The developer may, on the other hand, build new subdivision houses to sell on contracts for deed. This is a sales device by which the buyer makes a small down payment and continues monthly payments until he pays the entire price. The buyer does not get a deed until the last payment is made. If the buyer wants to resell, he is unlikely to find a purchaser for such a tenuous interest. In many cases, developers place the entire subdivision under a blanket mortgage to cover land acquisition, development and building costs. This mortgage has priority over the contracts which are later issued to the house buyers. Therefore, if the developer goes broke, the mortgage may foreclose and then evict all the "house buyers" without honoring their contracts.

The Effects of Various Types of Development--A Need for Regulation

New urban development ranges in quality from total community developments to substandard subdivisions. Quality developers are likely to meet good community standards. Substandard developers will meet few of these standards. To cut his costs, a developer may pour his concrete too thin or leave out reinforcing steel, expecting the city eventually to take over street maintenance. To protect itself against high maintenance costs, the city must establish and enforce paving standards on all subdivisions.

The city must regulate installation of drainage facilities in new subdivisions. Inadequate subdivision drainage will be a problem to the city, as well as to the subdivision residents. Flooded residents will look to the city, not the developer, for new drainage sewers to replace the old system. A developer can provide adequate drainage at the outset much more economically than the city can provide it later. The cost of drainage will be passed along to the residents in either event--by higher lot prices or by special assessments. Adequate drainage is a distinct benefit to lot buyers, because poor drainage can destroy their total housing investment.

A city may also have an interest in maintaining a certain size and scale of development, with minimum lot sizes and setback requirements. If these considerations are important, then the city must require that they be observed when the development is planned and laid out. It is too late to impose them after the houses have been built.

New residents need a certain amount of park and recreational open space. Although a quality developer may provide open space voluntarily, a city should oversee the location of parks to insure that they are easy to maintain and meet area needs. The city may need to encourage, or even force middle range developers to provide open space for their buyers.

Statutory Authority for Regulation of Subdivisions by Cities in Texas

Texas enacted its basic subdivision control act in 1927. As originally written, the Act enabled cities to regulate subdivisions within their limits and five miles beyond. However, statutes and court decision have reduced the extraterritorial application of the statute. Currently, cities may regulate subdivisions within their limits, and may extend their regulations into their ring of extraterritorial jurisdiction established by the Municipal Annexation Act. As to lands lying beyond the extraterritorial ring and within five miles of the city limits, cities have power to check the accuracy of subdivision surveys, but have no regulatory authority.

Cities share regulatory power with county governments as to subdivisions within their ring of extraterritorial jurisdiction. Counties are authorized to establish and apply regulation concerning street width, design, paving and drainage to subdivisions in unincorporated areas. It is not clear whether city or county standards would control in case of conflict.

Although the act "requires" subdividers within the regulated areas to make and record a plat, no penalty is provided for failure to do so. Therefore, landowners may avoid regulation by subdividing and selling lots by metes and bounds descriptions.

The Act applies to resubdivisions of land, as well as to initial subdividing.

It is unlawful for a county clerk to record a subdivision plat without a prior notation of approval from the appropriate control agency. If a city has a planning commission, it becomes the plat approval agency. If a city does not have a planning commission, then city council administers the regulations.

The approving agency, whether planning commission or council, must approve plats which conform to the general

plans and regulations of the city, and to the city's subdivision ordinance. The Act refers specifically to plans for streets, alleys, parks, playgrounds, public utility facilities, and street and highway extensions. Although cities may require subdividers to improve and dedicate streets, alleys and utility easements free of cost, it is not clear whether the Act authorizes cities to require dedication of park lands free of cost as a condition of plat approval.

The planning commission may apply the standards set out in the statute without council action. However, council may by ordinance establish additional regulations which promote the health, safety, morals, or general welfare, and the safe, orderly, and healthful development of the community. This general grant of power appears to enable cities to exercise the fullest extent of constitutional police power so long as their regulations reasonably promote the constitutional purposes.

Plat approval by the city does not constitute acceptance of the subdivider's offer of public streets and other public spaces. Dedication is effected, however, when the city uses or improves the spaces. On the other hand, disapproval of a plat amounts to a refusal of the offered dedication.

It is unlawful for a city to serve unapproved subdivisions with public utilities which are owned or controlled by the city.

If a subdivider changes his mind about subdividing, he may, with the city's approval, withdraw his plat prior to any sales of lots. If lots have been sold, the buyers must consent to plat withdrawal. Upon receiving a written withdrawal for recording, the county clerk indicates on the plat itself that it has been vacated.

<u>A Criticism of Texas' Regulatory System:
Controls are Geared to Regulate High
Quality Subdivision, and Allow Substandard
Subdivisions to go Uncontrolled</u>

High quality developers will make a plat of their subdivision so they can display the lots and sell them to builders by lot and block number. Conveying subdivision lots by lot and block is much easier than having a surveyor draft a metes and bounds description to each lot.

The Texas control system depends upon a developer's recording a plat of his subdivision and does not regulate developers who do not want to record. There are three critical statutory provisions.

1. It is unlawful for a subdivider to convey by lot and block unless he has first recorded a plat in the county clerk's office.

2. It is unlawful for the county clerk to record a plat which has not been approved by the appropriate authority (either city or county).

3. The city is entitled to withhold plat approval until the subdivider meets their lawfully established requirements.

If a subdivider meets city requirements, then the city notes its approval on his plat and the plat is recorded in the county clerk's office. The subdivider may then convey by lot and block number.

In addition to withholding approval from plats which do not meet city standards, a city may refuse to extend utility service to unapproved subdivisions, and it may bring a suit to enjoin sale of subdivided lots.

Even without strong enforcement, a high quality developer will obey local subdivision regulations. He depends upon development and sales financing from money lenders, such as savings and loan associations, insurance companies, and mortgage bankers. These financial institutions will not lend money on subdivisions which do not meet all local regulations. The developer may also want to secure Federal Housing Administration (F.H.A.) approval of his development for the benefit of house buyers in the subdivision. F.H.A. requires that the developer obey local regulations. Thus, quality developers obey the control system automatically because their money lenders and F.H.A. require compliance.

Ironically, quality developers would provide reasonably good housing even if there were no regulatory system. They must satisfy a discriminating market, their financial backers and F.H.A. The regulatory system's greatest effect may be in causing middle-range developers to provide similar quality.

Substandard developments need governmental regulation, but their method of operation virtually eliminates them from control. Developers of substandard subdivisions

often do not file subdivision plats. Instead they convey their lots by metes and bounds descriptions instead of by lot and block number. This sales method removes them entirely from the regulatory system which is geared to plat approval. Developers who convey by metes and bounds to avoid regulation are called "red flag" subdividers.

Red flag subdividers may choose not to provide utilities, instead expecting their buyers to apply to the city for service.

Purchasers of red flag lots sometimes assume mistakenly that pavement and utilities are provided at city expense. When purchasers find that their streets flood, and when they want paving and ordinary services, they go to the city. The city tells them that these services will be provided only if the lot owners pay for them. City refusal to serve red flag lots punishes innocent purchasers instead of the developers who fail to obey the subdivision regulation system.

The city may refuse to maintain streets in subdivisions which have not been through the plat approval process. It is difficult for purchasers of lots in red flag subdivisions to understand why people in other parts of the city get street maintenance at no expense. Here again, innocent purchasers suffer and the developer goes free.

Red flag developers do not require extensive financing from savings and loan associations or other institutional lenders. Their lots, houses, and purchasers could not qualify for F.H.A. financing and F.H.A. does not supervise them. Thus, there is no external pressure for these developers to conform to city regulation.

Cities do not go to great effort to locate red flag developments and enjoin their lot sales. Inasmuch as subdividers who convey by metes and bounds do not break a criminal law, there is no criminal punishment. Accordingly, they are free to subdivide and leave their buyers with all the problems of substandard development.

Red flag developments need regulation more than do the standard developments; yet, because the regulatory process is keyed to plat approval, red flag developers escape regulation entirely.

A Theoretical Framework for Judging the Legitimacy of Plat Approval Standards

Absent regulation, landowners may sell land as a single parcel, or subdivide and sell by lots and blocks. The state may regulate landowners to protect the health, safety and welfare of the community, but it may not take their property without due process. Nor may it take their property for public use without paying just compensation.

How do these abstractions fit the present control process? Subdivision control regulations have been applied for years, preceding even the popular enactment of zoning laws. Courts have regularly upheld traditional subdivision regulations without being too clear how the regulatory system is justified under constitutional law. At least three different theories could support the current regulatory system based upon plat approval: contract, privilege, and police power.

Regulation as a Contract Between City and the Developer. When a subdivider subdivides his land, he does so voluntarily, without governmental compulsion. However, the subdivider needs something from government. Merely carving up land into smaller pieces is pointless unless the lots have access to a public street and road system and access to public utilities. The subdivider wants government to provide access and utilities to his subdivision. He also wants government to accept dedication of subdivision streets so he will be freed from the cost of maintenance. Following this analysis, government is in a position to make a bargain, or contract, with the subdivider. Accordingly, government may agree to provide access and utilities, and accept dedication of streets, if and only if, the subdivider obeys its quality standards.

If subdividers and government are mere contracting parties, then government may legally exact whatever consideration it can get from the subdivider. If this theory be adopted, then there is no doubt that government may require that streets be paved, parks be furnished, and the developer pay large fees as part of the bargain.

The pure contract theory is not entirely satisfactory. It leaves government in a position to bargain independently on a subdivision-by-subdivision basis, and allows unequal treatment among subdividers. It allows government to place too great a burden upon land developers, who after all provide places for people to live and who perform a function necessary to the good life.

Recording a Subdivision Plat as a "Privilege." County records are maintained as a state service, and the benefits of recordation are extended to subdividers. However, the state is entitled to impose reasonable conditions upon use of the recordation system. If access to the records is viewed as a "privilege," then subdividers have no constitutional rights to record their plats. If this be so, then the State may enable cities to place whatever conditions they wish upon extension of this privilege to subdividers.

By the "privilege" analysis, a city may have to treat all subdividers equally. However, there is no theoretical limit to the total cost that could be imposed upon all subdividers who seek the "privilege" of recordation.

The "privilege" and contract theories may be combined. Organized government stands as a contracting party, offering to let subdividers record their plats, connect to public streets and roads, and escape future maintenance costs by dedicating their subdivision streets to the public. However, in order to get these valuable privileges, subdividers must obey regulations which government uniformly imposes upon all subdividers.

Credibility of the combined theories is enhanced by the fact that under the present system, subdividers have an option: they may sell by metes and bounds, and avoid regulation entirely if they do not need the benefits of access and public dedication.

Criticisms of the "privilege" theory are similar to those raised against the "contract" theory. Under both theories, government may be oppressive in its demands, and subdividers would have no recourse. It is simply not fair to require that subdividers pay more than a reasonable price for performing a worthwhile function.

Subdivision Regulation as an Exercise of the Police Power. The most sensible analysis of the subdivision regulation system is that regulation is justified as an exercise of the police power. Subdividers have a constitutional right to use their property as they see fit, including the right to sell it by smaller lots. This right, however, is subject to the state's police power to regulate their activity. Regulations must be causally related to the community's health, safety, and welfare, and they must be reasonable. They must not discriminate against one class of subdividers in favor of another.

Adoption of the police power test as the standard for subdivision regulation means that the city must establish regulations which apply equally to all subdividers. The regulations must be reasonably related to the business--land development--which is being regulated.

Although there is some case support for the "contract" and "privilege" theories of subdivision regulation, the police power rationale is the theory most likely to be applied to today's courts. Further discussion will therefore assume that the police power test applies to subdivision regulations.

A Supplementary View--Land Development is a Business, and Land is Inventory. To some extent, governmental regulation under the police power is judged more restrictively when applied to landowners than when applied to business operations. Courts and private observers emotionally favor the claims of landowners and resent governmental regulation which might be classed as a "taking."

It may therefore be worthwhile to look at land development as a business, instead of viewing the developer as a "landowner." A developer's business is buying raw land and selling developed lots. Land is his inventory. In some measure, land in an urban area is fungible. So long as it meets the requirements of access, utilities, drainage, tree cover, and sector location, one tract is as good as another.

If land development is viewed as a business, then regulatory authorities may reasonably require that the business pay the social costs of its operation, and produce a product which meets the public expectations. No less is required of other businesses. For example, government requires that factories clean up their pollution and cover the losses caused by industrial accidents and injuries to consumers. Government regulates automobile manufacturers to require that their product be reasonably safe. Government regulates drug producers to a far greater extent.

The business of land development provides a product which is socially useful. Yet, the product itself produces social costs for the community. When a new subdivision is developed, government services must be extended, parks and playgrounds provided, and the health and safety of the new residents protected. It may be reasonable to require that the business of land development bear all initial costs which new subdivisions cast upon the community. It is also reasonable that, as with automobiles, government take measures to assure purchasers that the product

which they buy--housing--is reasonably fit for the purpose for which it is offered.

If land development is viewed as a business which can be regulated to protect the health, safety and welfare of the community, then much of the emotional concern about "taking" the developer's property disappears, and the real issues of regulation may be addressed.

What Specific Standards May a City Apply to Protect the Health, Safety and Welfare of the Community?

The test for an exercise of the police power is that the regulation must be related to the health, safety or welfare of the community, and that the means used must be reasonable. The test may be applied to matters which ordinarily fall under subdivision regulation.

Accurate Survey. Governments must be able to locate lands and landowners within the city for taxation and regulatory purposes. It is therefore essential to the welfare of the community that new lots and blocks be accurately surveyed and platted.

This requirement does not place an unreasonable burden upon the subdivider. As a part of the subdivision process, a developer must identify the lots and blocks for sales to consumers, and have an accurate survey to avoid boundary disputes. The regulation can easily be applied equally to all subdividers. The Texas subdivision control statute expressly requires that subdividers have an accurate survey, and cities are entitled to enforce the requirements as a condition of plat approval.

Street Layout, Design and Paving. A city's street system is vital to pedestrian and vehicular circulation and to city services such as fire and police protection. Streets must meet width standards appropriate to the various types of ways, and be paved to insure all-weather access. Pavement should be of a quality which will withstand regular traffic use without excessive maintenance costs.

The goal of street regulation is clearly legitimate. The regulation is also reasonable. Developers have to provide some circulatory system within their subdivisions. It is reasonable to require that they observe the system established by the regulating city, and that they install pavement which will withstand ordinary use.

Developers may be required to dedicate subdivision streets to the public without cost as a condition of plat approval. If streets are not dedicated, then maintenance responsibilities fall upon the subdivision residents. If residents fail to maintain their streets, the city circulation system declines. Developers ordinarily suffer no disadvantage from dedicating streets to a city. Once streets are paved and opened, they lose their private value and become a community asset. Developers benefit from public dedication because the costs of maintenance are passed to the city.

There are bounds, however, to the ability of cities to require that developers adhere to city street plans and to improve and dedicate streets. If the streets serve primarily the developer own subdivision, the public benefits are to some extent incidental, and dedication is in order. However, if a city were to require a developer to improve and dedicate without cost a street which primarily serves the city's benefit, e.g., a major freeway, then the city may have exceeded the bounds of reason.

The test of reasonableness, thus established, is that the regulatory burdens placed upon a subdivider must bear a direct relationship to the needs and demands which his subdivision creates, and which benefit the residents thereof.

Sidewalks, Street Markers, and Street Lights. Cities may also require that subdividers provide sidewalks, and probably street markers and street lights. These improvements are directly related to the safety of the subdivision residents. Sidewalks keep children and other pedestrians out of the streets. Street markers assist travellers, police and firemen locate particular addresses within the city. Street lights enable drivers and pedestrians to see obstructions at night, and reduce the incidence of neighborhood crime.

The cost of these items to the developer is small, in view of the considerable public benefit from their installation. If applied to all subdividers, the requirements cause no competitive disadvantage and pass the constitutional test.

Drainage. Inadequate drainage allows waste waters to stand and creates breeding places for mosquitoes and other disease carriers. Inadequate drainage causes flooding problems with consequent loss of life and property. Requiring good drainage is essential to the health, safety, and welfare of the community.

It is reasonable to require that a developer provide adequate drainage. Independent of subdivision regulation, developers are required by Texas law to provide a product which is fit for its purpose. A subdivision which floods or which allows waste waters to stand is obviously not fit for its purposes. The requirement is therefore reasonable and clearly constitutional.

Utilities. Maintenance of community health requires that all dwellings be connected to approved fresh water supplies and to sanitary sewers. The effects of epidemic are too tragic to permit rain barrels and outdoor privies. In today's urban society, electric power and gas service are equally essential. Subdivision houses must have heating and lighting as a matter of health preservation. Urban society cannot accommodate the fire hazards of kerosene lamps and the pollution of oil stoves.

It is reasonable to require that developers provide utilities when the subdivision is developed. Utility lines must eventually be laid to provide essential services for residents. If they are provided before the lots are sold, utility lines can be installed efficiently and at low cost. If utilities are supplied at a later time, the utility companies may have to use their power of eminent domain, reroute lines around existing structures, and generally suffer a cost increase.

Increasingly, cities and developers recognize that electric lines should be placed underground. There are several reasons, one of which is aesthetic. The visual disturbance of poles and wires for telephone and electric service is becoming a national blight. Court definitions of public welfare are beginning to include aesthetic concerns. Safety reasons are also involved in underground placement. Exposed electric lines are a hazard when storms leave live wires dangling, and their poles are a constant attraction for young children to climb. Accordingly, city requirements that utilities be placed underground are legitimately connected with health, safety and welfare.

Developers may complain that underground utilities are more costly to install than the regular variety. However, this is a cost which may be passed on easily to lot buyers, and if applied equally to all developers creates no competitive disadvantage. Without a requirement of underground placement, quality developers would face a competitive disadvantage. Without a requirement of underground placement, quality developers would face a competitive disadvantage and all developers might follow the lowest standards of the business.

Minimum Lot Sizes. The zoning rationale for minimum lot sizes is equally adapted to subdivision regulation. The zoning enabling act specifically mentions the goal of preventing overcrowding. The test for overcrowding in a subdivision of single family homes is different from the test applied in an apartment district. In a subdivision, open space is privately owned, and each family unit must have an amount sufficient for its needs. In an apartment district, open space is shared and the quantity needed per person is far less. Minimum lot sizes therefore are reasonably related to the health and welfare of subdivision residents.

It is reasonable to require that developers provide lot sizes appropriate to the subdivision. The developer exercises choice when he elects to build single family houses instead of apartments. If he chooses to build single family dwellings, then he should observe the health standards appropriate to that use. The price per lot can be adjusted to reflect cost increases caused by large lots.

There may be a limit to the ability of a city to set minimum lot size limits. If lot size limits exclude certain classes of citizens from the community, then they are subject to the same attack as exclusionary zoning. Similarly, if lot sizes are not related to the needs of a particular subdivision, the developer may complain that the regulation is unreasonable.

Cluster housing and planned unit provisions in subdivision regulations are also valid. If a community decides to set density standards for new subdivisions, and allows developers to cluster housing and provide related open space, then the overall balance may be maintained to the advantage of the community, the subdivision and the developer. Planned unit developments are also appropriate. If a developer plans and creates a total community with appropriate residential, recreational, and commercial uses, then the community and its new residents can benefit from his planning efforts.

Parks and Playgrounds. Subdividers have generally accepted the previously mentioned standards for plat approval. They recognize an industry advantage which results in qualitative standards that all developers in an area observe, and they do not object to expenditures which clearly benefit their own marketing position.

However, there have been objections to requirements that subdividers dedicate parks and playgrounds to the city as a condition of plat approval. Early cases

indicated that such requirements might be unconstitutional. The requirement is clearly related to the health and welfare of the community. Parks and recreational facilities are essential to both physical and mental well-being of community residents. The question is whether the requirement is reasonable.

Historically, communities have undertaken the obligation of providing parks for the public. Although private donors have given substantial amounts of land for public parks, the gesture has been purely voluntary. Unfortunately, cities have not been able to keep up with the demand for parklands within their boundaries. Cities finance park acquisition by bond issues. Inner city residents are not likely to vote for a bond issue which will buy land for the suburbs. If the bond issues fail, then the cities have no money to buy parklands. The choice for many cities may be to require that the developer dedicate parks, or not to have parks at all.

Developers are understandably reluctant to give up valuable land for what they consider to be essentially a public function. If a land developer sees a need for parklands in his own subdivision, he may prefer to set up a community country club and restrict access to his own buyers. Public use might work to the disadvantage of his own buyers, and the city might not do an acceptable job of maintaining the subdivision park.

If a developer is willing to dedicate land to the public, he would prefer to make a voluntary gift than be required to dedicate. If he <u>voluntarily</u> dedicates lands to the city for parks, a developer may claim the <u>value</u> of the donated land as a federal income tax deduction. If, however, he is <u>required</u> to dedicate the lands, the developer can claim only the <u>cost</u> of the lands as an expense. Inasmuch as the value of the lands may have increased manifold by the time the developer makes his dedication, the income tax consequences may be substantial.

There is a problem of equalizing the burden of dedication requirements between large developers and small developers. Large developers may be able to identify tracts of land in their large holdings which are appropriate for parklands, but not for housing. They can, therefore, dedicate those lands in kind to the city. A city requirement that subdividers dedicate 5 percent-10 percent of their land area makes sense when applied to a large scale developer.

For small developers, however, a percentage dedication of lands may not make sense. Some subdivisions are no more than a few lots in size. A 5 percent dedication in such case may net the city a postage stamp park which is totally useless. The dedicated land will become a weedpatch, causing problems for both the city and the subdivision.

If the city requires dedication only from large developers, then it may violate the Equal Protection provisions of the Fourteenth Amendment, and courts may strike down the requirement.

One way to equalize the dedication burden is to require a dedication of acceptable parklands in kind, or a payment into the parks acquisition fund of an equivalent percentage of the <u>value</u> of the subdivided lands. This system appears to be equal, but in reality it operates more harshly upon the developer who has to pay cash into the parks fund.

Developers operate with very little cash, and finance as much of their land acquisition and development costs as possible. If a developer must come up with cash to pay a parks acquisition fee, then his cash problem is exacerbated. If he must pay a park fee based upon 5 percent of the <u>value</u> of his lands as of the time of dedication, he suffers a competitive disadvantage when compared with the large developer whose investment in parklands is measured by his raw land <u>cost</u>.

Although the mechanics of a dedication formula may be complicated, it is probably better to find an acceptable system and require dedication than suffer the entirety of a city's vacant lands to be subdivided, without any open spaces or recreational areas.

In testing the reasonableness of a dedication requirement, the courts are likely to look to the benefit which the subdivision in question receives from the requirement. By analogy to the limits placed upon street improvement and dedication, developers should not be required to dedicate parks which will be of primary benefit to residents away from the subdivision in question. Similarly, the small developer who pays a fee instead of dedicating lands should be assured that the money will be used along with other fees to provide park space which can be used by his lot buyers.

In recent cases, the courts have upheld requirements of park dedication which are limited to the need of

immediate subdivision residents, or otherwise controlled to insure localized benefit.

In Texas, according to a study by the Texas Municipal League, twelve cities require parkland dedication as a condition of plat approval. Four cities require school site dedication. Cities apply varying standards, e.g., Corpus Christi requires 5 percent of total area exceeding 20 acres, cash if between 10 and 20 acres and area is within 1/2 mile of an existing park, and no requirement if subdivision area is less than 10 acres; Pasadena requires 0.0066 acres per person; and Pearland requires up to 10 percent of tract area per master plan provision.

Most Texas cities apparently do not require parkland dedication as a condition of plat approval. It is doubtful that a city such as Houston foregoes the requirement because it has ample parklands. Perhaps cities doubt that the Texas subdivision control statute authorizes dedication requirements. Education and specific authorization from the State would be helpful.

Interrelation of Zoning and Subdivision Regulation. Both zoning and subdivision regulation affect land use. Zoning determines permissible land use by designating certain districts for residential, commercial and industrial purposes. A private landowner must observe the zoning designation when he puts his land to a particular use.

Subdivision regulation, on the other hand, does not specify what lands are to be used for particular purposes. Subdivision regulation sets performance criteria for all subdivisions within the city's control. Subdivision regulations state that if land is subdivided, then the subdivider must observe the prescribed rules.

Zoning and subdivision regulations sometimes overlap. For example, both may set minimum lot sizes, setbacks and sideyard limits. Both may have planned unit development provisions. In most cases, zoning and subdivision regulation will work together and not create conflicts. However, there is a possibility for conflict because their control systems are different. City councils control zoning decisions; the planning commission controls subdivision regulations.

Consider a planned unit development application which requires approval of a subdivision plat. If the city handles planned unit developments as zoning amendments, then city council may approve the developer's

application and pass a favorable ordinance. However, if there is a planning commission, then the commission must approve the developer's plat. Conceivably, planning commission and council could have different ideas about what the developer should do. In one Texas case, the City Council and City Planning Commission disagreed about approving a subdivision plat, and a lawsuit established that the City Planning Commission had final say.

Although disagreements may seldom arise between council and planning commission, there is no need to construct a control system which could result in conflict. In the A.L.I.'s proposed Model Land Development Code, the distinction between zoning and subdivision regulation is eliminated. If a landowner qualifies under the control ordinance, then he gets a permit to develop. The basic ordinance sets out both the zoning land use scheme and the substantive standards for new subdivisions.

Considering the already confused state of Texas' subdivision control laws in unincorporated areas, revision along the lines suggested by the Model Code may be in order.

Subdivision Regulation in Action: Houston's Plat Approval System. The city of Houston regulates subdividers by a system established under the Act. City planning commission handles formal approval, and the city planning department manages the detailed application of the city's regulations. The planning commission follows rules which it adopted in 1957, and has amended several times since.

A developer who seeks plat approval begins the process by sending his engineer or planning consultant to confer with the city planning department staff. The engineer discusses his plans informally, and then draws and submits a preliminary plat to the planning department. The developer pays a nominal fee based upon the number of lots in his subdivision. Plats must follow the city's form and scale requirements. At the time of submission, the developer must provide a title certificate showing legal description of the land, current owners, and lienholders. The plat must identify water source, ravines, school sites, churches, parks, sewage disposal plants, business sites, industrial areas, and other special land uses.

The plat must follow the city's plan for major thoroughfares and provide adequate secondary streets within the subdivision. Streets must conform to design standards established for curves, culs-de-sac, width, and

intersections. Street extensions must follow the established naming system, and new streets must not duplicate existing city street names.

Residential blocks may not exceed 1200 feet in length. Lots must be at least 50 x 100 feet in area and established a 25 foot building line. Townhouse regulations prescribes minimum lot sizes of 2500 squate feet for attached housing. Townhouse lots may be reduced to 2000 square feet if the developer dedicates 250 square feet of open space per lot.

Houston does not require that parks and playgrounds be dedicated as a condition of plat approval. Instead, the city requests the developer to reserve these grounds for two years, to be purchased by the city at developer's cost.

The planning department sends copies of the preliminary plat to all affected city departments and other governmental agencies for their review and recommendations. After receiving comments and recommendations from other agencies, the planning department forwards its own recommendations along with the plat to the planning commission.

The planning commission then takes formal action on the plat. It may disapprove the plat, defer action or approve the plat with or without condition.

If the commission approves, then the developer's engineer or planning consultant incorporates the commission's requirements and submits his final plat to the planning department. The planning department channels this plat back through the affected agencies, and sends it to the planning commission for formal signature. If the platted land lies inside the city, the planning department transmits the signed plat directly to the county clerk for recording.

If the subdivision lies within the five mile extraterritorial jurisdiction of Houston, the planning department forwards the plat to the county flood control engineer and county engineer for official county action. The county engineer presents the plat to commissioners' court for signature, and forwards the approved plat to the county clerk's office for recordation. The recorded plat will bear approval by the city and county.

Although the planning commission has asked the city to adopt an ordinance establishing subdivision standards, city council has refused to do so. Council

apparently takes the position that the enabling act gives the commission direct power to establish regulations and to apply them without an implementing ordinance. This is probably true as to those matters specifically covered in the enabling act, e.g., street layout. However, it is doubtful that matters such as minimum lot size can be lawfully enforced without an ordinance which relates minimum lot size to the general health, safety, and welfare of the community.

Houston's failure to pass a subdivision ordinance raises serious doubts about the legality of its plat approval system as to subdivisions outside city limits. Although the basic act gives cities plat approval power over subdivisions within five miles of city limits, the extraterritorial provision was repealed in 1931 by a statute which transferred plat approval to the county. The grant of power to the counties however, extended only to verifying lot descriptions for taxation purposes.

Cities regained plat approval power within the five mile ring in 1951, but the power was no greater than that which counties held, i.e., to check the land descriptions for tax purposes. Counties were later authorized to apply standards for street width, design and construction and drainage, which apply throughout the unincorporated area, including areas of cities' extraterritorial jurisdiction.

In 1963, the Municipal Annexation Act established rings of extraterritorial jurisdiction for cities, ranging from 1/2 mile to 5 miles, depending upon size of the city. The Act provides that cities <u>may</u> extend their subdivision regulations by ordinance into the extraterritorial jurisdiction.

Houston qualifies for five miles of extraterritorial jurisdiction. However, Houston has not passed an ordinance extending its subdivision regulations into the area of extraterritorial jurisdiction. Its control system, therefore, appears to be without legal authority. The complexities of subdivision regulation in unincorporated areas are described more fully in the chapter dealing with county control.

Houston exercises no particular control over red flag subdivisions. Several areas inside the city show the effect of substandard development and indicate a need for greater regulation.

Conclusions. Texas subdivision control systems are inadequate. The enforcement procedures do not operate unless the developer files a plat. Accordingly, there is no enforcement against "red flag" subdividers who sell by metes and bounds description. If a city withholds utility connections and street maintenance from unapproved subdivisions, then it merely punishes the innocent purchasers and not the subdivider.

The control picture in the area of overlapping jurisdiction between cities and counties is confusing. Cities should have firm control over lands which they will later annex. Counties should have increased power in areas beyond city control.

The present system assigns responsibility for subdivision control to the planning commission. Confusion may develop between commission regulations and council action on zoning amendments. Accordingly, revision of the entire process along the lines suggested by the American Law Institute's Model Land Development Code are in order.

Building Codes

Building codes are established by city ordinance to regulate the design, construction, materials, locations and designated equipment of all buildings and structures built within the city. Existing buildings which were lawful when originally constructed are allowed to stand, but later substantial repairs, alterations or additions must meet code standards applicable at the time they are made. A building permit is required for construction covered by the code. Violations are punishable by fine. Local building codes are usually modelled after a standard code recommended by a respected agency. Local modifications may be made to meet local conditions. On the other hand, some communities simply pass the "Southern Standard Building Code" without even looking at it.

The Administrative Process

The city of Houston has adopted a standard code, and its administrative procedures are probably similar to those found in other cities. The Houston code establishes a Building Inspection Division to administer the code. A Building Official heads the division and appoints inspectors, assistants, and other employees to carry out the duties of his office. The Building Official is authorized to enter structures during reasonable hours to inspect for

code compliance. If refused admission, he is authorized to seek a warrant to enter the building for inspection purposes.

To avoid code violation, anyone proposing to construct or repair buildings must apply for a building permit from the Building Official. The applicant must identify the work to be done, submit plans and specifications, describe the land, and state the value of the work. If the Building Official is satisfied that the work complies with code standards, he is required to issue a permit upon payment of the stipulated fee. The permit expires if work is not commenced within 60 days, or if the work is thereafter suspended for 120 days. City inspectors examine the work at specified points during construction and a final inspection upon completion.

The code establishes an appeals procedure for persons who want to contest the Building Official's decision. A nine member Appeals Board is appointed by the Mayor and must contain members from designated professional groups, e.g., architects, engineers and contractors, and the Fire Marshall. The Board has general responsibility for interpreting the code, and for settling jurisdictional disputes concerning plumbing, air conditioning and electrical matters.

Legal Authority of Texas Cities to Enforce Building Codes

There is a surprising absence of express authority for Texas cities to enact and enforce building codes. Although cities are authorized to prohibit wooden buildings and to require flame-proof construction, the enabling statute is narrow in scope and is not sufficient to justify the detailed regulations contained in most building codes.

Texas courts appear not to be bothered by the absence of express authoirity for cities to pass building codes. In a sweeping statement, the court stated in Scanlan v. Home Ins. Co.,

> The power of a city, by proper ordinance, to regulate the construction, reconstruction, and repair of buildings within its limits so as to prevent and abate fire hazards is of universal recognition. In fact, it is an essential attribute of municipal government under modern conditions.

In City of Tyler v. Ingram, the court stated:

> The supervision of the construction, maintenance, and repair of buildings falls within the scope of the police power which is inherent in the State. This power may be delegated by the State to a municipal corporation, and such power when delegated comes within the police power of a city.

Unfortunately, the courts did not point out where the delegation appeared. Home rule cities may rely upon their general constitutional authority and their statutory power "to enforce all ordinances necessary to protect health, life and property." Home rule cities also have power to regulate utilities. Inasmuch as buildings are likely to have utility connections, the building code could be justified as a regulation related to utility connections.

In City of Denton v. Weems, the court assumed that the city had power to pass an electrical code, but noted that the parties did not raise the validity issue.

Although general law cities do not have the broad range of powers held by home rule cities, they have been allowed to enforce building codes. In Town of Renner v. Wiley, the court upheld a general law city's building code, citing the zoning enabling act, as authority.

This act authorizes the city to:

> . . . regulate and restrict the height, number of stories and size of buildings, and other structures, the percentage of lot that may be occupied, the size of the yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures, and land for trade, industry, residence, or other purpose; and, in the case of designated places and areas of historic and cultural importance (emphasis supplied), to regulate and restrict the construction, alteration, reconstruction or razing of buildings and other structures.

Assuming that Dillon's rule would apply, it is not abundantly clear that the quoted article delegates power to general law cities to enact and enforce building codes.

In Newton v. Town of Highland Park, the court dealt with a case in which both parties assumed the validity of a general law city's building code and never raised the issue.

The Texas courts appear to be willing to uphold the power of general law cities to pass building codes without express delegation of authority. General law cities are empowered to pass laws "as shall be needful for the government, interest, welfare and good order of said body politic." This grant of unspecified power is probably broad enough to justify the courts in upholding cities in their control over new construction. However, in a recent case, a developer attacked the power of a general law city to pass and enforce a building code. From the city's viewpoint, it would be comforting to have a specific legislative grant of authority to do so.

Criticisms of the Present Building Code System

The Building Code system has been criticized for (1) unnecessarily raising the cost of housing; (2) increasing urban sprawl; (3) causing slums; and (4) creating graft and reducing respect for government.

Building Codes Raise the Cost of Housing. According to an official with a major developer and builder, his company can build a high quality subdivision house for $30,000 if it does not have to go through the permit procedures required by a building code. If the permit system is followed, the house costs an extra $2,000, with no real additional benefit to the buyer. The company's houses do not fall down or burn any more often than houses built to code standards. The houses are inspected by F.H.A. and the mortgage company which furnishes financing for the development. People live in them and do not complain about quality. The builder gives a one year guarantee on housing quality, which covers at least the serious shortcomings of electrical, plumbing or construction deficiency.

Why does it cost more to build according to a permit system? Here are some of the extra expenses.

1. Outdated code requirements concerning materials. According to the spokesman, the Southern Standard Building Code does not allow use of recently developed materials which meet performance standards of older materials. The Code specifies a grade of lumber which is virtually unobtainable in today's market. It also sets excessive safety standards which exceed the reasonable balance of safety over cost.

2. Delays caused by inspections. Fifteen different crafts are involved in building a single family

house. Where a permit system is used, the inspector must examine the house in its various stages of completion. During the time a builder waits for the inspector to check one phase of the work, the other craftsmen stand idle. For example, sheetrock hangers cannot cover the frame until the inspectors have checked plumbing, wiring and frame. This idle time adds to cost without increasing quality.

3. Local licensing. Large scale builders employ trained plumbers, electricians and other craftsmen. They learn the mass production routine and know how to do their work safely and well. However, if the builder moves his crew into a city having a building code, the city will require that locally licensed people do the code work. This practice provides local craftsmen with a monopoly and forces the builder to use them instead of his trained crews. With monopoly protection, locally licensed craftsmen cost much more than the builder's own workers. It was reported that one city using the Southern Standard Code required four years local experience before licensing plumbers and electricians. Here again, extra cost does not mean added quality.

Building Codes Cause Urban Sprawl. Currently, cities can impose building, plumbing and electrical code requirements only upon construction inside their city limits. If the builder and developer can provide an apparently identical house outside the city limits for $2,000 less, they will move out beyond the city limits to develop subdivisions. When land is annexed, it is less desirable for development. Thus, the present building code system contributes to urban sprawl by causing developers and builders to go ever-outward to avoid the permit system.

There are two ways to eliminate the sprawl-crating tendencies of the present system. One way is to set regional code standards which cover the entire metropolitan region and thereby remove the temptation for a developer to move out just beyond the city limits. Another way is to eliminate the permit system which causes the problem in the city.

In view of the general disfunction of city codes, the best solution appears to be adoption of a substantially downgraded code which applies to the entire region.

Building Codes Cause Slums. The cost of putting in an air conditioning system is $1,200 if it is "bootlegged" in; $1,600 if it is installed with code inspections. The cost of renovating plumbing in an old house is 1/5 more if code standards are followed. A Houston architect wanted to renovate an old building downtown for office purposes. He discovered that he had to leave the building as it was, because if he renovated, he had to bring the entire building up to code standards. Similarly, potential buyers and renovaters of substandard residential properties are disabled from doing so because costs are unnecessarily increased by code requirements. Codes and the licensing system encourage amateur bootlegging of repairs because the cost of getting professionals is maintained at a monopolistic level.

Building Codes Create Graft and Reduce Respect for Government. It is rumored that New York contractors add 2 percent to their bid estimate to cover graft for the building inspectors. Whether Texas building inspectors are similarly inclined toward graft is not known. However, conditions are ripe for such activity. When monopolies are perpetuated and useless expenditures must be made to satisfy a governmental system, the people's respect for government decreases.

Tentative Conclusions. Building codes are supposed to promote the health, safety and welfare of the community by reducing fire hazards and insuring quality construction. As the system is presently administered, it is doubtful that this result follows. The system instead raises costs, imposes unnecessarily strict standards, creates slums and graft, and generates disrespect for government.

It is highly unlikely that the present code system adds a great deal to fire protection and consumer protection. The fire fighting system inside the city has improved to the extent that fire in single family houses no longer poses a threat of destruction to the city. For construction in new subdivisions, F.H.A. and mortgage lenders apply their own standards and check to see that they are followed. One conclusion is that in such areas, an additional control is needed.

A Cavaet Against Repeal. Not all builders are as honorable as the one who supplied the case against building codes. A newly licensed lawyer who worked with a major builder remarked about the aluminum wire which he helped string in subdivision houses. The builder saved money by using conduits which were too small to hold the wire. The

wire, he said, would last no more than ten years. Where it went around bends, it would crack, then corrode and finally short out. The plumbers did not put wood chocks against the water pipes; hence, the pipes would clatter when the water turned on and off. Code standards and strict enforcement are entirely essential, according to this source. A similar plumbing noise problem appeared in an Austin area home built outside the code enforcement area.

The building code dilemma is perplexing. It seems a good idea to set standards for building, and to give the city responsibility for seeing that all new construction and renovation is of a good quality. But the end result falls frustratingly short of theory and conflicts with the goal of providing good housing for an increasing population.

The state has a new testing laboratory for building materials. A state building code system could be developed with regional standards which establish a reasonable trade-off between safety and cost. The licensing system could be abolished, along with many inspection requirements. A commission could be set up in each region with builder representation to set building standards for the entire region.

Perhaps governmental bureaucracy and rip-off are essential for consumer protection. If region-wide standards were adopted, the sprawl effect caused by city building codes vs. no county control would be solved. If the licensing requirement were dropped and performance standards were applied, then major builders could keep costs down. Truth is hard to find in this area; judgment is even more difficult than learning the truth.

Housing Codes

Housing codes are local ordinances which require that all dwelling structures in the city maintain prescribed levels of upkeep and structural integrity. Building codes differ from housing codes in that building codes establish standards for new construction in the city, whereas housing codes apply to all residential structures, whenever built.

History and Federal Influence

Housing code history in this country began with New York's 1901 Tenement Law. That law empowered the

city's housing department to declare dwellings to be a public nuisance whenever the plumbing, sewage, drainage, lighting, or ventilation was in a condition dangerous to life or health.

Housing laws did not sweep the country, being confined instead to the larger cities. Although there was considerable housing code activity between 1956 and 1964, by 1964 only 800 of the nation's cities had adopted minimum standard housing codes. The turning point for housing code enactment came when Congress required a satisfactory housing code as a prerequisite for workable program certification. Without workable program certification, cities were unable to participate in a broad range of federally subsidized programs, including public housing and urban renewal. With this impetus, housing codes multiplied dramatically: by 1968 almost 5,000 cities had adopted housing codes.

The role of the federal government in encouraging municipalities to pass housing codes cannot be overstated. The major federal programs restricted their grants to those communities which passed housing codes and received workable program certification. Moreover, the federal programs directed certain assistance specifically to concentrated code enforcement to help rehabilitate privately owned housing in salvageable neighborhoods. Section 17 of the Housing Act of 1949, as amended in 1965, provides:

1. Grants to localities for administrative costs involved in code enforcement;

2. Grants for public improvements;

3. Grants for relocation expenses of those displaced by code enforcement action;

4. Grants to poor homeowners for remodeling; and

5. Low-interest loans to homeowners and landlords to bring property up to code standards.

By April of 1971, twelve Texas cities had applied for concentrated code enforcement grants. Over three hundred Texas communities have some sort of code enforcement program.

However, 60 percent of Texas cities do not have housing codes. One reason for a city to pass a housing code is to gain access to federal dollars. Another reason is to eliminate slum conditions by requiring private owners

to upgrade substandard housing. The federal policy is that states should use their police power to its fullest extent to cause substandard inner city housing to be brought up to liveable standards.

What is Substandard Housing?

As described by one writer,

> Between patches of linoleum in the kitchen floor are treacherous holes--providing a view to the dirt below. The lights are hanging from worn out cord and the windows are clogged with cardboard.

Although such housing might have been a godsend for early pioneers, it is clearly inappropriate in today's society. It should either be torn down or fixed up, and adequate housing should be provided, with or without subsidy, for persons now living in such structures.

How Do Housing Codes Work?

A city which wishes to use its police power to set minimum housing standards passes an ordinance under its power to protect the health, safety and welfare of the community. Responsibility for structural integrity of dwellings is placed upon owners; upkeep responsibilities may be placed upon both owners and occupants. Violations are declared to be a misdemeanor punishable by fine.

The city names a Building Official to carry out code enforcement. The Building Official hires inspectors to make systematic inspections of property in code enforcement areas. Individuals also may lodge complaints against owners of substandard dwellings. Inspections will be made and action taken in response to such complaints.

If the inspection discloses a code violation, the Building Official orders the owner or occupant to comply with code standards. Owners and occupants may appeal from action by the Building Official. The Houston Housing Code establishes an appeals body consisting of seven members, appointed by the Mayor with Council approval. The Board determines whether the appellant violated the code and may waive compliance in cases of hardship. The appellant may appeal to City Council if unsatisfied by the action of the Appeals Board.

The city may prosecute an offender for violating a city ordinance, may declare the property unfit for occupancy and require all residents to vacate, and order demolition of the offending structure.

Recommendations for State Action

The following recommendations were made by the author of a recent report concerning housing codes:

1. The state should enact legislation providing for a minimum standard housing code which all municipalities must enforce unless they adopt a code with equivalent or higher standards.

2. The state department of community affairs should establish a program of technical assistance to localities in establishing and administering housing code enforcement.

3. The state should establish and fund a training program for housing code enforcement administrators. The profession of housing code administration must become attractive and well grounded in a recognized course of study.

4. The state should create a special revolving loan fund to assist a homeowner who is required to repair his home under the provision of a housing code.

5. The state department of community affiars should promote and foster incentives including special awards for imaginative and effective efforts by municipalities to renew neighborhoods.

For the most part, these recommendations seem reasonable and ought to be considered for legislative action. However, some other thoughts need to be expressed.

Housing codes may be written from too idealistic a perspective. The Houston code has extensive requirements as to window space, electrical outlets, and the like. Perhaps these requirements ought to be applied in cases of new construction, but it is doubtful that existing dwelling units should be substantially renovated just to make the windows bigger. Of course, the provisions will not be enforced strictly. But if that be the case, why make the requirement in the first place? Administrative discretion in the enforcement of laws is one step toward governmental

tyranny, and may also be one reason that nobody takes housing codes seriously.

Housing codes will upgrade inner city housing only if there is enforcement, if required reapirs are within the bounds of economic reality (with or without subsidies), and if the political climate within the community permits strong code enforcement. One emotional problem created by strict enforcement concerns owner-occupants who do not have enough money to satisfy code standards and who do not qualify for federal subsidies. Strict enforcement against such owners is unlikely. There is also a problem concerning who is liable as "owner" of a house which is sold under an installment land contract--the seller or the buyer. To some extent, the installment sale is like a rental, in that the seller receives little or no down payment, holds legal title, and probably expects to get his house back upon the buyer's default. Yet, the buyer has a contractual right to become the owner by making his monthly payments. If sellers are required to bring property up to code standards, they will undoubtedly attempt to recoup the expenses from buyers--a result which may not be acceptable as a matter of policy.

Big holes in the roof need to be patched, and indoor plumbing ought to be installed. But major renovation of low density low income housing does not appear to be justified. The following additions are proposed to the previous recommendation:

1. Make housing code specification less technical, less idealistic, more specifically related to the health, safety, and welfare of the occupants. This would require revisions of minimum window requirements, electrical outlet and some other standards now appearing in housing codes.

2. Enforce the final codes strictly against landlords.

3. Provide a "grandfather clause" exempting owner-occupied structures from compliance with any but the most vital requirements during the period of present ownership. Although owner-occupied housing should be connected to the water supply and the sewer, whether the roof is repaired may be more a matter for owner decision than for law.

4. Eliminate building code requirements for repairs in owner-occupied homes. This would lower the cost of repairs and make repairs more likely.

5. Apply the code with all its vigor when an owner-occupied house subject to the "grandfather clause" is sold or inherited. When title to the house passes, the emotional concern about the current owner is less a factor. Money which passes in the transaction can be diverted to code compliance without causing undue hardship to anyone.

These recommendations more nearly reflect community attitudes toward housing code operation, and should result in a more realistic prospect of actual enforcement.

Annexation

Central cities in many northern metropolitan areas find themselves encircled by an impenetrable ring of separately incorporated suburban communities. In some cases, virtually all of the area's middle income and affluent residents live in satellite villages.

Before rail and automobile transportation made the option of suburban living available, rich and poor alike resided close to their jobs in the urban center. Even then, they established separate residential areas with identifiable status and income distinctions. As cities grew in population, lower income residents sometimes made affluent residents uncomfortable by threatening to move into their sector. General living conditions in the city declined because of noise, pollution and concentration of population. Therefore, when convenient transportation to outlying residential areas became available, many upper income residents left the central city. They established separately incorporated bedroom communities at the urban fringe, and commuted to their central city jobs.

Suburban incorporation allowed affluent residents to sever governmental ties with the central city and control their environment by tight zoning laws, separate taxing structures, localized police and city ordinances reflecting their own moral and social values.

Central cities were powerless to stop the process. Annexation of unincorporated land was difficult, often requiring consent from residents of the annexed territory. Because one city cannot unilaterally annex another city, central cities could not take over suburbs after they incorporated. Central cities were limited to annexing land which was adjacent to their existing boundaries; therefore, they could not jump over the suburbs and annex land beyond their boundaries. When the satellites' circles closed,

central cities could not grow at all. Encircling was made easier by the presence of geographical barriers which excluded growth in one direction, e.g., Lake Michigan's barrier to Chicago's eastward expansion.

Encircled central cities found themselves overpopulated with low income residents, including large numbers of welfare-seeking immigrants from southern states. The tax base and community leadership which affluent residents might have provided were lost to the suburbs. The federal urban renewal program is partly directed toward bringing middle income and affluent residents back into central cities by clearing away troublesome slums and providing a cleaner, more inviting atmosphere. The programs have not always succeeded.

In Texas, large cities have not been plagued with the "ring of satellites" problem to the extent suffered by their northern counterparts. Favorable geography has helped Texas cities. Most of the State's major cities do not have natural barriers to their expansion; consequently, suburban confinement of the central city is less likely.

Perhaps more important to central city expansion is Texas' liberal annexation laws. Before 1963, Texas' Home Rule cities were virtually unsupervised in the exercise of their annexation powers. Home Rule cities may annex adjacent territory by ordinance, without needing a favorable vote from residents in the annexed area. As a result, when central cities in Texas felt pressure from active satellite cities, they could simply annex strips around the satellites thereby terminating this potential growth. Similarly, when communities in unincorporated areas commenced proceedings to incorporate, the central cities frustrated their efforts by commencing annexation proceedings.

Protective annexation reached ridiculous proportion when Houston annexed the entirety of Harris County to prevent competing incorporation. Although Houston needs protection from excessive suburban incorporation, it does not need the whole county. The Texas legislature responded to such excesses in 1963 by passing the Municipal Annexation Act. The Act strikes a balance between protecting central cities from competitive incorporation and annexation, yet it prevents over-aggressive annexation by those cities.

The Act provides the following basic formula for settling the annexation issue:

1. Each Texas city is granted a ring of extraterritorial jurisdiction, ranging from 1/2 mile to 5 miles beyond the city's corporate limits. The width of extraterritorial jurisdiction is determined by the city's population. In this area of extraterritorial jurisdiction, no new cities or municipal corporations may be created without the consent of the protected city. However, residents of unincorporated areas may petition the city for annexation, and if desired, thus they may incorporate.

2. If the extraterritorial jurisdiction of one city overlaps that of another, the cities may apportion the area by contract. If the cities cannot agree, then either city may file in the district court for judicial apportionment of the extraterritorial jurisdiction.

3. A city may annex only lands which lie within its extraterritorial jurisdiction. Annexation may not exceed 10 percent of the total corporate area of a city in any one year; however, if the city fails in any year to annex its total authorized territory, it may carry that amount forward and annex not to exceed 30 percent of its total area in a later year.

4. Cities may by ordinance extend subdivision regulations into their extraterritorial jurisdiction. The city may enjoin violations of the regulations but may not punish offenders by fine.

5. If a city annexes territory and does not provide services of a nature similar to that provided in other sections of the city, a majority of the voters and property owners in the annexed area may petition for disannexation. If the city refuses to disannex property owners may sue for disannexation.

6. The city may contract with industrial districts not to annex property in the district. Such contracts shall not exceed seven years and may be renewed or extended for successive seven year periods.

Soon after the Municipal Annexation Act was passed, a suit was brought challenging its constitutionality. A community called Stonegate attempted to incorporate within the overlapping extraterritorial jurisdiction of

San Antonio and the City of Windcrest. Neither city consented to Stonegate's incorporation. Stonegate alleged that the Municipal Annexation Act is unconstitutional in that it attempts to delegate to the District Court the legislative task of dividing areas of overlapping extraterritorial jurisdiction when the affected cities do not agree to a division. Although the court did not decide the constitutionality of that section, it did hold that the remainder of the Act was constitutional, and that Stonegate was prohibited from incorporating without approval from the existing cities.

Although the Municipal Act attempts to protect the interests of central cities as well as other cities and unincorporated areas, this does not mean all problems have been solved. Cities still desire to extend their control beyond the bounds anticipated by the present law. For example, in order to extend its extraterritorial jurisdiction, San Antonio annexed a strip of land 116.16 feet wide by five miles in length along the right-of-way of a highway. A developer objected to meeting San Antonio's subdivision regulations, as thus extended, and sued to declare the "spoke" annexation void. The Texas Supreme Court upheld the annexation and the control which San Antonio acquired thereby over new subdivisions. The court noted that land annexed by a city does not have to be of any particular length, width, shape, or size. Houston has also annexed along freeways, extending its extraterritorial jurisdiction throughout Harris County.

Unlike Home Rule cities, General Law cities must get a favorable annexation vote from residents of territory which they seek to annex. Inasmuch as cities with the qualifying population of 5,000 are likely to become Home Rule cities, this is not a significant disability in solving the "ring of satellites" problem. The limitation may even be helpful, in that satellite cities tend to be general law cities whose expansion might not be in the best interest of the metropolitan area as a whole.

Arguably, the ability of Texas cities to expand reduces the need for metro government. Metro is most needed in large urban regions where a proliferation of city governments and special districts intensifies the problems connected with planning and coordination of services. If central cities in Texas' metropolitan areas maintain their geographical and population dominance by expanding into newly developed areas, then the proliferation problem is minimized. Regional Planning Commissions may take care of area-wide planning and take over some regional service functions. Moreover, local governments

in Texas are able to enter into contracts with each other to provide services wherever efficiencies of scale may justify cooperative action. County governments continue to overlap cities insofar as some functions are concerned, but the scale of overlap may be quite small, inasmuch as counties tend to concentrate on administration of state tasks and services in unincorporated areas.

Perhaps the Texas system which produces super-sized cities is not altogether good. Although extremely large governmental units may provide certain types of services better than small units, individual taxpayer-citizens may get lost in a governmental system which stretches outward as far as major Texas cities are likely to go in the 1990's. This problem is exacerbated in a city such as Houston, where city councilmen are not even elected by districts. Citizens lose contact with their city governments, and they lose interest as well. Perhaps cities as large as Houston, Dallas and Fort Worth should be broken down into smaller political units for performance of some functions. Neighborhood zoning on a scale which is less than city-wide would certainly make sense in a city which stretches twenty or thirty miles from limit to limit. Other governmental function may also be best handled on a ward or district basis.

Whatever its deficiencies, the Texas system is probably better than that of many other states. The central cities can protect their areas of natural expansion from competitive incorporation. Governmental units are free to contract with each other to provide services when cooperative effort is worthwhile. The present formula may need to be improved, but wholesale revision is not called for.

Hawkins v. Town of Shaw: A Constitutional Right to Equal Services?

In the recent case of Hawkins v. Town of Shaw, a federal court declared that cities may not discriminate on the basis of race in furnishing services to its residents. The Town of Shaw, Mississippi, paid for all municipal services out of its general tax revenues. However, the quality of service provided white residents was significantly better than the quality of services provided black residents on the other side of town. For example, nearly 98 percent of all homes fronting on unpaved streets were occupied by blacks; 97 percent of all homes not served by sanitary sewers were in black neighborhoods; new mercury vapor street lights had been installed in white neighborhoods, but black neighborhoods were served by bare bulb

fixtures; water service to white areas was provided by six inch mains, while black areas were served by obsolete four, two or 1-1/4 inch mains.

The Fourteenth Amendment requires that a State not deny to any person within its jurisdiction the equal protection of the laws. This constitutional guarantee is a federal right, and persons who have been denied equal protection are entitled to maintain actions in federal courts against the offending state agency. The court held in the Shaw case, that plaintiffs made out a case under the Fourteenth Amendment, and required the Town to submit a plan showing how it proposes to cure the discrimination.

Applied widely, the Shaw case could have enormous impact upon local expenditures. Every city has its black section and its white section. Almost without exception, basic services are better in the white section than in the black section. The Shaw case dealt with aggravated facts in which discrimination clearly followed racial lines, and services were provided out of the town's general tax revenue. When these circumstances exist in other cities, a federal constitutional right has been violated, and the city is required to remedy the service problem. The cost of providing drainage, utilities, paving and police and fire protection to black sections of Houston or Dallas would be enormous. Yet, equal protection may require no less.

The discrimination proved in the Shaw case was based upon race. Courts are accustomed to dealing with racial discrimination, and are careful to require equal protection. However, unequal services in many cities may be based upon unequal wealth in addition to race. Government may not constitutionally discriminate on the basis of wealth in providing fundamental services such as education. If this requirement be applied to regular services such as paving, street lights and utilities, then the Shaw case would require equalization. One writer expresses doubt that these city services will be classified along with education as "fundamental."

Even if the Shaw case requires equal treatment of rich and poor, there may yet be a distinction which prevents it from requiring cities to provide services to poor sections free of cost. Most cities do not provide paving and utilities out of general tax revenues, as the Town of Shaw did. Instead, subdivision developers install streets, street lights and utilities. If a developer provides paved streets, street lights, and utilities, then lot buyers pay higher lot costs than if he provides dirt streets, no

lights, and no utilities. Cities merely receive the complete subdivisions with whatever amenities the developer provided.

When the developer does not provide adequate services, and cities pave rich or poor sections, they conventionally assess the property owners for the benefits of these improvements. It may be argued, then, that under the conventional system, cities treat rich and poor alike.

The "pay for benefits" test has been criticized, and may not protect cities from an expansion of the Shaw case. It is not true that cities sit innocently and impartially when devlopers either provide or do not provide basic services such as paving and utilities. Instead, the cities insure that quality services are provided for middle and upper income subdivisions through the subdivision regulation process. For example, the Houston subdivision regulations insure that quality standards are maintained for basic services, including paving and utilities. Low income subdivisions, on the other hand, are likely to be "red flag" and thereby avoid the regulatory process. Although cities have power to stop red flag development, they customarily make no effort to do so. Cities may even aggravate the red flag subdivision deficiencies by refusing to accept maintenance of the streets, and by denying utilities to the lot buyers.

Under these circumstances, cities are partially responsible for the disparity in services between rich and poor areas. Although it is true that the rich pay for the initial installation of their subdivision improvements, the city insures that they are provided as a part of the development process. Cities do not insure that basic services are provided for poor subdivisions. Arguably, the city protects the rich, but not the poor. Unequal protection is the result.

It is not clear what the Hawkins v. Shaw holding will eventually require cities to do. However, few cities in the country are totally free of discrimination against black residents in providing basic services. As a matter of constitutional law, Hawkins v. Shaw requires that these disparities be eliminated. Cities may have to go further and bring all basic services in poor sections up to the community norm.

VIII. PRIVATE DEED RESTRICTIONS

A system of private land use regulations operates almost unnoticed in new subdivisions and wealthy inner city areas. Yet, the private system probably has more to do with the character and appearance of these residential areas than the formal zoning plan.

Typical Restrictions

Behind every modern subdivision stands a set of residential deed restrictions which spell out in minute detail what lot owners within that subdivision may or may not do. The covenants are concocted by the subdivider (or his lawyer, with the friendly assistance and persuasion of a mortgage company). The following is a partial list of provisions which might appear in a large, high quality development:

1. No uses other than residential will be permitted.

2. Each lot buyer will become a member of the community association which operates recreational facilities for the subdivision occupants and their guests. The association also provides garbage pickup and a private security guard service.

3. Each lot is assessed a fee to cover the cost of administering the subdivision regualtions and maintaining the open spaces and other recreational facilities. If not paid, the assessment becomes a lien upon the lot.

4. Restrictions run for fifty years and are thereafter renewed automatically for successive periods of ten years each, unless a majority of the subdivision lot owners decide to terminate the restrictions.

5. Each lot owner agrees to observe stated standards and refrain from making any structural alterations without the approval of the architectural control committee.

In law, these restrictions are called "covenants running with the land" or "negative easements." This means that they affect the land itself, and are binding upon all

lot buyers, whether they personally know about the covenants or not. The covenants are enforceable by injunction, e.g., if someone breaches a restriction, the neighbors can get a court order which commands the offender to stop the violation If he disobeys the order, a lot owner may be jailed for contempt.

Deed Restrictions and "Private" Interim Government

Subdivisions located in unincorporated areas may use utility districts and civic associations to provide municipal-type services for their residents pending annexation by a nearby city. A municipal utility district provides basic water and sewer services, and maintains recreational lands. Deed restrictions establish a civic association which provides zoning-type land use control by supervising enforcement of the subdivision deed restrictions. The Civic association collects assessments from lot owners which are similar to the taxes which would be paid to a city government. The association uses its income to establish a legal fund to cover the cost of enforcing the deed restrictions against violaters, maintain common grounds in the subdivision, provide additional recreational services, and employ private security guards.

These services may be all that a subdivision needs pending incorporation or annexation. It would be undesirable if the subdivision had to incorporate to provide basic services. The incorporated municipality could not be annexed by the central city, and a"ring of suburbs" problem might develop. On the other hand, the central city may not want to annex newly developing lands until they have the tax base to support extension of full city services. The quasi-government which operates in new developments offers an ideal interim step between raw land and eventual annexation. It provides services without disabling the central city from eventually annexing newly developing fringe areas.

Although deed restrictions may be similar to governmental controls, the legal rationale is clearly different. The binding force of deed restrictions rests upon the law of private contract--not governmental power. There is not a "health, safety and welfare" or "reasonableness" limitation placed on deed restrictions. For example, it is questionable whether a zoning ordinance may constitutionally require that lot owners get approval from an architectural review commission before building houses on their land; yet such covenants which operate as deed restrictions are binding. The theory is that lot owners <u>agree</u> to the deed

restriction system when they buy, and courts merely enforce the agreement as a contract. Zoning, on the other hand, represents governmental power ordering property owners to do something with their constitutionally protected property. Therefore, governmental action must meet a constitutional test while private agreements need not.

It may be difficult to convince a typical lot owner that he agreed to all of the restrictive covenants which are attached to his lot. He may not even know about them, and rarely will he have read and understood them. Yet, in legal contemplation he will be treated as if he had contracted on each term. This is because the subdivider recorded a plat and a complete set of restrictions before he sold any lots in the subdivision. In every deed, the subdivider referred to the plat and to the recorded deed restrictions and incorporated them by reference. The first purchaser was therefore on notice of the terms of the restrictions when he bought, and by his acceptance of the deed, he is held to have agreed to them. Because the restrictions "run with the land," and because the reference to restrictions is in the chain of title, later purchasers also are on notice of the restrictions and they are held to agree to them when they buy. Even if the "implied agreement" theory fell short, the negative easement idea holds that the estate which is sold to the lot buyers is burdened with the power of other lot owners to enforce restrictions. Therefore, a buyer does not get full ownership of his lot--only a partial estate subject to the rights of the other owners to bind him to the restrictions.

Because deed restrictions arise out of private contract and property law, they cannot be imposed upon one who does not "agree" to them. Therefore, if a subdivider sells a lot which is unrestricted, he cannot thereafter subject it to the subdivision's restrictions without the agreement of that lot buyer. Adjacent lands which are not part of the restricted development are totally unaffected by the covenants.

When deed restrictions terminate by passage of time specified in the declaration, or by change of conditions, they cease to be effective. Although residents could renew expiring restrictions, the renewal would bind only upon those landowners who agree to renew. A single "holdout" may upset the entire renewal strategy, and his lot may form an opening wedge for commercial entry into the subdivision. Thus, without zoning, older neighborhoods with expired deed restrictions are subject to whatever market forces operate in the community.

Laches and Change of Conditions

If a lot owner threatens to violate subdivision restrictions, then other owners must act quickly and enjoin him by court process. If they wait too long, they may be unable to enforce against the particular violater because of the doctrine of "laches." If a number of violations go unchecked, then restrictions may become totally unenforceable because of the doctrine of "changed conditions."

The traditional method of enforcing deed restrictions is by a private suit brought in court to enjoin the violater from breaching the restrictions. Injunction is a harsh remedy, in that the enjoined party may go to jail if he persists in his conduct. Also, the injunction operates to prevent a landowner from using his property as he might in a free market, and may even cause him substantial monetary loss if he is forced to tear down an offending structure. For example in Viking Homes v. Larkin, a court ordered a builder to tear down a house which violated a building line restriction established for the subdivision.

When judges grant injunctive relief, they view themselves as dispensers of equity, or as courts of "conscience." Therefore, judges require that the complaining parties show that they have acted fairly in the matter. If the complaining parties sat back and watched the violation without notifying the offender that they plan to sue, then the judge may refuse the injunction on the ground of "laches."

Similarly, if a court is convinced that a subdivision has lost its residential character because of a number of uncontested breaches, the court is not likely to enjoin a lot owner who tries to join the crowd. In justification of its refusal to enforce the restriction, the court would state that the "change of conditions" removes any benefit which might come from enforcing the restrictions.

Thus, subdivision lot owners who wish to maintain the residential integrity of their subdivision act quickly when a breach of restrictions is threatened. They maintain a legal fund to employ lawyers to take immediate action and avoid laches. They contest every breach to avoid losing their restrictions through the doctrine of "changed conditions."

A Comparison of Land Use Control by Zoning and by Deed Restriction

Government may control land uses through zoning; private parties may control through subdivision restrictions.

In most communities residents rely upon both systems. In some communities, Houston being the most publicized, residents rely totally upon private covenants and eschew public control by zoning. With or without zoning, private covenants have considerable effect upon the actual patterns of land use within the community. A comparison may be made of the similarities and differences of the two systems, and the question asked whether zoning is irrelevant in view of the extensive use of private subdivision restrictions.

Overlap Between Zoning and Deed Restrictions

Although residentially restricted subdivisions are likely to be located in districts zoned "residential," they may be situated in cumulative commercial or even industrial districts.

Zoning and deed restriction enforcement work side-by-side. The city enforces its zoning ordinances. Residents of the subdivisions, acting either separately or through their civic association, enforce their deed restrictions. Property owners must obey both the zoning regulations and their subdivision restrictions. An owner who converts his house to a commercial use may thereby violate both the city's zoning regulations and the subdivision's deed restrictions. The city may punish him by fine. Other lot owners may sue for injunction to prevent the violation. If the lot owner converts his house for a home occupation, he may find that the zoning ordinance allows the conversion but his deed restrictions prohibit home occupations. In this case, the city will not bother him, but the neighboring residents may still enforce the restrictions by injunction.

If, on the other hand, the city's zoning system were more restrictive than the subdivision restrictions, the house owner must obey it. In sum, the lot owner must obey both zoning regulations and deed restrictions. This applies even if the city changes the zoning district designation to commercial or industrial. Changing the zoning designation merely removes some of the city's regulation on what the owner may do; it does not remove the contract obligation to obey deed restrictions. Arguably, the city's change of zoning designation might influence a court to hold in a close case that conditions had so changed in the subdivision that restrictions are no longer enforceable.

A peculiar control case may arise if a city adopts a zoning district designation which excludes residential uses from some districts, e.g., industrial parks. If a residentially restricted subdivision were located within the exclusive industrial district, then landowners would have to obey both the zoning regulations and then subdivision restrictions. The result would be that they could not use their land for any purpose. The private subdivision restrictions would prevent use of the land for any purpose other than residential; zoning, on the other hand would prohibit use of the land for the only purpose allowed by the restrictions. The resulting impasse would undoubtedly cause the zoning ordinance and the restrictions to be challenged in court. A city contemplating passage of an "industrial only" district, should avoid creating impossible land use situations of this type.

Incompatible Neighbors, Buffer Zones and Comprehensive Planning

Zoning is community-wide in effect; subdivision restrictions are localized to their particular development. Therefore, zoning may be helpful or even necessary to protect restricted residential developments from incompatible adjacent uses, and to control the environment into which the development fits.

For example, a developer may subdivide ten acres or a thousand acres. In either event, he can restrict his own land, but not his neighbors'. Without zoning, an adjacent landowner may build a factory next to a nicely restricted subdivision. This juxtaposition is not satisfactory to subdivision residents or to the factory. Because municipal zoning is not limited by property boundaries, the city may place buffer zones between districts, e.g., townhouses and medium density apartments may be used to separate commercial uses from detached family dwellings. Similarily, commercial zones may be used to separate residential zones from industrial zones.

It may be that the "incompatible neighbor" idea does not withstand close examination. In practical operation, market forces may generate primary and secondary uses which are compatible, not offensive. Buffer zones may develop without centralized planning and controls. For example, if land is developed for quality residential purposes, then surrounding land is likely to be too expensive for low grade industrial purposes. A factory is therefore unlikely to locate next door to a subdivision. Similarly, industries

tend to gather near heavy traffic and transporation facilities which repel residential uses. Commercial uses likewise follow traffic patterns which are not conducive to residential development. With or without zoning, land along major traffic arteries attracts commercial uses, and shopping centers locate at major intersections. Land between subdivision and commercial uses has prime value for apartment uses. The traffic conditions which make a piece of property desirable for these uses make the same land undesirable for single family dwelling use. Therefore market forces may provide natural selection of sites and buffer uses, and zoning may not be needed.

Zoning may make more sense in cities where small subdivisions are developed than in cities where major community developers operate. A small subdivision is directly affected by surrounding land uses. However, the developer of a thousand acre subdivision plans his subdivision as carefully as any city planner would. He is aware of the problem of neighboring uses, and creates his own buffer zones. He may turn his development inward, to minimize the adverse effects of surrounding environment. An imaginative land developer can find ways to produce a product which will appeal to buyers and planners alike.

For large subdivisions in undeveloped areas, zoning may indeed be irrelevant or nearly so. In areas which have been partially developed or which are experiencing small tract subdividing, zoning may help avoid unneighborly uses.

In inner city areas, zoning may be the only way to prevent traumatic land use changes. In older residential areas, deed restrictions may have terminated by passage of time or change of conditions. Even so, older neighborhoods may retain their general desirability for residential purposes. Absent zoning, there is no way to carry aging neighborhoods gracefully into townhouse and apartment development. Sewage facilities and other utility systems may be overloaded in the process. With zoning, a district may retain its general character through phased downgrading of the district use designation and avoid extensive replacement of sewage and utility lines.

On the other hand, rigid zoning in decaying neighborhoods may prevent the neighborhood from being renewed by private investors. Absent governmental control, when land becomes valuable for a new market use, e.g., apartments, old uses are phased out and rebuilding occurs. In one instance, a Houston office developer bought an entire subdivision for conversion into an office park. This conversion

could not have occurred in a zoned city because of the uncertainty which the developer would face in getting zoning approval. Without zoning, the Houston developer's only problem was acquiring title to all lots. He did this by offering a price which was substantially higher than the market value, and allowing owners to stay in the houses for an additional five years, rent free. As a result of the developer's efforts, a totally planned office complex is being constructed to serve business interests. Of course, a viable subdivision was eliminated, and must be counted as part of the social cost of the development.

Ideally, zoning allows a city to plan more efficiently how to provide essential services to its various users. For example, trunk utility lines to serve apartments and office buildings must be substantially larger than those needed by subdivisions. If a city installs a system large enough to serve heavy users, and the land is put to subdivision use, then the excess capacity is wasted. On the other hand, if the city installs subdivisions-sized utilities to serve an area which unpredictably develops office center requirements, then it must replace the existing system with facilities appropriate for the new use. Assumedly, if a city plans its land uses properly and applies zoning controls, the actual uses can be matched to the city utility plans. A consideration of utility costs may make the Houston developer's wholesale conversion of a subdivision to an office park less attractive.

Although the zoning-utility correlation sounds reasonable, it may not work out in practice. If an outlying section or an inner-city block develops a market value for office space, then the landowner will probably succeed in getting zoning amendments to allow the appropriate uses. Therefore, the planning premise fails.

In newly urbanizing areas, developers may bear most of the service costs for their improvements without city participation. If inner city utilities must be replaced or increased in capacity, the city may require that the developer bear part or all of the cost. If from a market standpoint, a developer can pay the cost of his service, there is little reason for the city to deny his request on the grounds of increased cost.

Assumedly, zoning allows the city to provide transportation more efficiently because it can control where development will occur. If outlying areas are zoned for residential purposes, then the city may logically provide freeway connections with the downtown center. To the extent that communities are committed to automobile transportation,

this planning makes sense. However, an unzoned city may reach the same result by predicting likely development instead of controlling it. If government builds a freeway to an undeveloped area, then subdividers will follow the transportation link. Development patterns are predictable within certain bounds, and public services may be provided with a minimum of waste. In reality, zoning may make less difference to actual land use patterns for outlying development than other factors, such as site location and transportation.

Rigidity of Restrictions

All zoning is potentially flexible because city council can change a zoning classification by amending the ordinance. However, every lot owner in a subdivision may enforce the deed restrictions on lots in his section. Therefore, all and not a majority of lot owners would have to agree to change the restrictions to let a prohibited use occur.

To insure that their subdivision remains residential, lot buyers may demand a strict set of deed restrictions in addition to favorable zoning classification. Mortgage companies and F.H.A. encourage developers to place strong deed restrictions on their subdivisions to ensure that the residential character of the subdivision will continue throughout the life of the insured loan. In a city such as Houston, where there is no municipal zoning, deed restrictions are especially important to home buyers who want to be sure that a filling station will not be built on the next block.

There may be some danger that the popularity and rigidity of deed restrictions will cause some subdivisions to remain in single-family dwelling use too long. It is true that zoning ordinances can be changed, and that city council sometimes reacts with a favorable amendment for land developers. But that is not necessarily bad. In the life cycle of a viable city, many neighborhood changes occur. Some changes are good for the city, but not necessarily pleasing to the older residents. The city may relax zoning to allow renewal when an old neighborhood of single-family dwellings begins to decay. However, the residents may hold off desirable redevelopment by continuing to enforce deed restrictions. As long as no prohibited changes occur within the subdivision itself, a court is not likely to hold that "conditions have changed" so as to invalidate the restrictions. Thus, normal market processes may be subverted by private restrictions.

Although there may be dramatic cases where a developer buys out an entire subdivision and thereby renders the restrictions inoperative, it is more likely that the miles of existing cheaply-built, detached single-family dwelling will not be so attractive for redevelopment that they will be bought out *in toto*. Instead, residents may simply hold onto their single-family status until decay is measured by the acre or by the mile. Ironically, the claimed ability of an unzoned community to react to current market forces may be lost when developers place long term, renewable restrictions on their subdivisions. Arguably, in a zoned community, there would be less need to tie up a subdivision forever with strict covenants. However, even in zoned communities, developers seek the double protection of private restrictions instead of relying upon zoning to protect the residential character of their developments.

Exclusionary Restrictions

Zoning ordinances which seek to restrict people from housing choice were declared unconstitutional in 1917. However, until recently, developers used restrictive covenants to exclude racial and religious minorities from their subdivisions. In 1948, the Supreme Court declared enforcement of such covenants by state courts to be unconstitutional. Such covenants were commonly included in residential subdivisions well after that date but are not now common today. The principle of open housing was further strengthened in 1968 when the Supreme Court held that an 1866 federal statute makes unlawful a seller's refusal to deal with a house buyer because of race. Additionally, in 1969, Congress passed an open housing act which outlawed virtually all types of racial discrimination in sales of housing.

Although direct discrimination on the basis of race is forbidden, deed restriction may be used to exclude certain classes of people without referring to prohibited categories. For example, deed restrictions which require that all houses in a subdivision contain 3500 square feet of living space would probably exclude any purchaser who earns less than $30,000 per year. Similarly, private deed restrictions which limit lot sizes within a subdivision to ten acres minimum exclude all but the wealthy. When such exclusion is sought through "snob" zoning ordinances, a constitutional question is raised. Recent court decisions have invalidated exclusionary zoning ordinances which relegate the poor to the less desirable and crowded inner city while providing isolated suburban shelter for the affluent.

The practice of achieving the same isolation of the affluent through private deed restrictions has not been questioned. Yet, the result may be exactly the same. It may be argued that inasmuch as government is not involved in the formulation of private deed restrictions, there is no cause for complaint. But if all suburban land becomes restricted by private covenants, where will the poor live? If "snob" restrictions remove great quantities of land from potential use for low income housing, then courts may strike down these private covenants because they violate the same strong public interest which is offended by "snob" zoning.

Private Recreational Facilities--A Threat to the Public System?

Large, high quality subdivisions offer buyers extensive community recreational facilities. Such developments commonly contain a golf course, swimming pool, and related community recreational space. Developers may dedicate these amenities to the city or county in order to avoid taxation and shift maintenance expense to a public agency. However, there is an increasing tendency among developers to make community facilities "private" and restrict use to subdivision lot owners.

There are several reasons to keep the facilities private. One reason is that a public agency might not maintain the recreational grounds at a level which would suit the developer and his buyers. Another is that buyers desire exclusive use to avoid overcrowding and enjoyment of the facilities by "outsiders."

Community-oriented recreational facilities undoubtedly strengthen the particular development to which they relate. They provide desirable open space and prevent overloading of public facilities. However, there is a disturbing possibility that the proliferation of exclusive and private neighborhood facilities may endanger the tradition of publically supported recreational services.

Low and middle income families who do not belong to a community club need swimming pools and other recreational space. However, these persons are not as politically aware and strong as the more affluent buyers whose recreational needs are privately provided. Accordingly, they do not exert concerted political pressure to get public recreational services. If middle and upper income families move into new residential areas with private community facilities, they will support those facilities instead of voting for

public facilities. Their lack of support, and even antagonism, for public bond issues to provide public recreational areas may eventually cause the downfall of the public recreational system.

Enforcement Problems

Zoning ordinances are enforced by the city. The city will not issue a permit for a building which violates the zoning ordinance. If a landowner violates the ordinance the city may at its own expense bring court action to punish the violator, or to enjoin him. If the city does not act to prevent violation, then the neighbors may bring their own suit for injunction.

Because deed restrictions arise out of private contract, they are enforced by private lawsuits. Any owner of a subdivision lot may sue any other resident of the same section to enjoin a violation of restrictions. However, the lawsuit is privately financed and lawyers' fees and court costs must be paid. Cities ordinarily are not involved in the enforcement of private restrictions.

In many cases, the subdivision will have a civic association which will collect regular fees from lot owners. A designated portion of these fees may be accumulated to pay for lawsuits to prevent lot owners from violating the restrictions. In quality subdivisions which have civic associations and a substantial legal fund, violators face almost certain legal action. However, many older subdivisions do not have civic associations and do not have legal funds. If a lot owner in such a subdivision threatens to convert his lot to a use which violates restrictions, residents must pass the hat to collect money to enjoin the violation. In upper income subdivisions, the hat may fill quickly. In low and middle income subdivisions, the residents may not raise enough money to support a lawsuit. Even if they do get the money and enjoin the first offender, residents must stand ready to bring suit against later violations.

Determined commercial users can eventually overcome the will of low and moderate income residents to fight for their restrictions. In Houston's South Park subdivisions, commercial users have probably rendered several sets of residential restrictions invalid because residents were uninformed about their restrictions, and lacked the wealth to bring suit.

In summary, zoning enforcement is automatic and effective in most cases. Enforcement of deed restrictions is effective in large developments which have active civic associations with assessments to pay legal fees; enforcement is also effective in affluent older areas where residents have both knowledge and money to fight violations. However, enforcement may be feeble and easy to overcome in low and moderate income developments where residents lack knowledge and money to maintain their restrictions.

The Houston Experiment: "Zoning" Through Public Enforcement of Deed Restrictions

Houston voters have emphatically rejected zoning. When zoning was last put to vote, real estate interests campaigned long and hard to defeat it. Some of their tactics were questionable. A "Zoning Fact Sheet," widely distributed in low income sections of the city, carried a cartoon showing a zoning inspector breaking into a house. A dog is pictured, afraid to bark because it might be against the zoning law. The campaign paid off. Fear of police intrusion into their houses brought low income voters out in sufficient numbers to insure defeat of the zoning proposal. Ironically, it is doubtful that the proposed zoning ordinance would have had much effect upon the parts of town in which those voters then lived.

Houston's city government is very closely tied to real estate interests, and did not want zoning. However, Houston's city government is also very closely attuned to middle class interests, and a fair number of middle income homeowners did want protection against offending uses. Residents in several areas had suffered entry of commercial uses which violated their deed restrictions, but they had no money to fight the intruders.

With the Texas legislature's help, Houston found a way to respond to middle income homeowner's interests without offending real estate interests.

In 1965, the legislature authorized Houston to use its tax supported legal department to sue to enjoin violation of private subdivision restrictions. This procedure removed financial pressure from subdivisions having restrictions, yet did not provide any control over unrestricted territory. The result was welcomed by homeowners who still had enforceable restrictions. It was apparently acceptable to real estate interests as well.

As originally written, the Act applied to all unzoned cities, towns and villages in counties of more than 1,000,000. Of course, few cities other than Houston fit the description. Afterwards, the Act was amended to apply to all cities, towns and villages, and to require that the municipality pass an ordinance requiring uniform application to its citizens.

A companion statute requires persons applying for building permits in Houston to submit a certified copy of applicable restrictions. The city may enjoin violaters from building without the permit.

In operation, the Houston system effects a piecemeal zoning system. In no sense is the system complete or comprehensive. Older portions of the city are not covered by the private restriction system. Therefore, they do not benefit from it. Areas where restrictions have been rendered unenforceable by "changed conditions" do not benefit.

Complaints about violators are referred to the city legal department for action. If a complaint appears to be justified, the city advises the violator by letter that the city may sue. In addition, the city may lift the violator's building permit, and thereby suspend construction.

The lawyer in charge of enforcement must interpret the restrictions, and determine whether a violation has occurred. He may also measure the intensity of objections to the violation. He may consider the effect of changed conditions on the enforceability of the restrictions.

A letter is probably sufficient to stop most violations. For others, filing suit or lifting the permit may cause the offender to give up. A decision to send a letter and to lift a permit may come easier than a decision to sue to enjoin the violation. There is considerable question about the constitutionality of the enforcement system, and the city may not want to put it to court test. Therefore, a commercial user who is ready to finance a suit to an appellate court may find the city willing to negotiate a settlement in order to avoid a decision that the enforcement system is unconstitutional.

There are several avenues of constitutional attack against the Houston system. One attack is that the system involves an illegal delegation of legislative power. The city has not gone through the steps of land use zoning, as authorized by the zoning enabling act. Instead, it has

empowered private land developers to do the zoning, and Houston does the enforcing. Houston enforces restrictions through threat of lawsuit and denial of building permits. Police power cannot lawfully be delegated to private parties. The Houston system may fall under the same rule that nullified Nacogdoches' delegation of power to adjoining landowners to keep away mobile home parks.

Another argument against the Houston system is that the city is spending public funds on what is essentially a private lawsuit. Public funds are supposed to be spent for public purposes--not private purposes. Houston would argue that there is substantial public benefit in enforcing the restrictions, roughly paralleling the zoning goals which have been accepted by the courts. However, zoning goals are required to be reached in accordance with a comprehensive plan as required by the zoning enabling act. Houston does not have a comprehensive zoning plan, and the enforcement may arguably be more a private benefit than public benefit.

The validity of the enforcement system may be questioned on yet another ground, that of unlawful delegation of legislative power to the courts. The statute provides that anyone who has been denied a permit may file suit against the city. The statute authorizes courts to "alter" restrictions to conform with present conditions. There is no particular limit placed on the court's power to alter restrictions; hence it may be empowered to extend them, or to carve out an appropriate area for commercial use. If a court were to do this, it would arguably be involved in the business of land use zoning--a legislative, and not judicial act.

Houston's system may be legal, and it may not be. It has been applied in one case, but questioned by the Texas Supreme Court. The system apparently works to the satisfaction of Houstonians. It was also sufficient to convince the Department of Housing and Urban Development that Houston should be certified for Workable Program without a zoning ordinance.

IX. SUMMARY OF FINDINGS

During the first centuries of this nation's history, land appeared to be an inexhaustible resource. Federal and state governments widely emphasized private property rights and private land ownership. The resulting free enterprise system brought civilization unmatched anywhere.

As the nation matured, however, uncontrolled land use developed bad side effects. Communities found that certain uses could not be tolerated without regulation. A progression of controls began at the purely local level, with cities acting to control certain noxious industries, e.g., slaughter houses, under the classification of "public nuisance." Cities also began to control certain sanitation problems with tenement laws which required landowners to meet minimal health standards.

In the 1920's, local control over land use began in earnest. The United States Department of Commerce recommended a set of enabling acts giving cities power to plan land uses and zone to control private landowners. Texas passed the model zoning act. Many cities passed zoning ordinances designating where certain types of uses, e.g., residential, commercial and industrial, could be situated within the city. Texas along with other states also gave cities power to regulate subdividers of new land so the new developments could be incorporated easily into the city's street and utility system.

Most states gave counties power to zone and control subdivision. Texas, however, did not. Texas land use regulation has not been changed substantially since the 1920's. As a result, cities are able to control land uses effectively within their limits. Land development in unincorporated areas is virtually uncontrolled, and the results are often substandard.

In a few states, land use control has become a matter of state concern. Hawaii, for example, applies a system of statewide zoning. Florida controls developments in areas of critical environmental concern. In other states, industrial sites are controlled at the state level.

Texas has not felt the pressing need for statewide land use controls because the state is large, and many areas are sparsely populated. Parts of Texas are changing in character, however, from rural to urban. As a result, the severe urban problems which are now localized in the northern and far western states are coming to Texas.

The year 1973 finds Texas at a crossroads. The state has substantial urban and rural problems. Houston and Dallas show a potential for enormous urban sprawl. Low density urban slums abound. Air and water pollution is commonplace. State agencies have not been coordinated in their activities, and sometimes work at cross purposes. Many small towns are dying at a time when large cities are becoming overcrowded. Substandard rural dwellings are often worse than urban slums on a house-by-house comparison.

As bad as Texas' problems are, they do not equal the land use crises which other areas of the country face. New York and Chicago have reached a saturation point on almost every conceivable urban problem. Cities face power shortages and utility companies cannot find land upon which to build power facilities. Recreational lands and wetlands are being developed for private use, sometimes with disastrous ecological consequences.

In many respects, the entire nation faces a land use crisis. No one knows what population projections to believe. One source may predict a zero population rate will hold population steady by the year 2000; another may predict a United States population of six hundred million by 2050. Some sources predict worldwide food shortages within a very few years, and make a convincing case that all available arable land will be required to maintain minimum human existence upon the planet.

The federal government has responded to the apparent crisis with a progression of laws which affect land use. Among the earliest federal land use influences was support for a national highway system. The federal-state partnership in highways committed the nation to an automobile economy and caused the downfall of mass transit. Federal entry into the field of private housing emphasized and subsidized home ownership, and encouraged urban sprawl through FHA and other financing agencies.

In the 1930's, the federal government began a program of public housing to help cities clear their slum areas and rehouse the poor. In the 1950's federal subsidies for urban renewal offered an even more ambitious program to rebuild decaying inner city areas. During the same period,

welfare programs attracted more problem families into the inner cities, and intensified urban difficulties.

During the 1960's and 1970's, federal reaction followed an ever-increasing tempo. Federal money for slum clearance, low and moderate income housing subsidies, and social programs increased manifold. Concern about the environment brought a host of new laws to prevent air and water pollution. Pending legislation promises a new federal power plant siting act and a massive land use planning assistance bill.

Almost every federal act has a state action component. Public housing subsidies are granted to local housing authorities which are set up under state law. Urban renewal funds go to sites which exercise powers granted by state law. New water pollution controls will be applied through state agencies if the states set up control systems. Proposed power plant siting legislation assumes that state agencies will be set up. The National Environmental Policy Act sets up a complex federal review system which may stall federal-state programs for years. If states set up systems for resolving environmental issues, the delay might be lessened.

From the state's standpoint, the most significant pending legislation is Senator Jackson's Land Use Policy and Planning Assistance bill. In addition to providing funds for land planning, the bill would require immediate state land use planning and control. States which do not conform may face serious cuts in funds otherwise available for highway and airport construction, and soil and water conservation.

In one form or another, the call is clear for state attention to land use and environmental matters. Land resource management, if not imperative in 1972, will be by 1975. Texas is a large state, with many diverse regions. The difficulty of inventorying existing land uses, identifying areas of critical environmental concern, and establishing a workable land management system may be greater for Texas than for any other state. Additionally, in many respects, Texas is well behind many states in establishing its management structure.

The State of Texas has begun to respond to the requirements of land resource management. This report is one part of that response. Formation of the Division of Planning Coordination and the Interagency Council on Natural Resources and the Environment provide other examples of the state's positive response. However, Texas cannot afford to rest on its past efforts. Momentum and support for land resource

management must be maintained and even increased if the State is to stay even with the task of planning for its citizens' needs during the next quarter century.

Because of the magnitude and complexity of new federal programs, and the increasing severity of land use crises, Texas should consider establishing a state entity with responsibility for administering a state land resource management program. Only through such an agency can the state maintain currency with the mass of federal legislation and coordinate the activities of the various state agencies which implement the state's policies.

Texas Land Use

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