehensive plan," and that zoning amendments which depart from the plan are therefore invalid. When rigidly imposed, this judicial attitude may make a city's zoning system so inflexible that it cannot adjust to conditions which were not apparent when the ordinance was first drafted.

Contrasted to the proposition that comprehensive planning means total preplanning is the idea that comprehensive planning is a continuing process--that all planning is to some extent a reaction to claims made by some owners for stability and by others for development opportunities. Planning-as-a-process permits continuing reception of these conflicting claims and constant measuring of the values of stability against the benefits of change in discrete situations.

What does the comprehensive planning requirement mean if planning is described as a "process" instead of a final plan? Perhaps the requirement is that ground rules for decisions must be spelled out, but that applications of planning principles to specific fact situations are left open.

The progression from rigid planning to "planning-as-a-process" can best be illustrated by looking at the "spot zoning" and contract zoning doctrines which uphold stability as a community value, and the planned unit and land use intensity techniques which maximize flexibility.

Zoning Amendments

Updating the Ordinance to Meet Changed Conditions. From time to time, city council may determine that its zoning ordinance should be amended. For example, a new highway interchange may be placed near a tract which is zoned for single family residential purposes. Because of the changed conditions, the tract may have locational desirability for a shopping center or other commercial activity, while retaining little value for residential purposes. After a determination by the planning agency (probably the city planning commission) that the public would best be served by rezoning the property to allow commercial use, city council may pass an ordinance which amends the original zoning ordinance.

Amendments to the zoning ordinance must be passed as a formal legislative act by council. Nearby landowners are entitled to notice of the zoning amendment, and public hearings must be held. If 20 percent of the neighbors protest, the amendment must receive a 75 percent council majority to pass.

Although the amendment procedure spelled out in the enabling act is a necessary part of zoning machinery, amendments which are unpopular with the neighbors are oftentimes challenged in courts. Among the challenges are: (a) that the rezoning is spot zoning, or (b) that the rezoning is unlawful "contract zoning."

Spot Zoning. The zoning enabling act requires that zoning be "in accordance with the comprehensive plan," designed to achieve the land use goals as set out in the statute and in the ordinance. If council departs from the comprehensive plan reflected in the zoning ordinance and passes an amendment which singles out a specific tract for favorable treatment, then the neighbors will complain that the zoning amendment is "spot zoning." "Spot zoning" is an arbitrary departure by council from its comprehensive plan. Because adherence to the comprehensive plan is required by the enabling act, a court will strike down zoning amendments which are subject to this infirmity.

The frustrations of "spot zoning" are illustrated by the recent case of Hunt v. San Antonio. In 1938, San Antonio passed a zoning ordinance which placed two lots fronting on the east side of San Pedro Avenue in a residential zone. Adjacent lots lying east of San Pedro were also zoned residential; lots across San Pedro were zoned for other uses, including hospital and clinics. In 1956, a group of doctors obtained a permit from the Board of

Adjustment which allowed them to use the two lots for parking purposes. The neighbors went to court and had the permit invalidated, presumably because the Board lacked authority to authorize a change of use. In 1965, two doctors again sought a change of use for the two lots. This time, they went to city council and requested rezoning. After hearings, council rezoned the lots to permit hospital and clinic uses. The neighbors went to court again, this time claiming "spot zoning." The Supreme Court of Texas held that the rezoning departed from the original ordinance in an arbitrary manner, and was therefore "spot zoning." In the decisions, the court announced a very strict test for determining whether rezoning would be upheld. Noting that only two lots had been rezoned, the court stated that the city must justify its action by showing that a "change of conditions" had occurred since the passage of the original zoning ordinance.

The Texas court's test makes small lot rezoning very vulnerable. The original zoning scheme is practically written in concrete unless the city can convince the court that the original scheme was erroneous, or that a substantial change of area conditions has occurred to justify rezoning. Although the court gave lip service to a presumption that legislative enactments are valid, the "changed conditions" requirement virtually eliminates this presumption. It is very difficult to assess the motives of the legislative body when it changes an existing zoning structure. Most changes in the zoning ordinance will affect someone in a manner deemed by them to be adverse. The willingness of a court to strike down zoning amendments under the opprobrium "spot zoning" leaves a great deal of uncertainty connected with any attempt by the city to update its zoning scheme.

Contract Zoning. A legislative body such as city council is not entitled to bargain away legislative favor. It would clearly be a corrupt act if council were to pass a favorable zoning amendment for a landowner who paid each council member $100. The same principle has been applied to bargains which require the landowner to bestow a reciprocal favor to the city in exchange for favorable zoning treatment. For example, if city council rezones a tract from residential to commercial in exchange for a gift of parkland to the city, the court might hold that the city bargained away a legislative favor in exchange for the land.

In many cases, a city's attempt to place reasonable restrictions on a landowner who seeks a change of zone may be rendered invalid because of the contract zoning

principle. For example, if a landowner seeks an amendment to rezone land from residential to shopping center designation, council might be willing to rezone if and only if, it can insure that the new shopping center will be compatible with the surrounding residential area. It therefore may reasonably require the developer to shield his parking lot lights, to plant shrubbery and other visual barriers around the parking lots, and even to maintain a certain amount of open space for the benefit of the nearby neighborhood. Under contract zoning doctrine, these apparently reasonable conditions could invalidate the amendment because they represent payment to the city for a legislative favor, i.e., a change of zone.

The contract zoning problem may thus disable a city from exercising specific control over a rezoning application. To avoid the contract zoning label, the city may rezone without stating the conditions, hoping that the developer will protect the surrounding neighborhoods, or refuse the zoning amendment even though it appears that a well designed and well shielded shopping center would be beneficial to the neighborhood.

Planned Unit Development. The prevalence of spot zoning and contract zoning problems indicates that cities seek flexibility in their zoning powers. If total preplanning for all areas and all land uses were really feasible, then there would be very little occasion to amend the zoning ordinance. This optimism pervaded early zoning theory. However, practice has shown that planners cannot preplan or even anticipate the actual trends of land development which take place in a growing metropolitan area. Yet, planners believe that new developments should be supervised to insure that they are in keeping with the generally stated goals of the community.

How can communities attain flexibility without falling victim to the charge of spot zoning every time a zone is changed? How can they require a commercial developer to design his development so there is minimum interference with the surrounding neighborhood? An answer has appeared in the form of "planned unit developments," a recent addition to zoning law.

Planned unit development procedures avoid the ad hoc appearance of spot zoning by spelling out in the basic zoning ordinance (as part of the required "comprehensive plan") the circumstances and standards to be applied to applications by landowners for major project rezoning. All requests for planned units are fed through the recommending steps to insure that they fit within the

framework of existing regulations and community needs. Upon final approval, the city grants a permit allowing the landowner to build the specific project which he proposed.

As an example of planned unit procedures, a city may anticipate a need for large apartment complexes which are centrally planned and design coordinated. However, the city cannot anticipate just which tracts will be acquired by a developer for apartment purposes. Therefore, it cannot identify "planned apartment districts" on its zoning maps until developers make a specific request that may require that potential developments contain at least ten acres; be design coordinated; provide adequate open space and support facilities for the residents; have easy traffic accessibility; and not adversely affect the surrounding neighborhood. The Planned Apartment District procedure may require approval by the city planning commission and all affected city departments before council passes on the rezoning application. Once the proposed development is approved and rezoning occurs, a building permit is issued for the specific development, thus requiring the developer to conform to the plans on which the approval is granted.

A developer who qualifies for planned unit treatment knows that he must satisfy the city planning department and the city planning commission with his proposal. He knows that he must build what he shows the city--not some other apartment project. He is likely to see the prospect of profit from a project which he could not build without a planned unit procedure. The neighbors have ample opportunity to be heard before the planning commission and before city council. There is sufficient flexibility to require that the developer plan his project to blend with the neighborhood.

Thus, planned unit developments meet the needs of the city, the developer, and the neighbors. By feeding the planned unit procedure into the master plan, the city avoids "spot zoning." By delegating project review and recommendation to the city planning commission, then limiting the building permit to the specific project, the city avoids "contract zoning" problems.

The advent of planned unit developments marks a departure from the planners' idealistic attempts to preplan an entire urban area and to force all later developments into the rigid boundaries set by the zoning ordinance. It recognizes that planning and zoning are a continuing process--not a simple "plan, then zone" procedure.

Opinions may differ concerning which agency--Board of Adjustment, city council, or planning commission--should decide whether applications for planned unit developments are to be granted. One approach is to treat planned units as special exceptions to the zoning ordinance, and let the Board of Adjustment handle them. In a sense, special exception uses are planned unit developments. They are allowed by the zoning ordinance, but their precise location is left to later decision. The applicant for a special exception must exhibit his plans to the Board of Adjustment, and then convince them that he meets the requirements set out in the ordinance. The Board determines whether the applicant meets the requirements, and whether the proposed project is consistent with the community's general land use policies. All of these procedures could apply to planned units as well as to special exceptions.

On the other hand, uses that are designated as special exceptions may be one-of-a-kind matters which do not raise the highly charged political issues which may accompany an application for significant apartment, shopping center or industrial developments. Because of the political implications of major developments, city council may wish to maintain first-hand control and approve planned unit developments as zoning amendments. Additionally, planned unit designations may amount to an effective change of use, which only the legislative body, council has power to adopt.

The planning commission is another agency which logically could hear and decide applications for planned unit development permits. Charged with communitywide planning responsibility, the commission has a long-range view of community growth. Its perspective may be broader than that of the Board of Adjustment, which is often preoccupied with quasi-judicial functions such as granting variances to landowners who show unnecessary hardship. The planning commission would act as an administrative agency in approving planned units; hence, the zoning ordinance would not be burdened by zoning amendments tacked on for each planned unit development. Moreover, city council, as a policy making body for the entire range of problems which face the city would not be involved in the administrative detail of granting or refusing planned unit development applications.

Regardless of whether the city planning commission would be a good choice for approving planned unit developments, there is some question whether under the Texas enabling act it could perform this function. The zoning

act places the planning commission in a planning and advisory capacity instead of an administrative role. The same problem of delegation of legislative authority which may disable the Board of Adjustment, could also work against the planning commission.

In one Texas city, Bellaire, planned unit developments are considered by city council and adopted as zoning amendments. Bellaire has enacted a new zoning ordinance which makes extensive use of the planned unit concept. Their zoning map even identifies certain tracts for planned unit treatment.

Courts in some states have invalidated planned unit development procedures holding them to be ad hoc "spot zoning," which departs from the established comprehensive plan and from the concept of "plan, then zone." However, Texas courts have apparently approved the planned unit procedure. The zoning ordinance for the city of Lubbock allows zoning amendments for high density apartments if the landowner has two and one-half acres to put to apartment use. The amendment grants a specific use permit for apartment use only. In City of Lubbock v. Whiteacre, city council followed its specific use procedures, and granted the permit. The neighbors complained to the court, arguing spot zoning. The court upheld the procedure, stating that specific use zoning was well established in Texas law.

The process which the Texas court called "specific use zoning" is essentially the same as planned unit development. The ordinance spelled out conditions under which the ordinance would be amended, i.e., proposed use of at least two and one-half acres for apartment purposes. The zoning amendment then approved the specific use for which the application was made.

With the Texas courts' approval of the basic planned unit development concepts, Texas cities are able to use this new method of supervising specific developments.

Performance Standards Zoning, Land Use Intensity Zoning, Incentive Zoning, and Zoning for Specific Purposes

Although city planners must make decisions concerning the location of heavy industry and large commercial uses, it is unlikely that they need to predetermine what precise land uses will be situated on large

development tracts. In practical operations, a variety of alternative residential or commercial uses can be accommodated on undeveloped land without adversely affecting the particular tract or the community. Profit-motivated land developers and the consuming public may be better judges of the exact housing types and mix of commercial uses than are city planners and city council. However, the developer should be required to follow standards which guarantee that the needs of his residents will be served, and that his development will fit into the general plan of the community.

Cluster Housing. A city may ordinarily zone undeveloped land for a single family use, setting minimum lot size requirements which will produce a population density of nine persons per acre. Developers would follow these standards and produce uniformly spaced houses with large yards, but no community open space.

A developer might wish to offer greater variety than allowed under the standard grid plan. For example, if he could offer housing which was clustered in compact neighborhoods, with smaller yards and large areas of common green space nearby, he might attract buyers who do not like standard tract developments. Moreover, he could save on the cost of paving and utilities because streets and services would run only to the clusters and not from a widespread grid throughout the tract.

Cluster housing may serve the city's purposes as well. Although the city may seek to maintain overall density at a certain level, it is not concerned about the precise manner in which land is used for residential purposes. The city could permit cluster housing, so long as the total product did not exceed its established nine-persons-per-acre limit. As a bonus from clustering, the city would acquire public or quasi-public open space to help break the monotony of its suburban grid.

Cities may use their planned unit development procedures to approve cluster housing. The city is thus able to supervise each development closely, insuring that its own concerns are met. Planned unit procedures are costly to the developer, however. Approval takes time and there is always a danger that the project will be disapproved and the cost of the application will be lost.

There is a strong element of bargaining in planned units. The developer must get the approval of many agencies, e.g., city planning commissions, county engineers, school districts, and city council. These governmental

units may place various conditions, official and unofficial, upon their approval. For example, a school district may demand that the developer donate school lands and even construct a school building to serve his development. This demand may relieve the taxpayers of the burden of providing a school, but it can also put the particular developer at an unfair financial disadvantage vis-a-vis other housing merchandizers in the area.

If a developer decides that the lost time and chance of disapproval outweigh the savings from clustering, then he may take the safe course and build according to the standard grid pattern. The city's own procedures thus may cause it to lose the benefits of open space and housing variety which cluster housing could bring.

Performance Standards--Land Use Intensity Zoning. Unless there were strong objection from neighboring tracts, the city would probably approve all conforming cluster projects as a matter of course. If this be true, then why not draft an ordinance which sets out precisely what performance standards a developer must meet for cluster housing, and make approval automatic?

Inasmuch as the city's primary interest is control of overall population density in a given development tract, performance standards could easily be written for cluster housing. When the performance standard option is accepted for cluster housing, its potential is apparent for different situations. Consumers may desire a market in which they may choose from a variety of housing types: single-family detached on large lots, cluster, row houses, garden apartments, and high-rise. Each of these housing types has its own requirements for open-space, parking, street access and utilities. For example, single family detached houses need more open space per unit than does a high rise. If the high rise apartment project were held to single-family standards, it would stand alone in a vacant twenty-acre park.

Although the formulae for calculating performance standards for all types of housing would be complex, the job is not overwhelming. Reasonable assumptions can easily be made concerning the needs generated by each type of housing for open space, parking, utilities, access and services. These assumptions could be written down in mathematical formulae and displayed graphically for the city's and developer's use. So long as a developer meets these standards, he can be left free to use his tract for whatever mixture he feels the market will buy. The public interest is protected, inasmuch as the standards must be

observed for all developments. Consumer choice is increased and urban monotony is lessened because greater variety is available. The cost per unit may decline because developers are free to balance total cost against market demand and produce the product which offers the best total balance. Housing is also spared the cost of lost time which accompanies individual planned unit development approval.

Performance standards zoning is more complex than the conventional model. City planners may reject it because its controls are less detailed as to individual developments. However, it offers the best promise of providing consumers with what they want, developers with freedom to provide the product, and protection for the basic community needs.

Performance standards zoning may offer an acceptable middle ground between Houston's "anything goes" nonzoning, and the stifling control which other cities sometimes apply.

Incentive Zoning. In New York City and San Francisco, zoning controls have been used to encourage developers to provide certain amenities which the cities desired. New York wanted more theaters built; San Francisco wanted office buildings to provide access to the new Bay Area Rapid Transit System (BART). Because of the expense, developers in those cities would not ordinarily provide theaters or transit access. The cities therefore sought some method of enticing developers to do their will.

Both cities had Floor Area Ratio (FAR) limits, which restricted total allowable office space to a multiple of the lot area. Because of the demand for office space, developers would be delighted to get permission to exceed the FAR limits. From the cities' standpoint, increasing the FAR for a building was a small price to pay for new theaters or for access to rapid transit. A bargain was therefore struck and incorporated into the cities' zoning ordinances: New York gives additional space if the developer put in a theater; San Francisco gives additional space if the developer connects his building with BART. Additional floor space is also available for certain other amenities, such as landscaped setbacks.

Although by traditional analysis, incentive zoning may resemble contract zoning, it is a rational way for the city to channel development into directions which meet community needs. As long as the terms are fairly open to all developers, and the goals are good for the community,

the practice is reasonable and should be upheld by the courts.

Use of Zoning to Preserve Open Space. Until recently, there was little concern about protecting land from urbanization. The supply of land seemed inexhaustible and urban development met the "highest and best use" test of the marketplace. However, as cities expanded ever-outward the benefits of an urban-rural mix and the evils of urban sprawl became more evident. To some extent, this reaction is aesthetic, based upon personal desires for rural views and recreation lands. However, concerns have recently been raised about the adverse effect of urban development upon the life-process, inasmuch as the country's best agricultural lands are succumbing to subdivision development. California orange groves and Texas rice lands cannot easily be revived after they are subdivided and paved. As reported in a recent study, an extension of world trends indicate that by the year 2,000 the world's entire available supply of arable land will be required to feed the population. Even if today's productivity is quadrupled, demand will exceed supply well before the year 2100.

The proposed National Land Use Policy and Planning Assistance Bill requires an inventory of lands within the states which are suited for agricultural purposes. It is not too early to begin preserving open space for food supply as well as for aesthetic and recreational purposes.

To what extent can zoning be used to preserve open spaces? In some areas, agricultural uses are designated for recently annexed lands as a "holding zone." Agricultural zones conventionally exclude industrial, commercial and intensive residential uses. Regulations ordinarily allow stock feeding, canneries, farming, and farm buildings.

The city of El Paso uses an agricultural zoning designation, apparently as a holding zone. The zone, designated "F-R" restricts land to farm and ranch purposes. In City of El Paso v. J. O. McArthur, the owner of a 54 acre tract zones "F-R" sued to require the city to allow him to install a mobile home park. The Texas court held that the zoning designation was valid, pointing to expert testimony that the character of the land should be preserved and maintained. As the necessity of preserving agricultural lands and open space becomes more apparent, cities and courts will apply and uphold more restrictive

regulation of privately owned land to prevent intensive urbanization.

At some point, zoning for agricultural purposes may run into constitutional and political difficulty. Zoning, to meet the police power test, must be reasonable as applied to particular landowners. To a judge, reasonableness may require that the balance between the free market value of land and the zone value of land not be too great. If land is worth several thousands of dollars per acre for urban development, but only a few hundred for farm purposes, the landowner may present an appealing case. This is particularly true if his tract borders on the zone in which urban development is permitted. Politically, the pressures from rural landowners could be intense. If the opportunities for private profit are shared with governmental decision makers, then a relaxation of the open space zoning policy might quickly occur.

In order to prevent the constitutional and political problems presented by an aggressive open space policy, the local government could simply buy the land and turn it into a park or wildlife preserve. Alternatively, it could lease it back to the landowner for acceptable open space purposes. A massive acquisition policy would be very expensive. The land acquired by government would be taken off the tax rolls, thereby increasing the burden upon taxpayers. Governmental acquisition is also unnecessary. Private ownership of open space is entirely consistent with social goals, so long as the land is not used for intensive development.

An alternative which might offer more promise than pure zoning or pure purchase is a combination of both. For lands which are beyond the immediate urban fringe, zoning could be imposed without causing a drastic drop in land value. Therefore, land which is valuable for agricultural purposes can be zoned for agricultural purposes without creating the value disparity which would cause a judge to brand the action "unconstitutional." As to land which has acquired substantial value for development purposes, the government might condemn and pay for development rights only, leaving the fee in private ownership. This method of preventing development would be expensive, but not as costly as buying the fee interest.

In order for open space preservation to be implemented as a land use policy in Texas, some agency must be given both responsibility and power greater than that presently exercised by cities and counties. Cities have only limited governmental powers outside their boundaries;

hence, they cannot impose an open space policy upon surrounding lands by zoning. Counties have no zoning power. Neither cities nor counties may be willing to undertake a land use control system which will limit local growth, no matter how disastrous the consequences of a growth policy may be.

Before open space preservation becomes a reality, a substantial increase in concern and involvement at federal, state, and regional levels must occur.

Flood Plain Zoning. Flood plain zoning is closely related to general open space zoning. As previously mentioned Texas has authorized all political subdivisions, including cities, to take all necessary and reasonable actions to comply with the federal flood insurance requirements. Cities are thus empowered to use their zoning to require that houses built in flood plains be placed upon stilts, that they be waterproofed, or that the land lying in flood plains be filled in. The city of Nassau Bay has passed an ordinance setting these types of performance standards for building situated in flood prone areas.

On the other hand, cities could reasonably prohibit construction in areas most subject to flooding, and limit the lands to nonintensive uses such as farming and recreation. In some areas, strict flood plain regulation would provide the city with an abundance of open space, at the same time protecting unsuspecting purchasers from the heartbreak of flood damage.

Exclusionary Zoning. Some cities have used zoning ordinances to deny housing opportunities to racial minorities and to low income families. In 1927, the same year in which it passed the Zoning Enabling Act, the Texas legislature authorized cities to establish white and negro residential districts by ordinance, and to withhold building permits for residences which would be used in violation of the ordinance. This statute was repealed in 1969.

Zoning ordinances which classify persons according to race violate the Equal Protection guarantees of the Fourteenth Amendment and implementing federal laws. In 1917, the Supreme Court declared unconstitutional a city ordinance which established separate residential districts for whites and blacks. In 1948, the Court held that state courts may not enforce private subdivision restrictions designed to keep blacks out of white neighborhoods. In 1954, the Court decided that school districts could not assign students to different schools on account of race. In 1968, the Court held that a white seller of housing could not

refuse to sell to a black buyer on grounds of race, basing its decision upon a century-old federal statute. In 1968 Congress passed sweeping open housing legislation which makes discrimination unlawful in the sale or rental of private housing.

Despite court rulings and federal legislation, racial segregation patterns remain virtually unchanged in many cities. Although there is nothing unconstitutional or unlawful about members of a racial minority deciding that they want to live in a certain section of the city, the use of "state action" to maintain segregation patterns is unconstitutional.

Zoning is a form of "state action." Although cities do not now enforce zoning designations based on race, they sometimes discriminate through zoning ordinances ostensibly unrelated to race. For example, a zoning ordinance which establishes large minimum lot and house size requirements throughout the city effectively prohibits low income persons from building or buying a residence. Inasmuch as income levels for blacks tend to be substantially lower than income levels for whites, zoning ordinances which raise the cost of housing exclude blacks in larger percentages than they exclude whites.

Courts have upheld ordinances which establish minimum house size, declaring that health and safety may require a certain minimum space for housing. They have likewise upheld minimum lot sizes ranging up to five acres. For years, courts disregarded attempts to connect apparently legitimate action with racial segregation.

Recently, new assaults have been made against what has come to be called "snob zoning," designed to maintain an elite status for a community. In addition to alleging that large lot zoning causes racial discrimination, claimants assert a broader ground, that government may not constitutionally discriminate against poor people as a class. If an entire city is zoned to prevent construction of apartments and low income housing, then one class of persons, the affluent, is using government to discriminate against another class of persons, the poor. It is unlikely that the health and safety purposes promoted by class discrimination outweigh the impairment of health and safety caused by restricting poor people to one part of the city. Zoning is justified as an exercise of the police power, if and only if, it promotes the health, safety and welfare of the community. Otherwise, it is an unconstitutional invasion of a person's property right to do with his land as he sees fit.

On the national level, a number of "snob zoning" ordinances have been struck down. In 1965, a Pennsylvania court held a four acre zoning ordinance unconstitutional. The court stated:

> The question posed is whether the township can stand in the way of the several forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens, economic or otherwise, upon the administration of public services and facilities cannot be held valid.

In two later cases, the Pennsylvania court reaffirmed its policy against snob zoning. Appeal of Girsh held invalid a zoning ordinance which would totally exclude apartments from a township. Appeal of Kit-Mar Builders held that potential sewerage problems caused by new construction were not grounds for refusing to accommodate new construction.

In Kennedy Park Homes Ass'n. v. City of Lackawanna, a federal court rejected the city's claim that a housing project would create sewer burdens, and that the land was needed for a park. The court stated that, "The city officials of Lackawanna have the obligation to consider and plan for all the citizens in the community." A similar decision was reached by a federal court dealing with a claim against the city of Lawton, Oklahoma.

A New Jersey court held that a community cannot use an unduly exclusionary zoning system to prevent persons from entering. The court flatly stated that, "There is a right to be free from discrimination based on economic status."

In Massachusetts, the State reacted against local government's excluding low income housing projects. The legislature passed a statute commonly referred to as the Massachusetts Anti-Snob Zoning Law. If a community refuses to issue a permit to a public, nonprofit or limited-dividend sponsor for subsidized housing, the developer may appeal to a state agency empowered to overturn the local decision. If, however, the city has already provided a "fair share" of housing for subsidized projects, the Board has no power to require more low income housing.

Nationally, a judicial trend appears to require local governments to make services available to all

claimants, and not use its power to exclude new claimants.

In a recent Texas case, a land developer argued that a zoning ordinance prohibiting use of land for mobile homes was invalid because it was exclusionary. El Paso's zoning ordinance placed land in an "F-R" district which restricted it to farm and ranch uses, and the owner wanted to build a mobile home park. The Court of Civil Appeals gave the city ordinance a strong presumption of validity, and noted that an extraordinary burden rests on one attacking the ordinance to show that no conclusive or even controversial facts exist which would authorize the governing board of the municipality to exercise the discretion confided to it. The court rejected the exclusionary zoning charge, noting that no facts or figures were submitted as to local demand for mobile homes, and no evidence that there was a shortage of land for such purposes under the present zoning. Further, the court remarked that this argument should be made before the city's legislative body, and not to the court.

The court referred to expert testimony that the character of the land in question "should be preserved and encouraged; that with the rather expensive, well maintained homes, the area should continue to attract families seeking a semi-rural environment."

The El Paso case indicates that the general issue of exclusionary zoning is open in Texas, but that no immediate judicial remedy is forthcoming.

Except for a few intensely urbanized areas, large quantities of Texas land are available for low cost housing within a few miles of any worksite or city center. The eastern seaboard's high concentration of urban population makes exclusionary zoning a much more active issue than in Texas.

This is not to say that exclusionary zoning is not practiced in Texas. Many Texas cities pass zoning ordinances to prevent mobile homes from being located within their boundaries. Some of the "villages" located inside Houston's city limits have such restrictive zoning ordinances that developers of luxury apartments have difficulty finding sites. Nevertheless, considering Texas' urban areas as a whole, middle and low middle income buyers and renters have good access to housing, outside of affluent areas.

Subsidized housing is another matter. No traditional public housing has been built in Houston within the past twenty years. One reason is that before new projects may be built, city council must enter into a contract with the local housing authority to supply services. Council is very aware of the adverse political consequences of approving public housing projects in middle class parts of the city.

Houston's exclusionary tactics also extend to housing built under a subsidy program designed for low-middle income families. Under § 236 of the National Housing Act, nonprofit and limited-dividend sponsors may build housing for low-middle income families, and receive a federal subsidy through F.H.A., which must also insure the project mortgage. These projects do not require a contract with the city for services.

Inasmuch as Houston does not have a zoning ordinance, and city approval is not required for § 236 projects, one might assume that a developer could place subsidized housing projects anywhere within the city limits. For a time, this appeared to be the case. However, a series of neighborhood complaints caused the city to seek a way to control project site location.

The city succeeded in gaining project site review under a demonstration program in which twenty American cities participate. The program, called "Chief Executive Review and Comment" (CERC) requires that local applicants for federal funding under categorical program aid submit their proposals to the Mayor for review and comment before forwarding it to the funding agency. Houston has set up a Planned Variation Demonstration Program as a division of the Office of the Mayor to review the proposals. The office is staffed by a Federal Aid Coordinator, six project analysts, and three secretaries.

Subsidized housing projects are funded by the federal government through the local F.H.A. office. Applications for § 236 funding are therefore channelled through the Planned Variation Office, and the city makes comments on the project. If neighborhoods object, the politically sensitive CERC office can be expected to reflect the adverse reaction in its evaluation of the proposal. Control through "review and comment" is far more subtle than through a zoning system which would openly act as an exclusionary system. The Houston system is less subject to judicial attack than exclusionary zoning, because it operates through an advisory, not legislative, system. Thus, unzoned Houston has gained tighter control over the

site location of subsidized housing projects than the average zoned city in the State, which must treat subsidized projects in the same way it would treat other apartment developments.

The A.L.I.'s tentative draft of A Model Land Development Code recommends that a state agency be established with power to identify and regulate developments of state or regional benefit. Projects which provide governmentally subsidized housing projects may be designated as developments of regional benefit. Local governments are required to consider the regional implications of land use decision by the Code where they pass on applications for these uses. If a local government refuses to allow a subsidized housing project to be built, the developer may appeal the decision to a state agency which has power to override the local decision.

State concern with developments of regional benefit extends to uses other than housing projects designed for occupancy by unpopular residents. For example, power plants are increasingly unpopular in certain sections of the country. Airports may be close behind power plants in unpopular uses, because of noise and pollution from the airplanes. However unpopular these uses may be, they are necessary to maintaining today's life styles.

Texas needs to address the issues of exclusionary zoning and consider adopting a state control system similar to that provided in the Model Land Development Code.

Zoning for Billboard Control and Other Aesthetic Purposes. Both the zoning enabling act and the police power limit the use of zoning to promotion of the health, safety, and welfare of the community. Although this broadly stated goal allows some uses of the power for aesthetic purposes, most courts have consistently stated that zoning authority may not be used for the sole purpose of promoting community beauty.

Early billboard control ordinances were attacked on grounds that their sole purpose was to protect a community aesthetic interest. In a 1911 case, the Missouri Supreme Court broke through the aesthetic barrier by finding a number of connections between billboard control and the public health and safety. Referring to billboards, the court stated:

> They are also inartistic and unsightly. In cases of fire, they often cause their spread and constitute barriers against their extinction; and in case of high

wind, their temporary character, frail structure and broad surface, render them liable to be blown down and to fall upon and injure those who may happen to be in their vicinity. The evidence shows and common observation teaches us that the ground in the rear thereof is being constantly used as privies and dumping ground for all kinds of waste and deleterious matter, and thereby creating public nuisances and jeopardizing public health, the evidence also shows that behind these obstructions the lowest form of prostitution and other acts of immorality are frequently carried on, almost under public gaze; they offer shelter and concealment for the criminal while lying in wait for his victim; and last, but not least, they obstruct the light, sunshine, and air which are so conducive to health and comfort.

Although it may have described the shocking evils of unregulated billboards with tongue-in-cheek, the Missouri court provided the nation with a rationale for doing what communities wanted to do--prevent the domination of local landscapes by unsightly billboards.

Billboard control became national policy when the federal government passed the Highway Beautification Act of 1965, requiring states to regulate billboards along interstate and primary highways or lose matching funds. Texas complied with the federal requirements in 1972 by prohibiting installation of off-premises advertising signs within 660 feet of interstate and primary highways, and requiring shielding of auto graveyards.

The constitutionality of billboard regulation, both by local and state governments, is now accepted. However, the tortured path to justification under the police power leaves other regulations which promote beauty and order in the community in a questionable status.

For example, the zoning ordinance of Spring Valley, Texas, requires that new buildings bear substantial architectural conformity with other structures in the area. There is no immediately apparent connection between the city's design requirement and the health and safety of Spring Valley residents. The ordinance was applied very strictly to one resident who owned a flat roofed house and wanted to build a shed with a peaked roof. Insisting upon his constitutional right to a peaked roof, he landed in jail for building to suit his personal taste.

Is the Spring Valley ordinance constitutional? In 1936, a Texas Court of Civil Appeals considered a

Texarkana ordinance directed specifically at filling stations. Texarkana did not have a general zoning ordinance. The court held the ordinance unconstitutional, stating that:

> This ordinance was not enacted to protect the city as a whole from fire hazard, danger, public health or annoyances, etc., but, as revealed by its terms, to satisfy the aesthetic taste and desires of the inhabitants of the small area affected by it. For the reasons abovestated, we think this ordinance is invalid.

In 1940, another Texas Court of Civil Appeals took an entirely different attitude in a case involving the comprehensive zoning ordinance adopted by the City of University Park. A dentist complained about the city's refusal to allow him to remodel his house to construct a dentist's office therein. The court upheld the zoning ordinance and stated:

> Furthermore, in zoning, the aesthetic consideration is not to be ignored. Harmonious appearance, appropriateness, good taste and beauty displayed in a neighborhood not only tend to conserve the value of property, but foster contentment and happiness among homeowners.
>
> Although flat and peaked roofs are not closely related to health and safety, they may be related to public welfare. Arguably, maintaining architectural control in a suburban community contributes to the public welfare by holding general property values and tax bases at a high level.

Similar arguments have been advanced to justify extensive architectural review and control over areas of historical or commercial significance. New Orleans' French Quarter is subject to extensive zoning control over new building design and renovation. Texas' zoning enabling act expressly authorizes cities to regulate and restrict the construction, alteration and razing of building in designated areas of historic and cultural importance.

A recent New York case indicates that purely aesthetic interests may be promoted by zoning laws. In the Village of Rye, New York, Mr. and Mrs. Stover decided to protest against high city taxes by placing a clothesline full of torn rags in their front yard. The city responded with an ordinance prohibiting clotheslines in front or side yards facing the street. The New York court

ignored the city's traditional justification on grounds of safety, e.g., that motorists would be distracted by the sight, and faced the aesthetic issue directly. The court said:

> [I]t is our opinion that the ordinance may be sustained as an attempt to preserve the residential appearance of the city and its property values by banning, insofar as practicable, unsightly clotheslines from yards abutting a public street. In other words the statute, though based on what may be termed aesthetic considerations, proscribes conduct which offends sensibilities and tends to debase the community and reduce real estate values.

Use of the police power to promote aesthetic interests was advanced by the Supreme Court in Berman v. Parker, which, although dealing with the power of eminent domain, nevertheless talked about the police power. Justice Douglas stated:

> It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. . . . If those who govern the District of Columbia decide that the Nation's Capital should be beautiful as well as sanitary, there is nothing in the Fifth Amendment that stands in the way.

There has been a gradual recognition that aesthetic values are worth preserving, and that they can legitimately be promoted by zoning ordinances. So long as a rational connection between the health, safety, and welfare goals can be established, reasonable restrictions which enhance community beauty will probably be upheld in courts.

In some cases, however, the community may need to compensate landowners for losses occasioned by regulation. In its Highway Beautification Act, the State of Texas requires payment for signs which antedated the Act, and must be removed under its terms. However, the regulations apply without compensation to lands not now containing signs.

When there is some doubt whether regulations without compensation is a fair way to achieve its aesthetic goals, the community may adopt a combination of regulation and compensation similar to that provided in the Highway Act.

Neighborhood Control Over Zoning. Zoning plays two roles. Its best publicized role is to implement large scale planning decisions and guide the growth of a city. However, the second role--to provide a system for arbitrating competing claims concerning very local, fine grained land uses--is far more important than broad based planning in the minds of homeowners who are zoning's strongest supporters. Voters are likely to be suspicious of city planning and city planners. But it is very important whether the lot next door is turned into a filling station, and whether a shopping center parking lot will be built on the vacant tract nearby.

Because city council is a political body, it will ordinarily respond to strong voter sentiment concerning zoning issues. When it does this, council acts in the finest tradition of a representative democracy. However, council may seek a more direct system for effectuating localized regulation of land uses by delegating to a neighborhood group or to adjacent property owners the power to make control decision or to give advice concerning zoning amendments. When council undertakes to involve nongovernmental bodies in the control process, it may run afoul of the rule that governmental police power cannot be delegated to private persons.

The Texas Constitution places governmental power in the designated legislative, judicial and executive branches. City council is a legislative body. Council cannot delegate its legislative power to an administrative body or to a nongovernmental body. Therefore, zoning authority cannot be delegated to a Board of Adjustment. The rule also prevents council from delegating zoning power to a neighborhood group.

For example, the city of Nacogdoches passed an ordinance prohibiting the placement of mobile home parks within 200 feet of property owned by another, unless all such owners consent in writing. In 1970, a mobile home park owner challenged the ordinance. The Texas Court of Civil Appeals struck down the city regulation, holding that it amounted to an unlawful delegation of police power to private persons.

Although zoning power cannot be delegated to a neighborhood group, Texas' zoning enabling laws recognize that neighbors have an immediate concern about particular land uses in their district. Accordingly, if the zoning commission proposes a change of zoning classification, written notices must be sent to landowners lying within two hundred feet of the tract. If more than 20 percent

of landowners lying within two hundred feet protest the reclassification, then city council must pass the amendment by a three-fourths vote for it to be effective.

Texas recognizes a further interest of neighborhood involvement in the zoning system. In cities of more than 290,000 population, city council may create neighborhood zoning areas, with a five member Neighborhood Advisory Zoning Council in each. When the zoning commission receives an application for zoning amendment, it notifies the neighborhood council for the area in which the tract is situated. The council then holds public hearings and makes a recommendation to the zoning commission concerning the proposed change in classification. The commission is bound by the neighborhood council's recommendation unless it votes against it by a three-fourths majority.

Landowners expect zoning to protect those neighborhood values which caused them to reside in a particular area. If their city were to consolidate with another, or permit itself to be annexed by another, then these landowners would feel that their expectations were threatened. The new government might have ambitions for their neighborhood which are different from those which were stabilized under the old government.

Recognizing that landowners in such circumstances want stability, the legislature in 1949 required that any annexation or consolidation of zoned lands must incorporate exactly the existing zoning system. The new government may not amend or repeal the zoning system without a favorable vote of the persons residing in the affected territory.

Although the 1949 statute is basically sound, it may limit the power of the annexing or consolidating city unduly. Some flexibility is necessary in zoning. When a severe change of conditions occurs, e.g., a new freeway interchange is constructed, the old zoning classification system may be so inappropriate as to be confiscatory. If the city cannot respond with a zoning amendment without local referendum, then the result may be awkward. On the other hand, if the annexation or consolidation had not taken place, the landwoner would have been subject to the same degree of local control, and the same issues of confiscation would have been presented.

If neighborhoods are sufficiently organized to fight a zoning change, then it is likely that the residents have a pretty fair idea about what they want in their district. For city planning purposes, it is usually irrelevant whether a given filling station, clinic or shopping

center gets to locate on a site involving a hotly contested change of zoning designation.

To the extent that control can be delegated to neighborhood bodies, a very significant part of the governmental system can be brought down to a local, democratic operation. Perhaps the power of cities to delegate power to neighborhood groups should be broadened in matters not related to significant long range planning, exclusionary practices, and developments of more than local importance.

Zoning Regulations Applied to Public and Quasi-public Landowners

Clearly, cities are entitled to apply their zoning ordinances to control private landowners in the use of their land. That is the very purpose of the ordinance. Application of local zoning ordinances to other public and quasi-public agencies is another matter. For example, must a city obey its zoning ordinance when it locates its own municipal buildings? May a city require other public bodies such as schools and quasi-public institutions such as churches to obey its zoning classification system? Texas has arrived at some fairly clear guidelines in answering these questions.

Municipal Buildings. In its original zoning ordinance, the city of McAllen empowered its Board of Adjustment to control the location of municipal buildings. However, after the Board refused to approve a new fire station, the city amended the ordinance and removed municipal buildings from zoning control. The court upheld the city's action, noting that the zoning ordinance did not disable the city from providing fire stations to protect its own citizens from the hazards of fire. Thus, cities are not bound by their own ordinances.

State Agencies. The city may not require that State agencies follow its local zoning ordinances. According to Opinions of the Texas Attorney General, State universities are not bound to obey the building regulations of the city within which they are situated. The State is politically superior to the city, and its agencies are empowered to carry out State functions without deferring to local regulation.

Schools--Public and Private. School districts, on the other hand, are subject to local regulations. School districts are independent governmental agencies which do not have political authority over the cities

within which they are situated. Accordingly, they do not meet the "state property" test. Cities may regulate private schools and colleges by appropriate zoning regulation.

Junior colleges fall somewhere between regular school districts and State owned property. A 1968 Attorney General's Opinion indicates that public junior colleges will be treated as if they were school districts for purposes of city regulation. Therefore, junior colleges must follow the local land use regulation of the city within which they are located.

Churches. Churches are considered to be generally beneficial to a community, and are protected by the constitutional guarantee of free exercise of religion. Regulation of churches is therefore subject to considerable scrutiny by the courts. For example, when the city of Sherman sought to exclude churches from residential districts, the Texas Supreme Court held to be arbitrary and void.

Inasmuch as churches may create parking and traffic problems, the city may wish to supervise site location through the special exception procedure. In Jehovah's Witnesses v. City Council of Halton City, the court of civil appeals approved the general procedure of locating churches by special exception, but held that the particular application was unreasonable and therefore allowed the church to build.

Telephone Company Buildings. The Texas Zoning Enabling Act specifically exempts buildings erected for telephone service from local regulation. In a recent case, this exemption was held to extend to location of the telephone company's parking lot for employees as well.

Conclusion. In Texas, cities may regulate all quasi-public and charitable landowners except those operating as State agencies and telephone companies. Giving local governments regulatory power over location of public buildings makes good planning sense, inasmuch as the city has responsibility for providing traffic control and services for the institutions' use. However, when regulation appears to be arbitrary, the courts will hold it invalid.

Conclusions Concerning the Power of Texas Cities to Zone

Texas has adequately empowered its cities to exercise zoning powers according to the standard enabling

format. Cities use these powers in ways that are sometimes standard, and sometime inventive. In their early decisions, Texas courts delineated clear distinctions between the various procedures of zoning, such as special exceptions and variances. Accordingly, Texas does not have the confusion at the judicial level that some other states exhibit concerning these technical matters.

Although Texas courts are clear on the distinction between variances and special exceptions, the cities may not be. Texas cities probably grant a large number of "illegal" variances in the course of administering their zoning ordinances. If cities cannot be educated to follow the existing system, then perhaps the system should be modified to legitimate what cities do.

Texas cities may use the technique of planned unit development, with virtual assurance that the courts will approve. Judging from their general acceptance of new zoning ideas, the Texas courts will probably uphold land use intensity zoning as well. Because these techniques are new many cities and the general public are not aware of them. Local officials should be apprised of planned unit development attributes.

The courts appear willing to allow cities to adopt highly restrictive zoning designations, such as El Paso's "Farm-Ranch" district, and to approve reasonable procedures designed to terminate nonconforming uses.

Texas courts may be unduly restrictive on city power in one circumstance: amendments which downgrade residential zoning. The recent case of San Antonio v. Hunt suggests that courts may over-supervise cases of alleged "spot zoning" and leave cities unable to make minor modifications of their zoning ordinance without establishing "changed conditions" to justify the amendment.

Texas does not have an adequate State administrative structure to regulate development in areas of critical environmental concern, and to insure that developments of regional importance are not unreasonably excluded from localities.

Cities in Texas are able to respond to all legitimate demands for zoning inside their limits. Development outside is not subject to zoning control. This lack of control may adversely affect the quality of developments in incorporated areas, and lead to eventual problems for the nearby city which eventually annexes the development.

Subdivision Regulation by Texas Cities

A Description of the Subdivision Process

Large Scale Development. Most of the new housing in growing urban areas is supplied by professional and developers and builders. Large scale developers may buy over a thousand acres of raw land per subdivision and embark upon a process which runs several years from raw land to finished development. They divide their raw acreage into immediate development sections of two to three hundred acres, leaving undeveloped land financed as "inventory." Within each development section, developers establish a two to five year development plan, lay out lots and blocks, install connecting streets and utilities, and offer completed building lots to professional house builders.

The two phases, development and building, are traditionally performed by separate parties. However, some developers also build houses as a regular part of their business. When a subdivision is located some distance away from existing sales territory the developer may build houses to attract attention to his subdivision, expecting to sell lots to regular builders as soon as the market is established.

As a general rule a professional developer designs his subdivision to maximize the site's topographical and access features for maximum profit and sales appeal. Land which is not suitable for housing because of drainage problems may be used for golf courses or other community open spaces. Land which has good access and visibility will be reserved for commercial use.

Large subdivisions produce opportunities for land uses which bring more profit than land used for single family lots. After a few years, a successful development houses enough people to justify construction of a neighborhood shopping center. A developer may identify his shopping center location in the early years of development, and sell the land to an investor. This allows the developer to realize an immediate profit of several thousands of dollars per acre. If he waits until demand hits its market peak, he may sell shopping center land for as much as $60,000 per acre. The developer may elect to build the shopping center himself, thereby retaining a long term interest in his subdivision.

Similarly, land may be identified and sold or used for other high income uses, e.g., apartments or office

buildings. A completed subdivision development may be a total community, containing residential, shopping and work areas. Throughout the development process, land developers must satisfy the requirements of mortgage companies and the Federal Housing Administration (F.H.A.). The developer will borrow most of the money to finance his development from a mortgage company which expects to finance the eventual house purchasers as well. Many house buyers will want F.H.A. mortgage insurance on their loan, and the subdivision must meet F.H.A. standards. The mortgage company and F.H.A. participate in planning to protect their investments by insuring that quality standards are observed throughout the process.

Small Scale Professional Developments. Not all developers operate on the scale just described. A small developer may have twenty acres or less at his disposal. A small developer is not likely to provide much open space and community amenities in his middle-range development. His investment in the total project is much less than the large scale developer, and he depends more upon the community to provide amenities for his buyers. His development may not be as well planned as the large scale model. However, basic housing quality may be equal to the larger development.

Amateur Subdividing. On yet a smaller scale, a landowner may merely subdivide and sell lots without planning at all. Amateur subdividers may provide streets and utilities, or they may let the buyers worry about those items. Amateur land development generates housing with water wells, septic tanks and dirt roads instead of the standard services provided in a professional development.

Substandard Subdivisions. At the very bottom of the quality scale stands the substandard development. Some developers knowingly design subdivisions for sale to purchasers with little or no choice as to housing, and little expertise in buying. A developer may buy poorly drained land at a low cost per acre, and install minimal utilities. If he is outside city limits, he may find a water supply and expect lot buyers to install septic tanks or use outdoor privies. The developer may provide asphalt streets with open drainage ditches, or he may simply grade the land for a dirt street system. He will not supply street lights, parks, or other community facilities. Lots may be sold directly to consumers, who will build small houses, park mobile homes on their lots, or move old houses in from other locations.