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THE CARROT AND THE STICK: CONDITIONS FOR FEDERAL ASSISTANCE *

FRANCIS D. FISHER**

Introduction

In the days when I was an undergraduate, Harvard College had a rule that no student could change his field of concentration more than six times, without permission of the Administrative Board. I took full advantage of this typically tolerant Harvard attitude and tasted Government, Economics, ending up as I recall in Social Anthropology. What impresses me now as a government bureaucrat is that nothing I learned in all these social studies has been of much use to me these last six years since I left the practice of law and took up the practice of political economy.

We studied some interesting subjects in "Gov One": separation of powers, Locke, Aristotle, Adolph Hitler, the structure of the French Chamber of Deputies. All good clean fun in the pursuit of truth, but no more relevant to the practice of government than theology. It *was* a kind of theology, a body of knowledge studied, refined, disputed about among academics. Harvard College was not intended to be a trade school.

Even in law school, which is supposed to be a kind of trade school, the courses I took in legislation, administrative law and government regulation of business, seem now to belong to a world far away from the problems looking up at me each day from my "In" basket. Administrative law, as I recall, was all wound up in such absorbing irrelevancies as judicial review and the division of power between a hearing officer and a commission advocate. How many angels *can* dance on the head of a pin?

*A revision of remarks delivered at the Case—Western Reserve Law School Conclave, March 23, 1968.

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I do not urge that Harvard College and Law School should cancel their traditional courses, but I do believe that somewhere we should start to collect the knowledge we possess about *government as it is practiced.* There is, I think, a body of truth here that would be useful to assemble and study. There are certainly some people who are better than others at practicing government. What are their trade secrets? How can the distillate of their experiences be shared?

There do appear to be parallels between dealing with foreign sovereignties and dealing with the local sovereignties of city and state, underlying similarities between "country team" and "model city team," between the art of programming assistance for an underdeveloped foreign country and programming assistance for a U.S. city in need of urban development. Otherwise, there is no justification for my transfer from Bogota, Colombia, where I was helping run the American foreign aid program, to Chicago where I administer the programs of the Department of Housing and Urban Development for ten states of the midwest. I would like to set forth a few of the principles that seem to me to be involved in the granting of assistance by one government or another.

I. The Art of Rendering Assistance

The intensity of the urban crisis, the problems that are with us today, and the problems which will arise from the continuing urbanization of our country (and world) for the rest of this century are well known. Instead of discussing these problems directly, I want to explore the methodology of assistance. We must become more thoughtful, more skilled, and hence more effective in the art of transferring resources to be applied for solving social problems.

Our assumption will be that the United States Federal Government has a purpose it wishes to pursue, and has decided to pursue this purpose not by establishing a direct-hire work force to accomplish it, but by making financial resources available to another government which will conduct an activity contributing toward the desired result. We will look at how to give money away so that something happens which is not now happening, and how to stop assistance if the receiver misbehaves. The general situation we are going to examine can be stated as "I am giving you a million dollars to help achieve ABC on condition that you do XYZ. If you do not do XYZ, no million dol-

lars." To lawyers this sounds like a simple contract. Can we find in contract law some of the principles of practicing the art of carrot and stick?

It would be lawyerlike to begin by asking what is the remedy for a breach. "No right without a remedy." More generally, what do I do when you say you do not want to do XYZ, or are willing to do X and Y but not Z. The grantor of assistance then has a right not to give the recipient the million dollars, but if the assistance is not given, the grantor's objective in giving the assistance (ABC) will not be accomplished.

On the other hand, if I continue to pay out the million dollars to achieve ABC in spite of the fact that the conditions XYZ are not being met, I will not succeed in having fulfilled those desired conditions. This poses a tough and recurring problem in the business of rendering assistance. It might be phrased as how much of a nose should be cut off to spite a face. Let us take some examples:

1. The United States wants to loan Colombia in South America 100 million dollars a year so that Colombia can import the goods it cannot afford to buy with its coffee earnings, goods which are essential to building up the Colombian economy, so that Colombia will become a healthy, stable, independent country and by so doing contribute to the peace and security of the United States. We agree to render this assistance *on condition* that Colombia increase the amount of money it raises in domestic taxes, taxes which will provide those local resources for public investment needed along with foreign aid to permit the country's economy to "take off." We might also require that Colombia arrange its exchange rate to promote exports so that eventually it will not need U.S. foreign assistance.

2. The U.S. Federal Government agrees to finance urban renewal in Milwaukee on condition that the city relocate into decent housing those families dispossessed by the project and on condition also, that Milwaukee conduct an adequate program of enforcing its housing code throughout the city, so that marginal neighborhoods will not slip beyond the point of no return.

What do we do if Colombia does not raise its taxes or if Milwaukee flubs its relocation or code enforcement program? We can stop assistance, but we should be conscious that by so doing we are stopping programs which are in the interest of the U.S. It is the U.S. interest

that Colombia strengthen its economy with essential imports and that Milwaukee renew its slums. If we cut off the aid programs, these desirable ends will not be obtained. The issue is whether the unmet conditions are on balance so important that they should become a *sine qua non* of the entire assistance program. While X, Y, and Z are important to the donor, are ABC so important that they should be funded without achieving XYZ? Or is the donor ahead by providing no assistance, by foregoing ABC because conditions XYZ are unfulfilled?

This is a problem that is not generally encountered in a private contract situation. If one potential party to a contract does not want to agree to fulfill the conditions, we can look around the market place until we find someone who *will* meet the conditions. Governments, however, are monopolies; and if Colombia or Milwaukee will not meet desired conditions, there are no other governments in those places through which assistance can be channeled to achieve the objectives. We are faced with giving up ABC or XYZ.

From the examples already given it appears that we should be careful to state as conditions of assistance things which are important to our total objectives. It would be a mistake to hold up assistance for failure to perform small or petty conditions.

Yet lawyers are aware that important principles turn on small facts of a particular case. The same is true of the conditions of assistance. In our example of Colombia, it is important that an adequate level of taxation and public sector investment take place. Without it, economic take-off will not result, *foreign* aid alone will never by itself achieve this objective. At what magic level of taxation will a few pesos more turn an inadequate effort into a satisfactory one?

It is important that Milwaukee have an effective program of enforcing a decent housing code so that old neighborhoods are preserved in livable condition and do not slip to the point of requiring expensive clearance programs. Without good code enforcement the efforts of urban renewal will be defeated by the creation of new slums, as fast or faster than old ones can be cleared up. In testing the adequacy of code enforcement, a certain number of city building inspectors will be found acceptable, one less will be inadequate.

Should millions of dollars of assistance turn on such small points as a few pesos in local taxes or the hiring of one building inspector?

Is not this the petty interference of Uncle Sam in local affairs at which local sovereignties bridle? The problem could be done away with if it were appropriate to give assistance proportionate to performance. For half fulfilling the conditions, half the assistance. In this way a small deficiency in performance would not have such large consequences.

But such a policy would probably be an error. There are generally critical levels of performance which must be reached in order to obtain the large objective. Short of a certain level of savings and investment, the economy of an underdeveloped country will never "take off." A small difference in city code enforcement performance may separate a constantly improving situation from steady deterioration. Experience shows, moreover, that it may pay to concentrate assistance on those countries or cities which are maximizing self-help efforts, which have a chance of getting off the dole, or definitely breaking a pattern of decay.

In administering an assistance program, it is important to be right in the selection of conditions. They must be important, even if in application the conditions turn on small facts. To keep recipients from being unhappy at foreign meddling or "Rule by Washington", a great deal of time must be spent on explaining to the recipients the general principle which the specific deficiency in performance brings into play.

Also we learn to be careful in stating important conditions in terms of the *result* which the condition is to bring about, trying to make sure that we do not get hung up on a choice of *method,* particularly so because the local sovereignty probably knows best that method which, in the local context, will serve best to obtain the objective. Performance is the criteria rather than specification of method.

Make it a condition, if you will, that Colombia must raise 15% of its Gross National Product in taxes for public sector investment, but do not specify *which* taxes should be levied, or whether the revenue should be obtained through better tax administration. Make it a condition for a model city, as we do, that the disadvantaged living in the model neighborhood must have a voice which will be heard by those city authorities who make decisions affecting the future of the neighborhood, but do not prescribe the sort of official or volun-

tary committee structure through which this required process of citizen participation takes place.

II. Principles of Government Assistance

So far we have collected a few working hypotheses, some tentative principles of government assistance:

1. We must balance the gain from the assistance with the gain from the conditions.
2. Only important conditions should be made *sine qua nons* to assistance.
3. Meeting important conditions may turn in practice on small specific facts.
4. Partial assistance for partial performance may not be wise.
5. There is an advantage in stating conditions in terms of performance criteria leaving the recipient to devise the method of meeting the test.

We can divide conditions into those that are necessary to make the assistance effective and those that have value in their own right. We may insist on conditions XYZ because those conditions are important to the achievement of ABC, or we may simply use ABC as a lever (some may say "bribe") to achieve XYZ.

We have referred to the model city program which requires "widespread citizen participation". Adequate citizen participation, we believe, is necessary to the effectiveness of the model city program. Without the participation in the program of the residents of the neighborhood, information and attitudes which residents know about may not reach decision-makers who need that input to formulate sound plans and make wise decisions. Also the necessary support of the model city program by neighborhood citizens will not be mobilized without such participation in the decisions of what is being done and understanding of the program. The condition of citizen participation is essential to the effective use of the assistance.

But there are other cases where X, Y, and Z have little to do with ABC, where conditions are insisted upon, not because they contribute to maximizing the effectiveness of the assistance, but simply because the Federal Government has an interest in the conditions being met

for their own sake. In this way we attach requirements for meaningful equal employment opportunity in any construction work which Federal assistance finances. These conditions may actually slow down the building of housing or public facilities, but the conditions are an important objective in themselves.

No Federal financial assistance for local programs of mass transit, open space, water and sewer projects, can be rendered unless there is an adequate regional planning institution in the area concerned. In general this is because we believe that such planning is important to the wise use of the money, but funds for even a strictly local project with little or no regional significance may be held up, as leverage to obtain needed planning.

Many conditions attached to assistance have the double purpose of making the assistance effective as well as being ends themselves. I have cited the requirement of an adequate program of relocation of persons displaced by urban renewal, a condition attached to an urban renewal grant. We go further. Congress requires that a community have an adequate Workable Program for Community Improvement as a general condition to a number of Federal assistance programs. As part of this required Workable Program, the Federal Government insists that an adequate program of relocation be developed for all persons displaced by government action whether through urban renewal clearance, or because of other government action, such as highway construction or school expansion.

In this way urban renewal assistance, low-income housing assistance and certain other Federal programs are used as carrots to obtain sound coordinated relocation of persons displaced by Federal, State and local government. This required city action is related in only the broadest sense to the particular assistance package used to achieve fulfillment of the conditions. I say related, only in the *broadest* sense, but perhaps relationships in the broadest sense are the most appropriate form of relationship for two severeignties working together towards generally agreed objectives.

III. The Relationship of Object and Conditions

Assistance is given for certain objectives. It is important that the receiver do certain things. There is no reason that the conditions must have a programmatic relationship to the object of assistance. But both

conditions and object should be important. The granting of U.S. assistance to Colombia was conditioned upon what Colombia was doing with its own resources. Similarly the Federal Government in reaching decisions on Federal aid programs often looks at what cities are doing with their own resources.

For illustration, Congress has authorized a program under which the Federal government can support up to fifty percent of a local park purchase program. Recently Federal priorities have been set up to emphasize support of those parks available to poor inner-city residents. Any large city can run down the list of park land it plans on purchasing and select for submission to the Federal Government those projected parks that meet the Federal criteria. This may result in no change whatsoever in the local program by virtue of the Federal program other than "to attribute" to the Federal program those parks that meet Federal criteria. Red, white and blue signs can be placed on those parks telling of the U.S. Government help and the city will be richer by the amount of money received. There is no assurance that there is any shift in local policies, no assurance that more parks would be located in those inner-city areas than would result without a Federal program.

To be so assured, the entire local park program regardless of source of funds would have to be looked into and Federal assistance made available depending on a shift in total local program. Only in such a way would the Federal Government be sure that its money is in fact influencing the result.

Of course, if the parks would have been purchased anyway, even in the absence of the Federal program, then Federal assistance really constitutes a block grant, e.g., general financial support to a city which is conducting that kind of park program. There may be nothing wrong in block grants. The point is that if the purpose of the grant is to induce behavior you may be kidding yourself. Perhaps also selecting cities for block grants depending on their park programs may not be the best way to select cities for block grants.

The Federal program of assistance to aid urban beautification is an example where an effort has been made to assure that Federal assistance *induces* a different result than would occur without the grant. This is done by setting a base level equal to what the city was previously spending annually on beautification. The Federal Government

then pays up to 50% of the increase over the base figure. Of course this may penalize a city that was doing a good job at the outset. Such a city would have a high base and can only with difficulty increase its expenditures. A city with a past poor performance may easily qualify for Federal help. Some balance is required between rewarding ongoing performance and inducing performance.

These examples illustrate that program assistance may require conditons to assure the effectiveness of that particular program. Or we may use assistance as an inducement to obtain the conditions. Sometimes the conditions require a certain use of local resources.

IV. The Problem of Overkill

Now if the conditions are desirable why not group all Federal aid together so that the locality's compliance will be assured? Watch out for overkill! If the pressure of cutting off assistance is more than the maximum amount needed to induce the change of local performance, the Federal Government is accomplishing nothing by holding up assistance beyond that needed to induce performance. This suggests a policy of having differing conditions attached to different programs. If the threat of holding up the water and sewer and open space grants produces as much pressure as will maximize local efforts to bring about regional planning, urban renewal should not be similarly conditioned. It may take irreducible time to organize the planning agency. There is no reason why urban renewal should be held up if the water and sewer program pressure is sufficient to move the locality toward meeting the planning objective.

If the assistance subject to being cut off is out of proportion to the condition insisted on, we have a problem analagous to massive atomic retaliation. The threat may be so excessive that it is not likely to be invoked. Our Workable Program requirement, the threat of no low-income housing, no urban renewal, no 221(d)(3) moderate income housing may be an excessive response to some failures in the Workable Program, e.g. poor code enforcement. Perhaps this is why many cities with only mediocre performance on some of the elements making up the Workable Program have nevertheless been certified. We lack sufficient variety of subnuclear capability.

Existing statutory requirements do not make Workable Program a prerequisite for water and sewer, open space, urban beautification and mass transit grants. These programs, however are subject to the requirement of adequate regional planning. Urban renewal, low-income housing and most FHA subsidy programs on the other hand are subject to the requirement of a certified adequate local Workable Program for community improvement but do not require regional planning. In making more flexible the federal administrator's response in permitting "the punishment fit the crime" we increase the prospects of meaningful dialogue with local authority and the chances of improved performance.

While the conditions need not be related to the program to which they attach, they should be fulfillable by the entity which wants to receive the assistance. In the jungle of multiple local governmental authorities this is not so easily arranged. We deny funds to public housing authorities when city councils will not appropriate adequate code enforcement funds. Maybe the housing authority members have some influence with city council members and pressure will indirectly achieve its object in that case. We also deny a private builder the chance to erect moderate income 221(d)(3) housing where a city council has not obtained approval of a workable program. This is probably less defensible.

V. Enforcement of Conditions

We must also examine the problem of enforcing conditions. If a city violates the conditions under which it receives assistance, it would be in violation of its agreement and liable to sanction, perhaps repayment. Yet this contractual concept may not be the best method to assure a desired result as between governments, particularly where there is everything to be gained by keeping the assistance flowing. Fortunately, the relationship between government donor and donee tends to be a continuing one. This permits a review of present performance on a fairly steady basis, looking *forward* to the next package of assistance as the sanction. This minimizes the chance that the flow of assistance will have to be interrupted. It runs against normal contract notions which tend to rely on protracted negotiation to work out what happens in all eventualities of nonperformance. The contract calls for payment against performance. The law provides rem-

edies for default. Between governments it is often more desirable to match performance on the old deal against the expectancy of assistance under a new deal. This has the added advantage (too often, I fear, not utilized) of making largely unnecessary, initial complicated contract negotiations.

Enforcing conditions, however, is complicated by the fact that many of the federally assisted programs tend to be big ones, taking years to carry out. The receiver may need long-term assurances in order to start. It may not be desirable for the giver to relinquish for such a long time the opportunities of reviewing performance and cutting off assistance. This may affect the choice of those programs to assist. In the foreign aid program, one of the most effective forms of assistance from the point of view of maximum flexibility to the giver and frequency of review is a program of cash loans to help an underdeveloped country meet its current foreign exchange deficit and thus aid its balance of payments position. That has been hard to sell to some members of the Congress as it lacks the romance of assistance to some physical project, where the product is enduring as a monument, but where the long term commitment may later place the U.S. in a position of either disbursing against poor local performance or leaving a bridge half-finished.

Urban renewal and public housing projects have tended to involve commitments of such length that Federal influence, or capacity to enforce conditions throughout completion, has been small. A national review is taking place of cities which are delinquent in their performances in an effort to cancel and recoup funds. It is proving a difficult and painful process. The Housing Act of 1968 provides that urban renewal funding be put on an annual basis. This is aimed at using now Federal resources which are at present locked up for future years of a renewal project, but it will also have the effect of permitting more frequent review of performance.

VI. Conclusion

We have taken a fleeting look at a few of the principles and recurring problems in structuring programs of government assistance. It is enough, I think, to compel all of us to look into the matter further. When your Congressman asks for your help in proposing a program of Federal aids for air pollution control you are alert to some

of the questions you would have to ask yourself. Should regional cooperation be a condition? Open-occupancy? Should existing local efforts be relieved by receipt of Federal funds? What are the crucial conditions? How should other federally assisted programs, other local programs be related? Is it wise to have another separate grant program or can it be subsumed in existing programs? Should we work out all the details before we start or give a year's grant and judge performance as a criterion for qualifying for the next year's program?

Here are enough issues to make clear some of the administrative problems of a Federal system. How do we assure to the local government the maximum discretion and authority consistent with compelling Federal objectives? This is an especially important question today in the United States as we witness the most remarkable decentralization of power the world has ever seen. Power is being shifted from Washington to regional Federal structures, to States, to local governments, to citizens groups in city neighborhoods, from public to private enterprise.

For each public decision we must find the appropriate decision-making institution of government, always as close to the individual as possible, reserving to higher levels of government only those decisions where local interest may conflict with an important interest of wider concern. The problems of our cities today are national, they are also the problems of neighborhoods and individuals and of all the Governments that lie between. The developments of such arrangements is difficult. It demands the greatest qualities that dedicated lawyers possess. The frontier of America lies in the central cities and on the frontier, as always, we need lawmen.

COMMUNITY CAPITALISM AND THE COMMUNITY SELF-DETERMINATION ACT

KENNETH H. MILLER*

Introduction

Ideologies built around the idea of community and the strength of capital have seldom found a common meeting place. The operative motive in capitalism is the pursuit of private gain, leaving the general welfare to the famous "invisible hand" of Adam Smith. Communal ideas have long been seen as antithetical to those of capital because of their association with ephemeral labor-intensive experiments or with anti-capitalist revolutions. Yet these two traditions are beginning to appear in tandem in America's ghettoes, where the idea of economic development is being adopted by grass-roots black community organizations.

"Community organizing" became a term of art after the sit-ins of the early '60's, when SNCC, NSM, SDS, and CORE began to demonstrate the power which could come from helping to articulate community discontents. The community was organized around the failures of the capitalist system vis à vis ghetto residents. Slumlord, cop, and social worker became symbols in the struggle to rally the community against the common enemy. The major organizational tool was the demonstration, and legitimacy depended primarily on effectiveness in advocating community demands.

Development of a conscious desire for economic power came different ways to different organizations. A tenant organization in Boston became a landlord when it realized that sit-ins were inefficient ways of combating the slumlord's economic power. The Woodlawn Organization, a group in Chicago which began organizing against urban renewal, now owns and manages a sizeable housing and shopping

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center complex. FIGHT in Rochester was born in a struggle against Eastman Kodak, and ended up negotiating an agreement for ownership of a factory.

Nationwide, new organizations are being formed around the idea of community economic development. A venture in Newark, called "Minority Economic Industrialization and Cultural Enterprises, Inc." plans to create "an instrumentality which will be in the business of making businesses," looking to the day when "the biggest business in the ghetto would be the community corporation owned, operated, and managed by the ghetto residents."[1] In Hough, a new development corporation seeks to

> attract and create industries that will train and employ Hough residents; attract and own commercial establishments to meet the consumer and service needs of area residents as well as the white community; and gain and use entrepreneurial and management abilities through improved employment opportunities.[2]

An organization that would turn Hough, Central Newark, Roxbury, or Bedford-Stuyvesant into a community which is no longer dependent politically or economically must inescapably combine the best features of business and politics. While the forms may be as familiar as the eighteenth century New England town meeting and the nineteenth century entrepreneurs' rugged capitalism, the *combination* is without American precedent. Such organizations, now springing up across the land, represent a radical and promising innovation in social action.

Many Congressmen have come to believe that government can play an important role in encouraging ghetto development through organizations of the type discussed above. But if such novel groups could be valuable agents of social change, it is nonetheless unclear what role the government might play. This article will discuss both past government attempts to intervene in the slum cycle and contemporary efforts by non-government groups to foster ghetto economic development. It will then analyze the Community Self-Determination Act, a much-discussed bill introduced in the last session of Congress, as a focus for consideration of how government might encourage black

1 *Narrative of Application for an E.D.A. Grant,* submitted by "Minority Economic Industrialization and Cultural Enterprises, Inc.," November, 1968, at 1.

2 *A Proposal for a Special Improvement Grant for Economic Development of the Hough Area,* submitted by Hough (Cleveland) Area Development Corp., June 10, 1968, at 19.

organizations working for community self-determination and economic strength. Finally it will consider the more important impacts of traditional business law on groups presently engaged in ghetto economic development.

I. The Federal Role in Community Development

A. *Past Government Interventions in the Slum Cycle*

Charity may alleviate the suffering of an individual, but it has not proven an effective way of intervening in the slum cycle. Traditional government poverty programs — welfare, job counseling, home services counseling, public housing — are a type of public charity much more harmful in its long-run effect on the ghetto than the private mission of mercy, precisely because of the greater resources at government's command. The traditional poverty programs perpetuated the dependence of the ghetto on white society while reinforcing a separate life style — a society within a society. Profits were generated for some white entrepreneurs, architects, lawyers, social workers. Income was created for those on welfare, but the money was used for survival, and nothing solid was left behind. Public housing built where a tenement used to be no longer signaled the "end of urban blight" but came rather to symbolize the absence of change. It seems evident now, that the problem of the ghetto is as much the *way* federal monies are being spent as the relatively small amount expended.

The community action programs (CAP's) administered by the Office of Economic Opportunity reflected government recognition of the fact that traditional services and income approaches to poverty were not changing ghetto realities. However, government acceptance of the techniques of community organizing also proved abortive. As Daniel Patrick Moynihan has recently said, "At the risk of oversimplification, it might be said that the CAP's most closely controlled by City Hall were disappointing, and that the ones most antagonistic were destroyed."[3]

The CAP's for the most part never answered the question: community action for what? They borrowed some of the techniques of the early '60's radical civil rights organizers, but the techniques never worked for the Kennedy and Johnson administrations the way they

3 D. P. Moynihan, Maximum Feasible Misunderstanding 131 (1969).

worked for, say, SDS. For one thing, students had organized around wringing concessions from a hostile society; rewards when they came were immediate and dramatic. When they did not, a person or institution, actually or symbolically responsible for the frustration could be found.

Government sponsored community organizing on the other hand could not tap the power which comes from giving form to the inchoate demands of an oppressed community. Nevertheless, one lesson which *should* have been drawn from successful community organizing projects of the past was that an organization cannot exist unless it produces results which are meaningful to a community. Since organizing against landlords and city hall was politically difficult for the government programs, some alternative means of fostering community power should have been sought, and economic development was an obvious candidate. Unfortunately, programs aimed at economic development such as they were, were administered by other segments of the bureaucracy, and no rapport was seen between the objectives of economic development and community organizing. Thus, community organizing was wrongly seen as an objective in itself, and the CAP's degenerated into lessons in town hall democracy, another form of the "services" approach to poverty which had the sole advantage of getting government salary money to some blacks instead of to white professionals.

The inadequacy of community organizing programs which merely give salary money to a few should be recognized. Community pride does not grow simply because some local people draw salaries from Washington. The riots emphasized that "integration" is not possible in the short-run, that the traditional "solution" of seeking out individuals worthy of upward mobility has been inadequate.[4] Since the ghetto has served notice that it will not cede to the onslaught of the war on poverty, training "qualified Negroes" skirts the real problem, which is how to deal with an alienated community as a community. Unless income-generating infrastructures are somehow created in ghetto communities, a feeling of powerlessness will continue to provide the stuff which violence is made of.

It does not follow, however, that large capital transfers to community groups will prove any more successful than past programs. Absent

4 C. Hampden-Turner, *Black Power: A Blueprint for Psycho-Social Development?* in R. S. Rosenbloom and R. Morris, eds., SOCIAL INNOVATION IN THE CITY 63 (1969).

the skill to change capital into a stream of income such transfers will merely elongate the begging cycle. Any government program which hopes to effect meaningful change must therefore concentrate on how to encourage massive skill transfers which will end the powerlessness springing from economic dependence. Capital grants are a tactic incidental to this objective; the major emphasis must be upon formation of organizations with strong ties to the community. Outsiders must recognize that they no more know how to get something done in Harlem than the average ghetto dweller knows who to see at the Chase Manhattan. If, for example, it is determined that a textile plant would be economicaly viable and therefore a "good project for economic development of the ghetto," chances for economic success would be improved if a group with community legitimacy held equity in the operation. The serious tensions which are certain to build up as economic values begin to be generated could thus be minimized, and vandalism reduced. Finding and retaining talent could be facilitated, and knowledge of the community organization's participation in the business venture would mean immediate psychological "return" for the community.

Assuming that the government would choose to deal directly with organizations having grass-roots ties, how can it choose the "right" group in a given community? This is a central question for federal legislation which seriously contemplates capital transfers and other devices to build community institutions by fostering community economic power. If a certification mechanism could be set up to work automatically so that a group would be entitled to receive the federal benefits after it met certain objective criteria, city by city political struggles could be avoided.

But how could such a mechanism avoid backing groups which became despotic, unresponsive to the community? Is it *desirable* that such groups be "democratic" in the town meeting sense, or is the ability to throw out an oppressive elite enough? And is it possible procedurally to ensure even the latter objective? After all, the by-laws of many corporations afford but little solace to the dissatisfied shareholder; how realistic is it then to insist on democratic or corporate formalities in a society where the leaders never depended on electoral formalities for legitimization?

Even assuming some satisfactory answers are found to the problem

of "democracy", how is the government to choose one group over another? Anyone can claim to have power, allegiance of the community, and economic skill. If the wrong group is chosen, however, a local program may be torpedoed by an organization with the real power in a community. Alternatively, federal subsidies might create a "success" which does not benefit the community at all. When one gains some knowledge of a local community, it is possible to estimate the value of subsidizing one group over another. But if such broad personal discretion is built into a bill, the program could degenerate into a type of federal patronage.

B. *Ghetto Realities*

Any attempt to deal legislatively with these problems must take account of the groups already engaging in ghetto economic development and of their experience to date. The approaches already tried illustrate possibilities, while the probable incidence of proposed federal legislation on already extant organizations is an important way of judging a bill's value.

In each city, organizations must face different realities. In some the "turf" is spatially well marked out; it is generally known that a given area "belongs" to a given organization. In others, a myriad of groups purport to speak for the entire community, and "turf" becomes defined either functionally (e.g., dope and prostitution, housing, manpower training, education) or in terms of ideological positions. In some cities the majority of the ghetto community consists of transients and new arrivals from the South, in others there is a more stable community. In some cities white organized crime is into the black community, in some there is a more autonomous black syndicate. In some cities, city hall uses the police to repress black organizations, in others not. In some cities blacks form a highly conscious substantial proportion of the electorate, in others they do not.

The fact that community development organizations operate in different environments, is reflected in both the organizational forms and the tactics they have adopted.[5] Many of the grass roots community

5 All comments about persons or organizations specifically named except those relating to the Hough Area Development Corporation are based on personal contact. General comments are based as well on many other groups which have been visited but not named. Comments on the Hough Group rely on unpublished studies of the Harvard Program on Technology and Society.

organizations were initially concerned with welfare organizing, tenant organizing, fighting urban renewal, picketing for jobs, or related activities. Expansion into business enterprises has taken various forms depending on local conditions, but almost universally such enterprises attempt to convert the rising black consciousness into economic power. In most cases community organizations can use the new consciousness as a business resource permitting access to a consumer market. In other instances this new resource may be used to reduce operating costs (from absenteeism, vandalism, etc.). In still one other case, it has opened up a producer dimension by permitting access to raw materials gathered from throughout the ghetto community.

While there are many exceptions, most of the new community businesses aim at the non-durable consumer goods market. Many groups have purchased franchises in order to obtain ownership, prestige of a national name, and some organizational guidelines. Those entering the producer dimension generally rely in the first instance on a "sheltered market" obtained through negotiation with government or private enterprise. Some of these groups attempt to encourage individuals to go into business, others run businesses themselves or through subsidiaries.

1. Existing Development Organizations

The community organizations we know of differ in:

1. the source and magnitude of their funds;
2. the time in their developmental process when funds became available;
3. the source of their legitimacy (election, organization against and outside enemy, organization for furthering economic interest, etc.);
4. tactical emphasis (violence, political dealings with city hall, mobilizing public opinion);
5. nature of leadership (male or female, many or few);
6. rewards for leadership (high visibility, economic return, etc.);
7. degree of continuing popular participation;
8. rewards for community participation.

It is impossible to know at this time which groups will maintain their legitimacy over time and produce economic successes. Community organizations as different as the West Side Organization

(WSO) in Chicago, Cleveland's Hough Area Development Corporation (HADC), and the Bedford-Stuyvesant Restoration Corporation (BSRC) in New York seem to have great potential for making a lasting impact on the ghetto. The Chicago group has not had access to large amounts of money during its four year existence and has not depended at all on technical assistance from outside advisors. It is run by a loose coalition of men in their 30's and does not rely on committees or functional groups to get a job done. Funds until recently came from small foundations. Its existence is barely tolerated by the city government and police force. After its initial successes in job and welfare organizing WSO turned to ownership of its own businesses; but fighting urban renewal and protecting community interests generally are continuing concerns.[6]

The Hough Area Development Corporation contrasts with WSO in almost every way except objectives. The Chicago group originally organized around job integration and welfare issues, only moving into business later in its developmental process, while HADC community leaders had economic development as their initial goal. The Hough group, incorporated in June 1967, received an OEO grant for $1.6 million a year later. HADC has strong grass roots ties, as does WSO, but relies much more on the charismatic leadership of one man. In HADC outside advisors are more frequently utilized than in WSO — and the group enjoys excellent relations with Cleveland's city government.

Least like WSO, the archetypically successful issues-oriented community organization, is the Bedford-Stuyvesant Restoration Corporation, the establishment of which was announced in a speech by Senator Robert Kennedy in December 1966. Senator Kennedy chose Judge Frank Thomas, a Bedford-Stuyvesant resident, to head the non-profit corporation, and the other members of the corporation have been chosen by Mr. Thomas. The sister Bedford-Stuyvesant Development and Services Corporation is manned by some of New York City's top business leaders. In June of 1967, the Department of Labor allocated $7 million to the two corporations and grants for $750,000 and $1 million from the Ford and Simpson J. Astor Foundations, re-

6 Cf. Kenneth H. Miller, *Community Organizations in the Ghetto, in* SOCIAL INNOVATION IN THE CITY, *supra* note 4, at 97.

spectively, followed. Of the ten man full-time staff, eight have graduate degrees and top consulting talent is freely utilized.

In terms of physical accomplishments, BSRC has been the most productive of the three groups. It has undertaken an ambitious housing rehabilitation program which generated six black-owned construction organizations. It is completing in May the construction of a two million dollar neighborhood center, and is running an ambitious manpower training program and home mortgage pool. It has both persuaded businesses to locate in Bedford-Stuyvesant and generated black-owned firms through its business development program. WSO with infinitely fewer financial resources, has been operating successfully a large Shell gas station, is negotiating several other franchises, and is closing a deal for a manufacturing operation. Plans include a housing rehabilitation program, a supermarket, and expansion of the community newspaper.

It would be bootless to point to one of these groups as the "model" for community development. One might have suspected that WSO, with its loosely organized grass-roots directors would have been least capable of doing successful economic development. Conversely, the Bedford-Stuyvesant Restoration Corporation especially in light of an earlier community split might have been thought incapable of involving the hard-core unemployed in its programs. At this early date, however, guarded optimism is possible with regard to all three groups discussed herein and many others not mentioned.[7]

2. Individual Entrepreneurs

The diverse possibilities for community development become even greater when one considers individual black entrepreneurs who have also begun to find economic opportunities in the ghetto. Archie Williams in Boston purchased three ghetto-based supermarkets from Purity Supreme in a series of highly leveraged transactions which laid the basis for Freedom Industries. Having sold contracts to certain electronics firms in the Boston area, Williams was also able to establish a components manufacturing firm. Graphics 34, a designing and advertising affiliate, and Freedom Manpower, a manpower training corporation, now form part of Williams' expanding network of businesses. All are located in the ghetto, and the overwhelming majority

7 *See supra* note 5.

of employees are ghetto residents. The Freedom Foods advertising campaign has placed heavy emphasis on the theme "build your future by buying at a black business". A major effort was undertaken to demonstrate that the stores really were purchased and that Freedom Industries was not just fronting for Purity Supreme. Freedom Industries is closely held, but Williams is interested in having stock widely owned in the black community. He pays top wages and spends an extraordinary amount of time and money on employee welfare.

Like Williams, Floyd McKissick, former national director of CORE, sees black capitalism as a means of ghetto transformation. Though McKissick has begun consulting and advertising operations and has purchased a publishing house, his projects are in the planning stages and cannot now be discussed. In general, however, like "Soul City," the new town being planned in North Carolina, McKissick's projects are more grandiose than those with which Williams began. The McKissick organization is much more personal and had access to more substantial sums of money from the beginning due to its relationship with Corn Products Inc.

3. "Community Benefit" Corporations

There exists also a myriad of new black businessmen who hope to put their successful business at the service of the black community. Harold Mars, president of Camura, Inc., and Frank McElrath, president of PA Plastics, two of a number of black entrepreneurs launched through the financial backing of the Rochester Business Opportunities Commission, espouse social as well as economic objectives. These for-profit enterprises arguably represent a new organizational form which might be called a community benefit corporation. Such corporations are unlike traditional Negro businesses which were either very small scale or a means of escape for the participants (who could then become concerned with what to do about the slums). Many new black entrepreneurs who are locating in the ghetto recognize that they are benefiting from a community spirit to which they will have access only as long as they can distinguish themselves from traditional white operators. Being black, however, gives one a certain time lag before he is put to the test, and it is no more possible to say at this time whether black entrepreneurs will succeed on the social dimension than

it is to predict economic success for business-minded community organizations.

C. *Community Self-Determination Act: A Framework For Federal Legislation***

The differences in types of black economic development entities as well as the extreme variations in urban environment must be considered by the draftsmen of federal legislation aimed at ghetto economic development. A bill known as the Community Self-Determination Act introduced during the last Congress which would in fact have created a program for government sponsorship of community development corporations received broad bipartisan support, and will serve as a useful vehicle to illustrate some of the possibilities for federal relationships with community groups.[8]

It has been re-introduced during this congressional session. The bill represents a giant step forward from past poverty programs. Unlike the community action programs, this bill does not aim at funding federal community organizers, but attempts instead to encourage true ghetto-based organizations. No salary money at all is provided by the bill. Moreover, unlike the past community organization programs, this bill assumes a reason for organizing which transcends political and social education: namely, economic development which would create a new source of funding for community service activities. People of slum communities would be assisted "in their efforts to achieve gainful employment and the ownership and control of the resources of their community including businesses, housing, and financial institutions."[9] The bill's major weakness is that it consistently makes detailed decisions governing organizational form and strategy which reduce the possibility of flexible response to local conditions by community development entities.

The bill prescribes a procedure whereby an organization in urban or rural poverty areas can qualify as a National Community Development Corporation (NCDC). It establishes guidelines for organization and operation; it creates tax incentives and grants for the NCDC's

**Analysis of the bill is based in part on work with the business group of the Harvard Program on Technology and Society.

8 H.R. 18715, 90th Cong., 2d Sess. (1968), S. 3875, 90th Cong., 2nd Sess. (1968). In the following discussion, the bill will be referred to only by section.

9 Sec. 2(c).

themselves and for outside businesses which undertake certain projects in conjunction with NCDC's. (The bill also sets up a system of national community development banks to provide the financial services required by NCDC's and independent businesses in NCDC areas, but only the parts of the bill dealing directly with the urban NCDC will be discussed here.)

1. Formation of a Development Corporation

Procedure for initial formation of an NCDC is quite complex. The NCDC may be formed in any community whose "development index" is below a certain level as measured by comparing its unemployment rates and median income to the national average.[10] A national community corporation certification board (NCCCB) consisting of five persons appointed by the President is in charge of overseeing the certification procedure.[11] Any five or more individuals who would form an NCDC have to submit to the NCCCB a letter of intent describing the geographic area of the proposed community, articles of incorporation, and an organization certificate which contains statistics to indicate whether the development index is sufficiently low.[12] At the same time, the incorporators submit agreements to purchase five-dollar shares in the NCDC signed by five percent or more of community residents over sixteen years old.[13] Upon receipt of the necessary materials the NCCCB issues a conditional charter.[14] If the group can then obtain additional pledges to bring its total up to ten percent of the residents and collect $5,000 from at least 500 residents, a referendum is held to determine whether the majority of the community favors the establishment of an NCDC.[15] If the majority of those voting approves, the NCDC is eligible for a final charter and a grant from the NCCCB equal to the amount invested by shareholders.[16]

However, if more than one group is claiming to represent the same territory, a referendum is first held in the "potential community" which includes the contested territory as well as all additional areas claimed

10 Sec. 138.
11 Sec. 101-105.
12 Sec. 131-133.
13 Sec. 133 (c).
14 Sec. 135 (e).
15 Sec. 136 (a), 137 (a).
16 Sec. 137 (a), Sec. 140.

by competing groups.[17] Before any group can obtain a final charter, a majority of those voting in the potential community must favor the establishment of a CDC.[18] If such majority exists, the group with the largest vote becomes eligible for final certification, but if the majority does not vote in favor of the NCDC, a new referendum is held in the next largest geographical area described by an eligible groups' letter of intent, and the procedure is continued until a majority favoring the establishment of an NCDC is obtained, or the final proposal is rejected.[19]

Though the bill would have an impact on poor communities throughout the nation, its influence would be particularly strong in black slums. The formation procedure must therefore be judged in part by the response it would be likely to evoke from ghetto groups. In highly politicized and well-organized communities, militant groups (sometimes the only legitimate ones) might refuse to participate in a white-sponsored contest among the natives. The bill's provision (Section 135A) for branch offices in the ghetto to administer the referenda, would lend force to that view. When organizations strong enough to get 5% of the population to buy shares did participate, the referenda might create the bitterness that sometimes results from a formal public battle for the right to represent the community. It is not unimaginable that the referendum procedure could become a catalyst for violence.

In those communities where strong organizations were not yet in existence, there would also be some dangers. The bill seems to hypothesize the existence of a group of founders who are far-sighted enough to see what they could do with the seed money and tax advantages to be discussed below. The group would have to sell shares in a nonexistent venture to 10% of the community. And it would have to undertake a referendum campaign which is not valid unless 15% or more of the eligible residents vote[20] (a percentage above the average for Model City's elections where the federal carrot is even more in evidence). Moreover, the ghetto's real leaders have traditionally spurned public office. While the formation procedure does not exclude an entrepreneur with a business idea who hopes to gain a community

17 Sec. 137(b), Sec. 135(a).
18 Sec. 137(b).
19 *Id.*
20 Sec. 142(c).

following, it does force a tactic on him. He must win the community *before* he can try his business ideas.

The bill allows the possibility that subsequent CDC's may be formed in an overlapping area, but only three years after the formation of a pre-existing NCDC.[21] Even then the rival group must obtain pledge cards from 20% of the community and win the vote of 70% of the residents in a campaign for final certification.[22] The bill's careful time-consuming procedure (perhaps a year or more if there were contested referenda) follows necessarily from the decision to favor one NCDC per community.

2. Operation of the Development Corporation

The bill's provisions regulating corporate operations are as rigid as its formation procedures because the draftsman has in many instances taken the decision to resolve the tension between economic and social purposes, one way or the other. For example, the bill does not rely on economic return to stimulate the ghetto dweller's participation. Generally, no dividends may be paid on shares in the CDC, and shares may only be resold to the corporation, which repurchases them for the original five dollars.[23] No matter how many shares a man purchases, he gets but one vote.[24] Participation is to be encouraged through an interest in NCDC affairs stemming from the NCDC's hoped-for effect on the ghetto environment and possibly through preferential access for shareholders to NCDC services and facilities.[25] Since these $5 shares are the only class permitted to be sold,[26] a rigid capital structure, which may or may not be suited to its needs is imposed on the NCDC.[27] A community corporation which would rely on dividends for incentives (like Rev. Leon Sullivan's OIC program in Philadelphia) cannot qualify as an NCDC, although anomalously the bill applies state law relating to "business corporations".[28]

21 Sec. 143.
22 *Id.*
23 Sec. 120, Sec. 118. Dividends may be paid if after five or more consecutive years at a development index above 100 the corporation elects to be treated as a normal business corporation for tax purposes. Upon dissolution dividends may be paid proportionate to the length of time distributee was a shareholder.
24 Sec. 111 (e).
25 Sec. 116 (c).
26 Sec. 132 (a) 5.
27 *See* text preceding note 40, *infra.*
28 Sec. 110 (c).

A crucial question is the extent to which the NCDC will be able to go outside its own community for markets and resources. One critic of the bill has argued that the draftsmen intended to restrict the NCDC's business activity to the community it has defined for itself,[29] while one of the draftsmen has disclaimed any such intention.[30] The bill's language, though it could be cured by legislative history, favors the critic's interpretation. The NCDC is to have the power to own property wherever situated if such property is reasonably required for the operation of an individual proprietorship located in the community or for the operation of other named traditional type business entities within or without the community.[31] It also has the power to

> conduct its business, carry on its operations, have offices, and exercise the powers granted by this title throughout the community and elsewhere to the extent consistent with this title; . . .[32]

Initially, at least, it appears that it would be improper for an NCDC to conduct activities outside its community since the articles of its corporation must contain

> the precise boundaries of the geographic area within which the corporation intends to conduct its activities and a statement that the corporation shall be authorized and empowered to make such efforts within, but only within, the community so described, unless the boundaries of the community are enlarged or diminished by amendment to the article as provided by this title; . . .[33]

The articles may be amended by the traditional two-thirds vote of the shareholders, but only pursuant to procedures of general applicability prescribed by the NCCCB and only if the amended articles contain such provisions as might lawfully be contained in the original article at the time of making the amendment.[34] It is clear that no NCDC could lawfully define its community as the nation or the metropolitan area since in any event an NCDC is limited to a community of no more than 300,000 residents of 16 years of age or older.[35]

29 F. D. Sturdivant, *The Limits of Black Capitalism*, 47 HARV. BUS. REV. 122 (1969).
30 Macloughery, Letter to 47 HARV. BUS. REV. 43, 45 (1969).
31 Sec. 110(a) (4).
32 Sec. 110(a) (11).
33 Sec. 132(a) (3).
34 Sec. 122(a).
35 Sec. 110(b).

Even if the NCDC itself is not empowered to conduct activities outside its community, it could be argued that activities of its subsidiaries, wholly owned or otherwise, are not attributable to the NCDC.[36] Against the expanding notions of corporate "presence" this interpretation seems particularly strained and the spirit of the bill as a whole favors the more restricted interpretation. If the legislature does adopt the view that subsidiaries can operate freely outside the community, the rationale for the elaborate definition of a community to which the activities of the NCDC itself are confined and the reasons for confining the NCDC to drawing resources from that community are both undercut. Under the bill's present form, a non-resident may not buy shares unless he owns or operates a business in the community and then only after a two-thirds vote of the shareholders.[37] Thus sources of NCDC equity capital are restricted; an officer of an NCDC subsidiary operating outside the community would not be able to own shares in the parent unless he lived in the community. And if a shareholder moves out of the community and does not operate an enterprise located in the community, he will lose his voting rights.[38] The bill sets up a nine-member business management board (BMB) to direct the economic development activity, and all nine BMB members as well as NCDC officers must be residents of the community.[39] There is no good reason to impose this restriction on the source of the personnel. Many of the black community organizers and entrepreneurs operating in the ghetto, like WSO's full-time chairman or Boston's individual entrepreneur Archie Williams, have large grass-roots followings and work in the slums but reside elsewhere. And it is conceivable that community organizations might want to have non-residents on their boards in minority positions.

Through the use of subsidiaries, an NCDC might achieve some flexibility both in sources of capital and in ability to use financial return as an incentive. An NCDC subsidiary is permitted to pay federal income tax at a lower rate according to the degree of development of its area, as measured by its "development index."[40] In the most underdeveloped areas, an NCDC subsidiary would pay no tax on the first

36 Apparently Sturdivant does not consider this possibility.
37 Sec. 117 (a).
38 Sec. 118.
39 Sec. 113 (b), Sec. 114 (a).
40 Sec. 402 (b).

$50,000 income and could claim a surtax exemption of $200,000.[41] Since dividends from an NCDC subsidiary to the parent are 100% deductible,[42] this tax abatement would be of great value to a profit-making NCDC with a low development index. But in order for an NCDC subsidiary to qualify for the bill's tax benefits, all the subsidiary's shares must be held either by the NCDC or by the employees' pension, profit-sharing, or staff-bonus trusts qualified under section 401 of the Internal Revenue Code.[43] And if the NCDC were to forego the tax benefits, either by running the for-profit activities as part of the parent's operations, or by having the subsidiary stock held throughout the community, it would not have available the option of using financial incentive as a means to encourage participation in the NCDC's own activities. (In any event though shares in parent NCDC would presumably be exempt from the 1933 Act,[44] the subsidiary would encounter the same securities regulations problems as are discussed *infra.*)[45] Since the NCDC is a for-profit corporation, there could be no argument that any of its income is exempt under section 501 of the Code, so that a Type II or III CDC, described *infra*,[46] could be in a better tax position than an NCDC whether or not the NCDC relied on outside capital. Of course all the tax savings techniques available to a for-profit enterprise discussed *infra*,[47] would be available to the NCDC subsidiary.

In its requirement that the Business Management Board must allocate twenty to eighty percent of the after-tax income to social programs each year,[48] the bill has again made a decision which local realities might disapprove. For example, where existing government social programs are responsive to community pressure, it might be desirable to plow back 100% of profits into business expansion. Conversely, where a corporation desired to expand the number of shareholders in its community, it might want to spend the first several years'

41 *Id.*
42 Sec. 403.
43 Sec. 402(b).
44 Such shares might fall under Sec. 3(a)(2) of the Act which exempts securities issued by any person "supervised by and acting as an instrumentality of the Government of the United States" . . . or perhaps under the Sec. 3(a)(4) exemptions for non-profits.
45 *See* text accompanying notes 117-132 *infra.*
46 *See* text accompanying notes 76-110 *infra.*
47 *See* text accompanying notes 133-155 *infra.*
48 Sec. 119(a).

profits on social programs. Such a tactic in the initial period might lead to more after tax "income" in the form of share subscriptions than pure economic development could generate.

The bill's decisions regulating the board of directors afford another example of excessive detail. It is provided that a majority of the shareholders may remove the entire board of directors with or without cause[49] and where there is only one CDC per community chosen through the prescribed formation procedure, this provision may indeed afford a necessary prophylaxis; it would not do to saddle a community with a federally sanctioned despotism. But the organizations which take advantage of the federal procedure will have legitimated themselves in many different ways, with the result that procedural democracy will be more (or less) central to the parties concerned than to the draftsman. Some groups, for example, would be seriously inconvenienced by a procedure replacing a highly informal method of getting feedback — like drinking in local bars — by a responsibility to a formalized and changed constituency. Others might find it necessary to insure a minority — through cumulative voting, classification of shares, or more casual methods — that it would in all circumstances continue to have representation on the board. The bill further provides that the *size* of the board must vary directly with the size of community. The largest communities are to have a board with a mandatory minimum of 63 directors.[50] Such a large board would probably develop informal ways of accomplishing business, but such top-heavy management could hamstring operations.

The bill's decision in favor of broad citizen participation in one comprehensive community group brought the draftsmen dangerously close to attempting to make the ghetto safe for democracy. The bill sets up a procedure for federal examination of corporate records and requires filing of annual financial reports with the NCCCB;[51] so that even after the NCCCB branch leaves the community, the federal presence will continue to be felt. This is doubly unfortunate, because the traditional antipathy of businessmen for federal regulation will be reinforced by black suspicion of outside control. It is further provided that any aggrieved person may appeal to the NCCCB for failure of the corporation to distribute benefits in accordance with objective,

49 Sec. 112(g).
50 Sec. 112(b).
51 Sec. 126(c).

non-discriminatory, and equitable criteria described in the corporations by-laws.[52]

Given the bill's detailed regulation of corporate form and operation, possibilities for financial advantage should be the key factor for a group considering whether to attempt qualification as an NCDC. The four-pronged approach to subsidization is tax abatement, seed grants, turnkey programs, and planning funds. As the following discussion of possibilities for community capitalism under present law will suggest, a group may have a better tax position under existing code provisions than that afforded by the bill's tax abatement provisions. Initial seed money granted to a newly certified NCDC is to equal the amount paid for share subscriptions at the time of certification.[53] Even in the largest communities of 300,000, if ten percent of the community subscribes, the NCDC will only receive $150,000 — most of which will be required to pay organizational and administrative expenses previously incurred.

The turnkey program provides tax benefits to industry for building facilities and turning them over to NCDC's. Any firm which enters into a contractual relationship with an NCDC to build a turnkey facility benefits from:

1. A ten percent tax credit for wages and salaries of shareholder employees in turnkey facilities.
2. A tax credit equal to 15% of profits generated by the turnkey facility for five years after its sale.
3. Rapid amortization of turnkey facilities.
4. Exemption from recapture of investment tax credit for machinery and equipment in turnkey facilities.
5. Non-recognition of capital gains on sale of turnkey facility to the CDC if proceeds are reinvested in a new turnkey facility or in Class B stock of a community development bank.
6. Exemption from recapture of depreciation if the proceeds are reinvested in a new turnkey facility.[54]

By themselves, turnkey programs beg important social and economic questions; they can only work where a community vehicle capable of entering the turnkey partnership exists. Only the first two tax benefits depend on the continued success of the turnkey operaton, so that

52 Sec. 116(c).
53 Sec. 140(b).
54 Secs. 404-409.

a contractor who preferred to avoid arduous continued dealings with local groups could take a quick profit while leaving the community with no long-range economic potential.[55] Furthermore, reliance on such programs assumes that the desirable strategy will be construction of plant whereas in many instances the correct approach to the market is renting space while making expenditures for soft-ware such as advertising or a sales force.

The bill's major attraction for a community development organization is the amendment to Title IV of the Economic Opportunity Act of 1964 providing Small Business Administration grants to NCDC's for identification and development of new business opportunities, market surveys and feasibility studies, organizational planning and research, plant or facility design layout and operation, marketing and promotional assistance, and business counselling.[56] Such grants to an NCDC would allow it to pay a technical staff which would be responsive to its requirements. And the funds might provide an opportunity to train the NCDC's own staff in business skills. The NCDC might for example commission a marketing firm to do a study and hire a community nominee to supervise it.

3. A Preliminary Conclusion

It is by no means clear that the federal government has any role to play in coordinating the diverse approaches to ghetto institution-building being undertaken across the land. If, however, it is determined that federal assistance is dependent on the existence of a certified local group, it is nevertheless possible to achieve greater flexibility than is afforded by the Community Self-Determination Act. One way of doing so would be to abandon the concept of one CDC per community in favor of a pluralist model which relies much more on institutions tailored to meet local needs. An NCCCB would still have to certify any organization before it could become entitled to the benefits of being a National CDC. Any ghetto corporation could submit to the board a type of simplified prospectus on the basis of which it would sell shares at five dollars or more to the community, and specially streamlined federal conditions would offer the CDC an alternative to meeting its state's blue sky laws.

55 Note, *Community Development Corporations: A New Approach to the Poverty Problem*, 82 HARV. L. REV. 663 (1969).

56 Sec. 503.

If broadly-based community ownership were deemed important, the number of shareholders the prospective CDC would have to obtain could be different for every metropolitan area — a percentage of the total population of those areas having a low "development index." Perhaps only a schedule for ownership distribution over time should be required. Any group which obtained the requisite number of shareholders could qualify for certification if it were "controlled" by people in underdeveloped areas. Control could be defined so as to permit flexibility in financing. The CDC could organize as a for-profit or not-for-profit corporation, and the government would make seed money grants on the basis of $20 to 1 with safeguards in the case of for-profit enterprises to prevent profiteering by a few. The CDC could have as many classes of shares as seemed desireable. There would be no constraints on its internal organization. There might be five CDC's based in one community all of which were marketing products throughout the city. One might pay dividends, another would not.

There would be no federal presence in the ghetto since private sector auditing and bonding facilities would be relied on. The issuing group would be guaranteed its CDC status for two years with the right during certification to be given special priority in federal poverty programs. After two years the group would have to resolicit the purchase of shares and would continue to qualify as a CDC if:

a. the subscription drive resulted in the sales of securities to a number of persons equal to a given percentage of those who purchased prior to initial certification,
b. control was still retained by people in areas with a given "development index."

After the resolicitation, a CDC would continue to qualify as long as it retained a certain percentage of its second year shareholders and met the community control criteria.[57]

Whatever the government may do to encourage the development of community capitalism, decisions on what kind of ghetto institutions will develop and what directions they will follow will ultimately be made at the grass roots level. A decision by Washington in favor

57 Despite its thorough procedural safeguards, the Community Self Determination Act as presently written does not provide any criteria for determining when a CDC has failed, so that a group could continue to qualify for the benefits of NCDC status although its impact on the community was negligible or negative.

of one organizational form could only produce a series of attempted transplants which do not take root locally. While it seems premature to be putting forth a national model for ghetto development, federal legislation could doubtless affect the possibilities for ghetto economic growth by changing the legal environment.

II. PRESENT LEGAL CONTEXT

A prerequisite to determination of what legislation might facilitate the progress of the kinds of community development entities discussed above is a consideration of possibilites and constraints under present law. Many of the possibilities have never been tested, since the advent of an entity interested both in business and in social welfare is recent —a fact reflected in the traditional dichotomy between "poverty lawyers" and "business lawyers". The following discussion will investigate the impact of tax, corporate, and securities law on both non-profit and business corporations doing community development.

A. *Not-For-Profit Community Development Corporations (CDC's): Tax aspects*

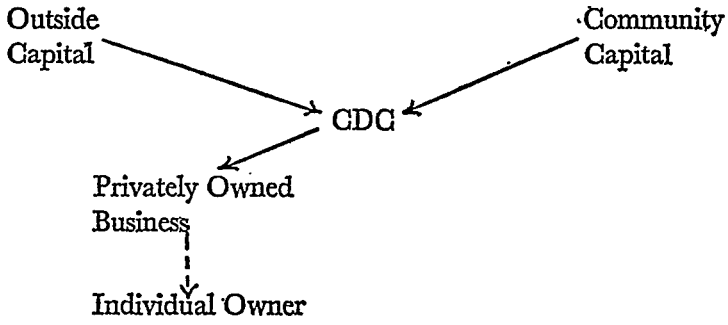
To illustrate the possibilities for flexibility in attaining corporate purposes through the non-profit form, three types of CDC will be discussed against the background of the tax code. A "type I CDC" generates privately-owned enterprises through grants, loans and financial counselling. None of the income of the individually owned businesses is returned to the CDC. A "type II CDC" generates business enterprises in which it retains the ownership interest. The income earned by the business it funds is returned to the CDC for further social and economic development. A "type III CDC" generates businesses in which it retains part of the ownership interest. Part of the business income returns to the CDC for economic and social development, and part returns to community investors.

1. "Type I CDC"

Let us first assume that a community based group is interested only in generating enterprises privately owned by community people through the provision of grants, loans, and financial counselling. The input would come from contributions by civic minded individuals within and without the community while the only take-out would be by

owners of the privately run businesses. None of the income generated would be ploughed back into the CDC for community development.

FIGURE 1: *CDC Type I — Generating Privately Owned Enterprises*



This type of CDC is the easiest to fit into the charitable exemption provisions of the code. The definition of "charitable" includes *inter alia:*

1. Relief of the poor and distressed or of the underprivileged.
2. Lessening of the burdens of government.
3. Promotion of social welfare by organizations designed.
   a. to lessen neighborhood tensions
   b. to eliminate prejudice and discrimination
   c. to combat community deterioration and juvenile delinquency.[58]

Contributions to section 501(c)3 "charitable" organizations are deductible up to a certain percent of the contributor's adjusted gross income,[59] and income from activities substantially related to the corporation's exempt purpose is not taxed.[60] Such organizations may not engage in political activities,[61] nor may any part of their net earnings inure "to the benefit of any private stockholder or individual."[62] Read literally, this latter limitation might be held to preclude exemption for a CDC which benefitted some individual ghetto residents, but the statutory proscription has usually been taken to forbid only indirect

58 Treas. Reg. Sec. 1.501 (c) (3) -1 (d) (2) (1959).
59 INT. REV. CODE OF 1954, § 170 (c) (2) and § 170 (b).
60 *But see,* discussion of provisions taxing unrelated income (Sec. 502, 511-513), text accompanying notes , *infra.*
61 *See,* Treas. Reg. Sec. 1.501 (c) (3) -1 (c) (3) (iii) (1959).
62 Treas. Reg. Sec. 1.501 (c) (3) -1 (c) (2) (1959).

benefits to member-contributors[63] and direct dividends to them on amounts contributed.

Although charitable organizations traditionally tax-exempt ministered to the immediate needs of the individual, there is no *statutory* reason for denying tax exemption to organizations aimed at lending an individual enough to start a business. It has never been a pre-requisite to exemption that the recipient of the benefits be totally impoverished.[64] Moreover, while the Congress has been concerned with the danger of unfair competition to existing businesses through the use of the charitable exemption, it dealt with the problem in 1950 by taxing unrelated business income of charitable exempt organizations[65] in a way not intended to affect the original question of eligibility for exempt status.[66] Of course, if the organization were to lend money to entities which would otherwise have sought and obtained conventional financing, exemption could be denied, not on some unfair competition theory, but rather because the organization's primary purpose would not be charitable — i.e. its funds would be used to duplicate a function adequately fulfilled by private enterprise.[67]

While there have been no cases or public rulings holding tax-exempt a business development CDC of the kind under discussion, there is a line of cases and rulings exempting organizations which attempt to place disadvantaged people in jobs through counselling and individual financial assistance.[68] And CDC's which offer more extensive financial aid in order to encourage business development have recently succeeded in obtaining exemption through private rulings.

A June, 1968 ruling, for example, granted exemption under section 501(c)3 to the Boston Urban Foundation, a trust organized to solicit public and private contributions which are to be distributed by loan

63 *E.g.*, Spokane Motorcycle Club 222 F. Supp. 151 E.D. Wash. (1963) holding that refreshments, goods, and services furnished to members of charitable nonprofit corporations from business enterprise net profits, constituted benefits inuring to individual members, and therefore corporation was not tax exempt.

64 Scofield v. Rio Farms, Inc. 205 F.2d 68, (5th Cir. 1953).

65 INT. REV. CODE OF 1954, §§ 511-13.

66 *Sen. Rep. No.* 2375, 81st Cong., 2nd Sess. 29 (1950).

67 *See, e.g.*, Veteran's Foundation v. U.S. 178 F. Supp. 234 (D.C. Utah 1959) aff'd. 281 F.2d 912.

68 *E.g.*, Rev. Rul. 67-150, 1967-1 CUM. BULL. 133, superseding IT 2088, III-2 CUM. BULL. 220 (1924). An organization dedicated to rehabilitation of convicted criminals obtained all its funding from contributions. It gave counselling and financial assistance, helped to secure employment, disseminated information. *Also* Rev. Rul. 56-304.

or grant to individuals and corporations to start new businesses in economically depressed areas of Boston. The exemption letter permits grants and loans to needy individuals who are unable to obtain needed funds through any conventional source, but it specifically reserves the question of whether grants or loans to firms, corporations, financial institutions and other entities are permissible.[69]

In January 1969, a similar New York group known as "Coalition Venture Corporation" obtained a slightly more liberal private ruling which permits the organization to aid corporations as well as individuals. The ruling is ambiguous on the question of whether grants as well as loans are to be permitted.[70] In any case only individuals or corporations unable to obtain funds through conventional financing may be considered.

How valuable are these section 501(c)3 exemptions to a CDC interested in ghetto economic development? To date almost all recipients of such rulings have been associations of concerned businessmen. Thus a major difficulty is that such rulings encourage a selection of "qualified negroes" by white outsiders who distribute funds raised and controlled by them. This dramatic manifestation of outside power operating directly on individuals may have the effect of fragmenting the community and weakening internal attempts by a grass roots CDC to organize. Of course where strong community organizations already exist, the intervention might be met with such resistance that some way of working through the local organizations will be found. A Boston group known as FUND which obtained a ruling similar to that of the Boston Urban Foundation discussed above, confronts the problem by turning over the bulk of the money it raises to the United Front, a coalition of most significant Roxbury community organizations.[71] Also there is no apparent reason why a community based

69 I.R.S. exemption letter to Boston Urban Foundation, June 24, 1968.

70 The letter seems to assume throughout that loans and not grants are to be employed. For example if "a business that you financially assist cease(s) to be compatible with your purposes in that it will primarily serve some private interest, you will withdraw your financial assistance either by exercising a buy-out privilege or by arranging for refinancing." But elsewhere the letter explicitly allows: "You will make your loans and grants available to all qualified individuals on a non-discriminatory basis."

71 While the Boston ruling provides that "The screening of applicants will be conducted *under the direction* of your organization," the New York letter requires that "The screening of applicants and the determination of the recipients of loans will be conducted *by* your Board of Directors." (Emphasis added.)

group could not itself qualify for section 501(c)3 exemption.[72]

A problem with the Boston rulings is their limitation to needy individuals. Admittedly, the ability to get its supporters started in business could enhance the strength of a community organization, but many black groups are interested in projects, which are on a much larger scale than the individual proprietorship, and which offer opportunity for broad scale community participation. The adverse effect of the "needy individual" restriction can be mitigated somewhat by the individual's incorporation after receipt of the grant.[73] In any case, the limitation seems to be absent from the more recent rulings.

To be sure, a section 501(c)3 exemption could be quite valuable to a community-based CDC which had access to funding through contributions. Though almost any community organization will be highly political, it should not be too difficult to avoid running afoul of the prohibition against exemption for "action" organizations.[74] Funding for political campaigns and the like could be handled through a separate organization, and community organizers when acting politically would do so in their private capacity.[75] Nevertheless community groups dedicated to economic independence would by definition seek to end reliance on outside contributors as soon as practicable.

2. "Type II CDC"

While funding of privately owned businesses does offer some hope of eventual economic independence, it is evident that the developmental process would be greatly speeded if profits from CDC-funded businesses were available for community purposes. One way to insure the return of profits would be for the CDC to own the businesses it funds either as subsidiaries or as integral parts of one multipurpose corporation. Such a CDC might look like this:

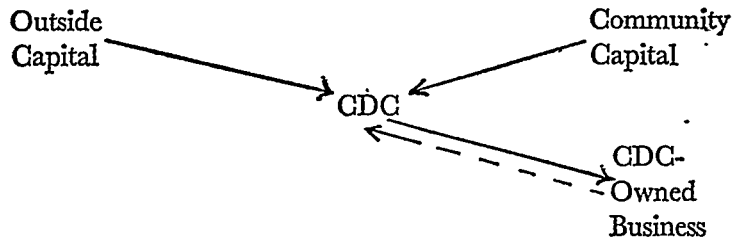
72 Detroit's Inner City Business Improvement (ICBIF), although not engaged in grass roots community organizing is an all black group which possesses a § 501(c)3 exemption. The United Front itself has submitted an exemption application.

73 Telephone interview with Ralph Hoagland, a founder of FUND.

74 Treas. Reg. § 1.501(c)(3)-1(c)(3).

75 The exemption in § 501(c)4 for "civic" organizations places even fewer restrictions on political activity but has not been discussed here because contributions to a civic organization are not deductible (Sec. 170).

FIGURE 2: *Type II—Ploughing back "unrelated" income*



This type of CDC has great advantages over the previously discussed form. Not only is a greater degree of independence built in, but also, community owned projects offer opportunities for stimulating community pride and mobilizing community support for incipient economic ventures

a.) *The § 501(c)(3) Exemption*

The probable tax treatment of the "type II CDC" can be discussed only after a closer examination of the statutory environment. Prior to 1950, many organizations were involved in income-generating business activities unrelated to their exempt purpose. A series of cases in which the IRS attempted to challenge this practice had held that the determinitive test of the availability of the exemption was the destination of the income, and not its source.[76] In 1950, however, responding to well publicized abuses, Congress enacted amendments to the code which aim at taxation of "unrelated business income". (The present secs. 511-514.)

The amendments impose a normal tax and surtax on the gross income of any unrelated trade or business regularly carried on by the exempt organization. And the trade or business is deemed unrelated if it is

> not substantially related (aside from the need of such organization for income or funds or the use it makes of the profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis of its exemption under sec. 501. . . .[77]

76 *See, e.g.*, Trinidand v. Sagrada Orden, 263 U.S. 578 (1924).
77 INT. REV. CODE of 1954, § 513.

But in no case is a trade or business to be deemed unrelated where substantially all the work in carrying on the trade or business is performed for the organization without compensation, where certain types of organizations carry on business primarily for the convenience of their members, or where an organization sells merchandise substantially all of which has been received as gifts or contributions.[78] Even where the income is from an "unrelated trade or business", it is not seen as "unrelated business taxable income", and therefore not subject to tax if it is "passive" income from dividends, interest, annuities, royalties, certain rents from real property (including personal property leased with real property) or gains from the sale of capital assets.[79]

The 1950 amendments also foreclosed the possibility of channelling business profits to charities through the device of "feeder" subsidiaries. Thus, an organization operated for the primary purpose of carrying on a trade or business for profit is not itself exempt under section 501 on the ground that all its profits are payable to a section 501 exempt organization. For a CDC which is interested in economic rehabilitation of a community, these sections dealing with unrelated business income and feeder organizations are of particular importance.

b.) *The § 501(c)(4) exemption*

An alternative for a Type II CDC is the possibility of exemption under 501(c)4 of the code as a "civic" organization. Although a (c)4 exemption would probably be available for a Type I CDC,[80] the exemption would be of little value to it since contributions to an exempt civic organization are not deductible under sec. 170. Here, however, the CDC hopes to plough back income, and the unrelated business income provisions do not apply to (c)4 organizations. Thus, it might be argued that a Type II CDC has a trade-off between deductibility of contributions with taxation of unrelated income under 501(c)3 or non-deductibility of contributions and exemption of unrelated income under 501(c)4. Unfortunately, there is no reason to believe that a CDC could so easily escape taxation of business income by choosing the second alternative, since the IRS would be able to argue: first, that the CDC is *both* a (c)3 and a (c)4 organization and thus subject

78 *Id.*

79 *Id.*, § 512(b). *See*, U.S. v. Myra Foundation, 382 F.2d 107 (8th Cir. 1967), holding that these terms are to be defined by state law.

80 Rev. Rul. 67-294, 1967-2 CUM. BULL. 193.

to sec. 511-514, or second, that the CDC loses its exemption because it is organized for profit and not *exclusively* for the 501(c)4 exempt purposes of promotitng social welfare and the like. The latter argument is particularly strong since the failure of Congress to include (c)4 organizations within the business income provisions might suggest that unrelated business income is more noxious to a 501(c)4 exemption than to the 501(c)3 status. It will therefore be assumed in the discussion below that risks to a CDC engaging in reinvestment of business profits are at least as great under 501(c)4 as under 501(c)3.

If it is an exempt purpose to create job opportunities and upward mobility in the ghetto through the funding of black businesses (as in the case of a Type I CDC) a Type I CDC converting to Type II CDC activities might argue that businesses owned and operated by the CDC are not unrelated to its exempt purposes — that is, that there is a substantial causal relationship between the *conduct* of these businesses and the purpose of ghetto rehabilitation through business building.[81] The regulations contemplate that

> An organization may meet the requirements of section 501 (c) 3 although it operates a trade or business as a substantial part of its activities, if the operation of such trade or business is in furtherance of the organization's exempt purpose or purposes and if the organization is not organized or operated for the primary purpose of carrying on an unrelated trade or business as defined in section 513.[82]

And although the regulations practically leave it to the case law to decide the meaning of "unrelated" they do provide that where an organization is engaged in a program of rehabilitation of handicapped persons, income from sale of articles made by such persons as part of their rehabilitation training and sold in the state of manufacture will not be gross income from the conduct of unrelated trade or business.[83] By analogy, the argument would run, a Type II CDC is conducting businesses for the purpose of training the hard core unemployed, and the consequent opportunities for dramatic upward mobility, creation of success models for youth and stimulation of com-

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81 Treas. Reg. Sec. 1.513-1 (d) (2) (1967).
82 Treas. Reg. Sec. 1.501 (c) (3) -1 (e) (1959).
83 Treas. Reg. Sec. 1.513-1 (d) (4) -Example (3) (ii) (1967).

munity morale all further the exempt purpose; indeed one of the CDC's exempt purposes is getting businesses started.

The legislative history of the unrelated business income provisions does not foreclose this line of argument;[84] and the IRS has been consistently beaten when it has attempted to argue that a business operated like a commercial enterprise is *ipso facto* "unrelated."[85] For a type II CDC with access to legal help this argument is one worth making.

Nevertheless, cases and rulings to date are not particularly helpful to a Type II CDC which would argue that its business income is not unrelated. An organization which sponsored sports events was held to be exempt under both (c)3 and (c)4 and not to have any unrelated business income where it was chartered as a non-profit, where children

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84 According to Sen. Rept. No. 2375:

> The problem at which the tax on unrelated business income is directed is primarily that of unfair competition. The tax-free status of section 101 organizations enables them to use their profits tax free to expand operations, while their competitors can expand only with profits remaining after taxes. Also, a number of examples have arisen where these organizations have in effect used their tax exemptions to buy an ordinary business. That is, they have acquired the business with little or no investment on their own part and paid for it out of installments — a procedure which usually could not have been followed if the business were taxable. SEN. REPT. No. 2375, 81st Cong., 2nd Sess. 28 (1950).

But some income for tax exempt entities and therefore some competition was obviously contemplated where income was generated by a business related to the exempt purpose. For example, as Sen. George of Georgia, Chairman of the Committee on Finance was explaining the 1950 amendments proposed by the House, he engaged in the following dialogue:

> Mr. Butler: . . . Sec. 422 levies regular corporation taxes on unrelated activities of Section 101 exempt institutions. In that regard, would the distinguished chairman say that a tax-exempt organization which has built a new building that cost $100,000 and is advertising daily inviting the general public to patronize its dining rooms, bars, and overnight room accommodations, is subject to the tax?
>
> Mr. George: Whether or not it is a related activity is the question on which its taxability would turn. If it is a related activity — but I am not certain in the case stated by the distinguished Senator from Nebraska that it is related — that after all is the determining question. If it is an unrelated activity of course it does fall within the taxable class. 96 CONG. REC. 13273-75, 81st Cong., 2nd Sess. (1950).

85 Note: *The Macaroni Monopoly: The Developing Concept of Unrelated Business Involvement of Exempt Organizations*, 81 HARV. L. REV. 1280 (1968).

got into events at reduced rates, and where there had been operating losses for several years.[86] And similar good luck smiled on a business league's income from trade shows.[87] A charitable organization fared worse where income from the operation of orchards and farms by its employees was held to be from an enterprise not related to the charitable purpose.[88]

As the above small sample of cases indicates, whether income is taxable as "unrelated" has been decided on an *ad hoc* basis. While the area is thus ripe for a test case, it would be difficult to limit the issue to taxation of a CDC's unrelated business income. Rather the IRS would be likely to attack head-on by arguing that the CDC itself is not tax exempt because it is not operated "exclusively for" exempt purposes. The practice has been for the IRS to take a wholistic approach, interpreting the "exclusively for" language in sections 501(c)3 and 501(c)4 as limiting the *amount* of business activity as opposed to the purposes for which income may be used.[89] This IRS practice is reflected in the fact that during the first year the sections operated, only $37 of unrelated business income was collected, and through 1965, the annual amount never exceeded $2000.[90] Even if the benefit of tax free income from its economic activity were not available to a Type II CDC exempt under section 501(c)3, the (c)3 exemption would still be valuable since the CDC would continue to qualify for tax deductible contributions under section 170 and tax free sales of its capital assets.[91] But if there is a substantial danger of losing exempt status altogether, a given CDC might be well advised to limit profit generating activities to wholly separate entities — that is to fall back to the simpler Type I CDC.

c.) *Creation of "for-profit" subsidiaries*

It might be thought that a CDC could limit the danger of a head-on attack by spinning off for-profit activities to subsidiaries, since then

86 Mobile Arts and Sports Assn. v. U.S. 148 F.Supp. 311 (D.C. Ala. 1957).

87 *Orange County Builders Assn.* v. *U.S.* F.Supp. (D.C. Cal. 1965), held that the trade shows operated by a professional producer of trade shows who turned over a percentage of the profit to the organization were directly and substantially related to the organization's exempt purpose.

88 Rev. Rul. 58-482, 1958-2 CUM. BULL. 273.

89 Note: *Preventing the Operation of Un-taxed Business by Tax Exempt Organizations,* 32 U. CHI. L. R. 581 (1965).

90 G. D. Welsten, *Effect of Business Activities on Exempt Organizations,* 43 TAXES 77 (1965).

91 INT. REV. CODE of 1954, § 512(b) (5).

each sub would be attacked separately as a feeder organization having a "primary purpose of carrying on a trade or business." Because the test of "primary purpose" turns on whether the sub's activity is one which would be "unrelated" if carried on by the parent,[92] a Type I CDC could convert to Type II and raise the narrow issue of relation without risking its exemption. But the IRS has insisted that the extent of unrelated activity is some evidence of exempt purpose whether carried on by the parent or a subsidiary, and the legislative history indicates an intention that tax results should be the same whether activity is conducted by a parent or a sub.

What those results should be is a matter of some discussion. A senate report on the 1950 amendments stated that the tax imposed on unrelated income was not intended to have any effect on the tax exempt status of the organizations. Present exemptions were to be preserved, and any reasons for denying exemption prior to enactment of the amendments would continue to justify denial after passage.[93] While Congress did not consider the unrelated income provisions the exclusive weapons for attacking an exempt organization engaging in business, it eschewed the intention of adding new weapons to the IRS arsenal. Nevertheless, since 1950 the courts have frequently revoked an organization's exempt status where there was substantial unrelated income.[94]

In *Scripture Press Foundation v. U.S.*,[95] the court denied exemption to a printing foundation originally established by two persons interested in religious education in order to improve the quality of religious teaching materials. Although the foundation engaged in door to door evangelism, as well as free instructional work, without promoting sales, the court was unimpressed:

> We think that plaintiff's assertion that its instructional activities are more important to plaintiff than its selling activities is entirely sincere. . . . However, the intensity of religious convictions of the plaintiff's members and officers can not operate to exempt them from the tax law if the activities of the plaintiff can not in themselves justify such an exemption. Piety is no defense of the assessments of the tax collector.[96]

92 Treas. Reg. Sec. 1.502-1 (b) (1958).
93 SEN. REPT. No. 2375, 81st Cong. 2nd Sess., 29 (1950).
94 *See, supra* note 89.
95 285 F.2d 800 (1961).
96 *Id.* at 804.

That said, the court then compared how much plaintiff accumulated with how much it expended for instructional activities and, finding the latter amount "unaccountably small", asked:

> Can it be said of the plaintiff's competitively priced lesson material that financial gain was not the end to which its sale was directed? Can the impressive earnings which the sale of the lesson materials has brought the plaintiff be said to be incidental to the plaintiff's primary work?[97]

The court reasoned that competitive pricing leading to profits is some evidence of "commercial character". It then inferred that if profits from commercial activity become large enough, exempt activity is no longer the organization's primary purpose so that exempt status must be denied. While the court explicitly rejected a suggestion that large profits dictate the conclusion that an organization is *ipso facto* noncharitable, it did seem to maintain that profits mean *some part* of an organization's activities are noncharitable and that the only remaining problem is to weigh the profit-generating activity against the exempt activity to determine which is the primary purpose. With due respect, the code, regulations, and legislative history suggest that profit-making activity may indeed be related to an exempt purpose, and it is difficult to see how the amount of profit can bear on the issue of exempt purpose if that profit is generated by a "related" business.

In *Peoples Educational Camp Society Inc. v. CIR*,[98] exemption was likewise denied on the grounds that excessive profit-making negated exempt purpose. But the court gave more attention to the question of whether the income-generating activity was related to the exempt purpose. The main activity of the plaintiff socialist organization was running a resort camp. It also ran a library, published the *New Leader*, and sponsored lectures. The only issue was whether petitioner's operations were exclusively of a social welfare nature. While the court conceded that the non-camp activities served to promote the exempt purposes, lectures, plays, and art exhibits at the camp were said not to involve social welfare at all:

> They were simply part and parcel of (the camp's) operation as a commercial resort and were necessary features of a luxury vacation spot catering to a young adult intellectual clientele.[99]

97 *Id.*
98 331 F.2d 923 (1964), *affirming* 39 T.C. 756, *cert. den.* 379 U.S. 839.
99 *Id.* at 931.

The camp's "cultural activities" were not sufficient to justify the conclusion that the camp was operated for exempt purposes given the court's finding that they were no more beneficial to the community as a whole than the golfing, swimming, and dancing activities. It appears that the Society was in no position to press the argument that the camp was a business related to its exempt purpose. Neither this case nor *Scripture Press*, however, forecloses the possibility that a Type I CDC could undertake Type II activities and still win on the issue of relation of business income to exempt purpose. In *Scripture Press* the issue of relation was not reached, and a CDC would have a much stronger case for the relationship of its Type II activities than had the socialist camp. The New York "CDC" discussed above would have to show, for example, that its businesses were substantially related to an exempt purpose "of promoting social welfare by combatting community deterioration and lessoning neighborhood tensions in impoverished communities of metropolitan New York."[100]

Both cases threaten improperly that a Type II CDC, even if it is contemporaneously involved in Type I and traditional social welfare activities, will lose its tax exempt status if it does fail to win the relational issue. In *Peoples Educational Camp*, for example, after admitting that the word "exclusively" in the statute has been interpreted to mean "primarily", the court cited a case from the period before the 1950 amendments for the proposition that a single non-exempt purpose, if substantial, will destroy the exemption, regardless of the number or importance of truly exempt purposes.[101] Not only is the proposition irreconcilable with any accepted meaning of the word "primarily", but the case cited for the proposition was dealing with exemption from tax under the Social Security Act. The source of the organization's income was there not in question, but only its destination. Prior to 1950, however, the *source* of income was not considered to bear on the issue of purpose. And since the Congressional intent was to create no changes in pre-1950 criteria for exemption, there can be no foundation for assuming that if an exempt organization runs an "unrelated" business, its purpose is *pro tanto* non-exempt. The existence of "unrelated business income" however large is no evidence on the issue of exempt purpose.

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100 Coalition Venture Corp., exemption letter, *supra* note 70.
101 Better Business Bureau v. U.S., 326 U.S. 279 (1945).

Even if a "source" test is imposed on a Type II CDC, and even if it is found that all the CDC's businesses are "unrelated", the CDC might still argue that its primary purpose continues to be the exempt one of ghetto economic rehabilitation. It is conceivable that a business may not be able to meet the statutory test on relation and yet be complementary to an exempt purpose — as where a religious educational organization runs a printing company (but not a shoe factory). Conversely, a "related" business may be such that it is some evidence of a non-exempt purpose — as where a group is organized to promote love of sports and engages in the business of sponsoring sports events so that a founder may have an expanded market for his popcorn company.

d.) *Sale and leaseback*

Because the two cases criticized above substitute a "source test" for the traditional "destination test" of exemption, they could cause a Type II CDC to lose its tax exempt status. But there is a way of reducing the risk substantially if a CDC is willing to make certain minor adjustments to organizational form. The key to success lies in the fact that section 512 excepts from the definition of "unrelated business taxable income" all interest, and all "rents from real property (including personal property leased with the real property)."

A CDC wishing to take advantage of these exceptions could buy a business and then lease its tangible assets for five years to a new corporation formed by community people or by the present operators. The new corporation would pay eighty to ninety percent of its net profits to the CDC as tax deductible rent and the CDC would pay the sellers eighty to ninety percent of amounts received from the new corporation. Sellers could elect the installment method and pay capital gains tax on the portion of each payment representing profit.[102] At the end of the period, the new corporation might exercise an option to purchase. At all phases, the original owner could take back the business on default. There would be no risk to the CDC, and the sellers would be able to get a higher price than the normal fair market value since the CDC's exemption would allow it to project a tax free income stream.

If the CDC wished to retain ownership after five years, it could

102 W. G. O'Neil, *Sales of businesses to charities—The Brown case and its aftermath*, 43 TAXES 508 (1960).

avoid granting a purchase option and instead grant a new lease. Obviously, control would be much less certain than if the CDC owned all the lessee business's stock — a luxury it could not afford if it wanted to avoid the "source test" problem. A shorter than five year lease might make it difficult to find a seller and, if tantamount to "control", might be sufficient to revive the "source" test of exemption. A longer than five year lease would subject the CDC to the business lease tax of section 514. In most instances, however, it would seem possible to build in all the *de facto* control desired through pre-selection of directors, private assurances, and the like.

As might be imagined, the IRS looks askance on this type of "trading on the charitable exemption".[103] Presumably the practice will come under review during the present discussion of tax exempt foundations. In the meantime, the IRS has essayed various attacks on the matter and has been defeated on all fronts. The commissioner's argument that capital gains treatment for the seller should be disallowed was defeated in the leading case of *Clay Brown*.[104] In *Emmanuel N. (Manny) Kolkey*,[105] where the commissioner did succeed in denying the capital gains treatment, the sales price was almost four times the fair market value; the transaction was collapsed; and the business was retrieved by the former owner within one year after the purported sale.

When the commissioner attempted to contend that rental payments should not be deductible by the new operating company he was uniformly defeated.[106] In one rare IRS vitcory, *Royal Farms Dairy Co.*,[107] the court held that to the extent amounts denominated "rents" exceeded a fair rate of rental, such amounts were not required to be paid as a condition to continued occupancy and hence were not deductible. Normally the reasonableness of the rents would not be an issue, but because of a specific finding of fact that there was no negotiation — arms length or otherwise — on the lease, the court reached the

103 Rev. Rul. 54-420, 1954-2 CUM. BULL. 128.

104 37 T.C. 461 (1961), *aff'd.* 380 U.S. 563 (1965).

105 27 T.C. 37 (1956), *aff'd.* 254 F.2d 51 (1958).

106 *See* Union Bank v. U.S., 285 F.2d 126 (Ct. Cl. 1961); Estate of Hawley, 20 T.C.M. 210 (1961); Isis Windows, 22 T.C.M. 837 [government's appeal dismissed pursuant to stipulation (9th Circ. 1965)] (1963); Oscar C. Stahl, 22 T.C.M. 966 (1963), *cert. den.*, 379 U.S. 836; and discussion in K. C. Eliasberg, *What is behind the current IRS attacks on subsidiaries of exempt organizations?*, 26 J. TAX. 236 (1967).

107 40 T.C. 172 (1963).

question of reasonableness. A CDC could avoid the *Royal Farms* result by bargaining on lease terms with the new company. In any event it would be difficult for a court to find a percentage rent unreasonably high where a history of fluctuating earnings introduced a risk element.

The commissioner has been handed his most recent defeat in *University Hill Foundation v. Commr.*,[108] where he attacked the status of a 501(c)3 organization which had engaged in numerous purchase and lease-back transactions as part of its efforts to raise funds for Loyola University of Los Angeles. Reviewing the legislative history, the court emphasized the twin Congressional objectives of avoiding unfair competition and undue impairment of fund raising. It noted that Congress had been concerned with purchase lease-back operations by charities at least as early as 1950; that attempts to deal legislatively with the problem in ways other than withdrawing exempt status had been proposed but had never reached fruition. Additionally the court noted that prior to the 1950 amendments petitioner would have been exempt under the destination of income rule. The court then found section 502 tax of "feeder" organizations inapplicable since the foundation was not carrying on a trade or business, rental of real property including personal property leased with real property being excluded from the section 502 definition of trade or business. The foundation had no control abnormal to the status of lessor. A similar analysis was applied to the exception of rents from the unrelated business income provisions. Five judges filed strong dissents in which they argued that the continued activity of acquiring and leasing so many businesses was itself "carrying on a trade or business" within the meaning of sec. 502, despite the specific exception for rent therein. They would have limited the exception to a more normal renting of real property with incidental personal property.

3. Type III CDC

While it is possible that legislative reform may eliminate the opportunity for purchase and lease-back transactions, this should not obscure the fact that what present tax law permits is in reality a third type of exempt CDC.

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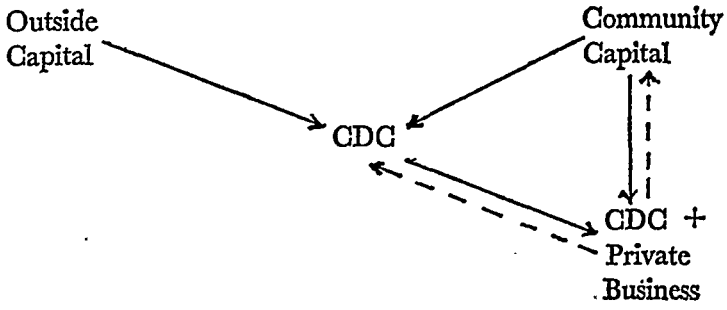
108 51 T.C. No. 54 Ch. Tax. Ct. Dec. 29, 407 (1969).

FIGURE 3: *Type III CDC*



The Type III CDC not only makes it possible to plough back funds for reinvestment but also permits the use of financial return as an incentive to community investment. Substantially the same result which the purchase lease-back transaction makes possible might be obtained, with less *de jure* CDC control, through reliance on the exception of "interest" from the sec. 512 definition of "unrelated business taxable income". A business which borrowed from a Type III CDC could deduct interest costs under I.R.C. sec. 163; and it is likely that a high ratio of debt to equity could be sustained against a "thin incorporation" attack by the commissioner.

Since *Gooding Amusement*,[109] courts determining the availability of the interest deduction to a corporate taxpayer have considered controlling the intention of the parties creating the obligation as evidenced by surrounding circumstances. Valid business reasons and the absence of pro rata holding of debt and equity have been taken to justify a ratio of approximately seven hundred to one.[110] In the case of ghetto businesses, with equity money particularly difficult to obtain, there is a strong argument that valid business reasons exist for a "high" debt-equity ratio. The Small Business Administration itself recognizes this reality, to an extent, when it provides debt of seven times equity for minority businesses. The gravamen of equity is participation in the growth of a business; an attack by the commissioner would thus be particularly weak where the CDC held no common stock and received a fixed return on debt.

109 236 F.2d 159 (6th Cir. 1956), *cert. den.* 352 U.S. 1031.

110 Baker Commodities, 48 T.C. 374 (1967). See also Rowan v. U.S., 219 F.2d 51 (1955), Leach Corp. v. Commr., 30 T.C. 563 (1958).

B. *Other Aspects of Non-profit CDC's: Corporate and Securities Problems*

Whatever path is followed by a CDC interested in business development, the provisions of state corporation statutes dealing with non-profit corporations will not generally be constraining. For corporate purposes, "non-profit corporations" traditionally means a corporation no part of the income or profit of which is distributable to its members, directors or officers.[111] Profit is contemplated for corporate purposes; only its use is restricted. The Model Non-Profit Corporation Act provides that corporations may be organized for any lawful purposes including *inter alia* educational, civic and charitable.[112] Stock may not be issued, nor any dividends paid,[113] but in none of the CDC types herein discussed would it be necessary for the CDC to pay dividends. If a CDC desired to rely on financial return as incentive to participation, the Model Act would seem to leave open the payment of dividends by a CDC affiliate to the affiliate's shareholders, as long as the CDC itself offered no return for contributions.[114] Within the general powers of a non-profit under the Model Act are the powers

> to lend money for its corporate purposes, invest and reinvest its funds, and take and hold real and personal property as security for the payment of funds so loaned or invested.[115]

Constraints may vary from state to state, but the flexibility provided by the Model Act is not unusual.[116]

Neither the 1933 Securities Act nor the Uniform Securities Act would regulate the "sale" of a right to vote in the parent CDC in return for contributions made.[117] A mere right to vote, without participation in profits or right to distribution upon liquidation would

111 Model Non-Profit Corporation Act, ALI-ABA Sec. 2(c). Since a fifty state analysis is beyond the scope of this paper, the Model Act will be used as a basis for discussing state law. The laws of Wisconsin, Ohio, Ala., N. Carolina, Virginia, Illinois, Minn., and Mo., approximate the Model Act. In California, Delaware, Georgia, Kentucky, Mich., Miss., Okla., Vermont, and W. Virginia there is one statute for profit and non-profit corporations. New York and Pennsylvania require court approval of a non-profit charter. L. Haller, *The Model Non-Profit Corporation Act*, 9 BAY. L. R. 319 (1957).

112 MNPCA Sec. 4.

113 MNPCA Sec. 26.

114 R. S. Lesher, *Non-Profit Corporation: Neglected Stepchild Comes of Age*, 22 BUS. LAW. 951 (1967).

115 MNPCA Sec. 5(i).

116 Some state non-profit corporation statutes do not deal with the power to engage in income-generating activity, but define "purpose" quite broadly. *See, e.g.* MASS. GEN. LAWS, ch. 180, § 2 (1955).

117 Although state blue sky laws vary greatly, the Uniform Securities Act will be used to focus discussion.

probably not fall within either act's broad definition of "security".[118] But in any case, both acts exempt securities "issued by a person organized and operated not for private profit but exclusively for religious, educational, benevolent, charitable" or other named purposes of similar nature.[119] The exemption would be broad enough to cover securities issued by a CDC in a related business affiliate if the word "exclusively" were seen as meaning "primarily" as it does for tax purposes. But a major purpose of securities regulation is to protect the unsophisticated investor, and there is every reason to assume that federal and state agencies would interpret "exclusively" to mean "solely".[120]

Potentially the most serious legal constraint both for the related business affiliate of an exempt CDC and for a for-profit corporation interested in community development are the federal and state securities regulation laws.

Unless a corporation were prepared to rely on the capital of a few sophisticated investors, the substantial costs of SEC registration could become the price of broadly based community ownership. The SEC has the power to exempt an issue offered to the public at $300,000 or less,[121] but even the Regulation A offering authorized under this power involves a rather complicated filing and may entail expenses of $5,000 or more. For a new ghetto business, the prospect of Federal regulation and the difficulty of providing the information required may prove a serious impediment to beginning operations.[122]

118 *See,* Uniform Securities Act, Sec. 401 (1); Securities Act of 1933 Sec. 2 (1), 15 U.S.C. § 77b (1) (1964).

119 Uniform Securities Act, Sec. 402 (a) 9; *see also,* Securities Act of 1933, Sec. 3 (a) (4), 15 U.S.C. § 77c (a) (4) (1964).

120 Interview with Prof. Louis Loss, Harvard Law School, Mar. 18, 1969.

121 Securities Act of 1933, Sec. 3 (b), 15 U.S.C. § 77c (b) (1964).

122 According to William Jackson, general counsel to Fairchild Hiller Corporation which was starting a manufacturing operation in cooperation with "Fairmicco" a ghetto organization: "Securities laws will hit anyone getting involved in this kind of thing. We initially went to the SEC on behalf of Fairmicco asking for exemption from the 1933 Securities Act to market shares to the public. It is possible to get such an exemption but not probable. They said they would take this and all other similar requests and formulate a general rule—a rule which would cover exemptions in situations similar to Fairmicco's. They did not get to that but did come out with a proposed rule under the Small Business Act for local development corporations. Informally they told us that the best thing to do was to file under Regulation A. They would not cut corners but would bear in mind the unusual purpose of the business. The SEC has been excellent to deal with. They have gone out of their way to be helpful." Telephone interview with Mr. Jackson, April 14, 1969.

If a corporation did not wish to meet the Regulation A filing requirements, it might choose to rely on the exemption in section 3(a)11 of the Act for

> any security which is a part of an issue offered and sold only to persons resident within a single State or Territory, where the issuer of such security is a person resident and doing business within, or, if a corporation, incorporated by and doing business within, such a State or Territory.[123]

The intrastate exemption, however, is a shaky one on which to rely. A single offer to a non-resident destroys the exemption for the entire issue, as does a secondary sale by an investor before completion of the ultimate distribution.[124] Particularly troublesome in cities bordering on other states[125] would be the requirement that a purchaser be a resident. Although criminal suit by the Commission is not a serious danger here,[126] a class action for recission and damages under section 12(1) of the Act poses a substantial risk.[127]

A final possibility for a community business seeking to avoid federal securities problems is to eschew the use of jurisdictional means — that is to avoid using either the mails or any instrument of interstate commerce in making the distribution. This method of avoiding federal securities regulation is impractical for normal business operations since both direct and indirect use of the jurisditional means brings a corporation within the Act. When shareholders pay by mail or by check for example the Act would apply.[128] A community organization, however, might drum up interest door to door or at public meetings and only make sales in person for cash at its community office. Subsequent use of the mails or telephone for corporation business should not subject the issue to the Act.[129] In any event, only a person who purchases a security sold by the jurisdictional means can recover under section 12 of the Act. And as a practical matter it would be difficult for the SEC to make a case under Section 17 which provides for criminal sanctions.

All of the possibilities for avoiding regulation present difficulties; and one might have suspected that the SEC would be drafting more

123 15 U.S.C. § 77c(a) (11) (1964).
124 L. Loss, SECURITIES REGULATION 592 (1961).
125 *Id.*
126 *Id.* at 603.
127 *Id.* at 605.
128 *Id.* at 1524-1528.
129 *Id.* at 1525.

simplified procedures to deal with ghetto based businesses. Indeed a proposed Rule 237 which has not been promulgated would have waived the full requirements of Regulation A for companies qualified as Local Development Corporations under section 502 of the Small Business Act if certain conditions were met. The problems of qualifying under section 502 are beyond the scope of this paper. Indications are that the commission is not contemplating any specially flexible regulation for ghetto based business and that the main route for them is seen as Regulation A, discussed above.[130]

Even if a business resolves its federal securities difficulties, it will have to deal with state blue sky law administrators. On the state level, however, there are "all kind of conditions you can impose that will provide some kind of public protection without preventing an enterprise from going forward."[131] A fidelity bond could be required, a limit of no more than $20 worth of shares per person might be imposed if that were consistent with a group's planned financing, and initial amounts received might be placed in escrow until a certain

130 Telephone interview with Courtney Whitney, Jr., Chief Counsel, Corporation Finance Division, SEC (Apr. 10, 1069).

While no moves have yet been made to resolve the tension between the disclosure requirements of the 1933 Act and the need to facilitate ghetto economic development, a recent release under the 1935 Public Utility Holding Company Act reveals that pressure to make concessions to urban realities is being felt. In the Matter of Michigan Consolidated Gas Company, Michigan Consolidated Homes Corporation (Holding Company Act Release No. 16331) a public utility subsidiary of a registered holding company sought SEC permission to provide financing for a moderate and low income housing project in the Detroit inner city. Despite the act's purpose of creating single integrated utilities systems and despite cases and rulings requiring an extremely close functional relation between the utility system and non-utility business, two commission members found sufficient relation to grant the application:

> "There is no need to give this 1935 statute an inflexible, static historical reading. Companies subject to it are now presented with the Congressionally recognized urban problems of the 1960's 1970's that could not have been contemplated by the original enacters. The desireability of private capital becoming involved in the rebuilding of our cities is widely recognized and urged, and the posture today of the utility industry is substantially changed . . . Equally relevant, there has been evolving since the 1930's a broader notion of corporate responsibility to the community." (Footnotes by the commission omitted.)

One commissioner concurred on grounds of finding an exemption from the relationship requirements for home construction companies. The fourth commissioner dissented. (There is presently one vacant seat.)

131 Telephone interview with Stanley Ragle, Securities Administration, Public Service Commission, Washington, D.C., Apr. 9, 1969.

minimum amount was obtained.[132] Not all states will be flexible in their approach to community businesses however, and since the SEC has done little to ease the problem, the question of how government can allow a business to go to its community for capital without depriving investors of protection should be a major target for legislative reform.

C. For-profit "Community Benefit Corporations

In the discussion of exempt organizations it was assumed that if a CDC's business income were tax exempt, community development would be greatly speeded. The assumption is correct if the net profits of a corporation over time and its accumulated surplus are viewed as rough measurements of the entity's power to generate additional job-creating structures, management opportunities, and welfare services for residents. Of course it may be true that ability to undertake community devolopment projects will depend on factors unrelated to after-tax profits. Thus a for-profit corporation which owns a supermarket with $2 million of annual sales may be in a better position to establish a community shopping center than an exempt CDC — even though the latter entity has a positive annual cash flow from several purchase and lease-back arrangements, while the for-profit corporation's sales money goes to debt service, upkeep, and wages. Where, as in the example, the key to success would be obtaining commitments to lease, the for-profit corporation's proven administrative ability would be a more relevant consideration than the CDC's accumulated surplus.

Even if both entities were equally capable of undertaking the shopping center, and if after-tax profits were considered a major measure of success, the examples illustrate that ownership of a given project by the non-profit entity is not always the best path. Due to depreciation of plant, the for-profit corporation might realize as great a cash flow from the shopping center as the CDC could by "selling" the tax losses. In many normal business situations requiring investment in depreciable assets, the for-profit corporation can thus approximate, if only for a while, the results of a tax exempt CDC.

The ability to approximate exempt status through the use of deductions is more questionable, however, when it comes to social welfare

132 *Id.*

expenditures. The section 170 charitable deduction would be of little help to the for-profit enterprise with significant taxable income because it is limited to five percent of adjusted gross income.[133] A more hopeful possibility is the section 162 deduction for ordinary and necessary business expenses.[134] Here corporate law becomes the first relevant consideration; before a corporation can argue that its social welfare expenditures are ordinary and necessary business expenses, it must have the power to make the expenditures. Corporation statutes will not generally bar such expenditures. For example, the Model Business Corporation Act (MBCA) defines "corporation" as "a corporation for profit subject to the provisions of this act . . ."[135] Since corporations may be organized under the Act "for any lawful purpose",[136] a corporation may be organized for profit and yet have other lawful purposes such as improving community environment. One is entitled to assume, in other words, that a corporation may be "for-profit" and have some purposes other than short-run profit maximization. The assumption is strengthened by section 4 of the Act which gives a corporation the power to make donations for the public welfare or for charitable, scientific, or educational purposes.[137] *A fortiori*, a business-motivated social welfare expenditure which will arguably be of financial benefit to the corporation — one which would raise the educational standard of the labor pool, generate community good will, or improve the workers' morale — is not *ultra vires* the corporation.

133 There is some doubt, in any case, about the freedom of a corporation to make a charitable contribution. In some states, a ceiling is placed on corporation contributions to charity without legislative approval. (Mass. Ann. Laws U. 155, Sec. 122, N.J. Rev. Stat. Sec. 14:3-13). ICBIF, the black community development entity noted at footnote 13 supra requires many of the businesses it funds to contribute to a separate fund for community development. Presumably the percentage limitation on charitable contributions apply but below that ceiling ICBIF can approximate the *tax* advantages of a Type III CDC.

134 According to Regs. § 1.162-15, no deduction is allowed to a corporation under section 162 for a gift or contribution if any part of it is deductible under sec. 170. But the limitation may not apply where the business receives some consideration from the sec. 170 organization — or where it contributes money to an organization not described in sec. 170 with a reasonable expectation of financial return. In the following discussion it will be assumed that all expenditures for social welfare are made by the for-profit corporation itself.

135 MBCA Sec. 2 (a).

136 MBCA Sec. 3.

137 Many state corporation statutes like that of Delaware lend themselves to similar anlysis. All but a few states have statutory provisions authorizing donations. Ruder, *Public Obligations of Private Corporation*, 114 U. PA. L. REV. 209 (1965).

And if the relevant state corporation law makes business-motivated social welfare expenditures a legitimate corporate activity, the danger of losing a shareholder's derivative action because of such outlays could be diminished by indications in the articles of incorporation that such expenditures are contemplated. Such a provision would reduce the conflict between corporate (profit maximizing) and non-corporate (public welfare) goals which might otherwise form the basis for a shareholder attack on a director's loyalty. Even absent such a charter provision, it is likely that welfare expenditures reasonably related to long-term corporate benefits could be defended against an attack by shareholders charging waste of corporate assets.[138] Such expenditures, if related to a corporation's general size, its net annual earnings, its capital, and its place in the community, should be within the "business judgment rule" which has insulated directors in past shareholder derivitive actions.[139]

Whether a given expenditure would be of sufficient benefit to the corporation to qualify for deduction under section 162 is a more difficult question. The strongest case for deductibility is where expenditures are solely for the benefit of a corporation's employees. Amounts paid by a taxpayer as compensation for injuries of employees are deductible as ordinary and necessary business expenses.[140] And amounts for

> dismissal wages, unemployment benefits, guaranteed annual wages, vacations, or a sickness, accident, hospitalization, medical expenses, recreation, welfare, or similar benefit plans, are deductible under section 162(a) if they are ordinary and necessary expenses of the trade or business.[141]

Ordinarily such expenses are deductible if the business of the tax payer is thereby benefited by reduced labor turnover or increased efficiency of personnel, but there must be a causal connection between the payments, the effect on the employees, and the benefits to be derived therefrom in connection with the business.[142]

The courts have been lenient in deferring to employer estimates of

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138 *Id.* at 218-219, 221-224.
139 *Id.* at 219.
140 Treas. Reg. Sec. 1.162-10 (1958).
141 *Id.*
142 J. MERTONS, JR., 4A LAW OF FEDERAL INCOME TAXATION, § 25.119 (rev. 1966).

benefit to the business,[143] but each case will be decided on its facts. Some "welfare" activities such as job training would always be of obvious benefit to the business and should be recognized as ordinary and necessary for a business in slum communities; for other activities the question may turn on the relationship of the employees who benefit to the particular business. To take one example, a corporate day-care center would have the strongest claim to be considered an ordinary and necessary business expense where the corporation employed mainly women in low-income brackets. Where the employees were primarily male, the expenditure would have to be justified on grounds of the more remote benefit of morale or less employee turnover. But the tax court has been willing to see expenditures calculated to improve employee morale as ordinary and necessary business expenditures where the IRS challenged an employer's attempted deductions for employee dances, picnics, and in one case an employee recreation lodge.[144] The latter case is most apposite here since it involved a continuing benefit to employees.[145] And the service itself has determined that an amount contributed by an employer to an exempt association of its employees for the construction of a new hospital building title which was to be in the association was deductible as an ordinary and necessary business expense.[146]

If a given expenditure is deductible to the corporation it may nevertheless be includible as income to the employee. The code explicitly excludes from gross income certain expenditures for employee health[147]

143 *See, e.g.*, W. M. Ritter Lumber Co. 30 B.T.A. 231, Supp. opinion 33 B.T.A. 117, holding deductible expenditures for the purpose of welfare work and employees at mill and camp sites. Money was turned over to employee committees for needy employees. *Also* Champion Spark Plug Co. 30 T.C. 298 (1958) *aff'd.* 266 F.2d 347 (6th Cir. 1959), holding deductible payment to employee to alleviate financial suffering resulting from fatal illness.

144 Employee dances: Popular Dry Goods Co. 6 B.T.A. 78 (1927).
Employee picnic: H. H. Bowman, 16 B.T.A. 1157 (1929).
Employee recreation lodge: Slaymaker Lock Co., 18 T.C. 1001 (1952) *rev'd. on other grounds sub nom.* Sachs v. Comm. 208 F.2d 313 (3rd Cir. 1953).

145 Whether an expenditure is an ordinary and necessary expense deductible under Section 162 or a capital expenditure which must be depreciated or amortized turns on traditional distinctions which will not be discussed here. But it seems likely that the depreciation or amortization deduction would have to meet the same standard of relation to financial return as would the section 162 deduction. Of course, it may be more "ordinary" in a given case for a corporation to rent a facility than to construct the facility itself.

146 Rev. Rul. 160, 1953-2 CUM. BULL. 114.

147 INT. REV. CODE of 1954, §§ 104-106.

and meals or lodging furnished for the employer's convenience.[148] But includibility of the value of services such as job training, education, day-care and recreation programs presumably presents traditional (IRC section 61) "gross income" considerations. In theory, compensation paid other than in cash is includible in gross income,[149] but the threshold question is: what services are to be considered "compensation". And the line between non-taxable conditions of employment designed primarily to benefit the employer and taxable compensation primarily benefitting the employee is a hazy one.[150] As a practical matter, the administrative problems of taxing individual employees on welfare benefits received have proven a barrier to taxation in the past.[151] But as corporations begin to spend large proportions of income on deductible welfare type services, the IRS can be expected to feel pressure to seek includability.

Any argument by the Service that certain welfare expenditures are income to employees could be greatly weakened if the benefits were made available to the entire community. It would then be evident that they were being offered not as compensation but to promote the long-range interests of the corporation in the community, and an attempt to enforce includibility as to employees would surely stumble on administrative difficulties. (Where a large proportion of the community consisted of a corporation's shareholders, the Service could theoretically argue that a proportionate amount of the expenditure was a corporate dividend.) To be sure, the commissioner might argue that the benefits were too remote, but depending on the nature of the expenditure, the taxpayer may have a good case for deductibility.[152] Entertainment or recreation expenditures are closest to the types of expenses for advertising traditionally deductible. In fact, "expenses for goods, services, and facilities made available to the general public" are excepted from the special showing of relation to trade or business

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148 *Id.* § 119.

149 Treas. Reg. Sec. 1.61-2(d) (1957), T.D. 6416, 1959-2 CUM. BULL. 131 (1959), T.D. 68881966-2 CUM. BULL. 23.

150 H. MACAULEY, FRINGE BENEFITS AND THEIR FEDERAL TAX TREATMENT 29 (1959).

151 J. H. Guttentag *et. al., Federal Income Taxation of Fringe Benefits: A Specific Proposal,* 6 NAT. TAX J. 251 (1953).

152 It would not always be necessary to capitalize such expenditures—*e.g.*, where the corporation was engaged in continuous annual outlays for social services. *See,* Godfray v. C.I.R. 335 F.2d 82 (6th Cir. 1964).

imposed by the code on deductions for a recreation facility or activity.[153] And the regulations approve of advertising to promote civic causes.[154]

Whether an expenditure can be considered a business expense will turn on whether it was made primarily for business or social purposes, and it will be "ordinary and necessary" if a hard-headed businessman would have incurred the expense under like circumstances.[155] Obviously the two considerations are not unrelated, and the dichotomy between business and social purposes begins to break down for businesses in a ghetto community. The implicit threat of violence hanging over even a community organization which gains a reputation for exploitation might be urged as justification for a number of community welfare and recreation programs. Deductibility of community job training and education expenditures is especially easy to justify if the Service agrees that the decision to hire local labor is within the purview of the corporation's business judgement.

III. Conclusion

Whether an organization goes the profit or non-profit route, both tax and corporate law afford significant opportunity for adaptation to ghetto business needs. The main bottleneck is securities regulation, state and national, which makes mobilization of community capital for a common venture a problem of expensive and time-consuming negotiation. It may be that poor people, as well as rich need the protection of securities laws; a series of well-publicized failures might spell the end of community capitalism. On the other hand, securities regulation cannot guarantee business success, and the effect of private

153 Int. Rev. Code of 1954, § 274.

154 Treas. Reg. § 1.162-15 (c) (i) (1958), T.D. 6435, 1960-1 Cum. Bull. 79 (1960).

155 First National Bank of Omaha v. U.S., 276 F.Supp. 905 (D.C. Neb. 1967), holding that a bank had met the burden of proof in showing that parties and dinners for customers were ordinary and necessary business expenses. The 1930 case, *American Rolling Mill Co.* v. *Commr.*, 41 F.2d 314 (6th Cir. 1930), held deductible as an ordinary and necessary business expense $360,000 contributed by a corporation to various civic groups. The case is weakened as precedent here by the fact that under the 1918 Revenue Act corporations were not entitled to deduct contributions to charity. The court's language nevertheless does support deductions for community corporations under certain circumstances: "The question always is whether balancing the outlay against the benefits reasonably expected, the business interest of the taxpayer will be advanced. The answer must depend among other things upon the nature and size of the industry, its location, the number of its employees and what other employers similarly situated are doing." *Id.* at 315.

offering exemptions in existing statutes is to make access to capital more difficult for one who does not have a few wealthy acquaintances. Certainly special streamlined procedures could achieve a balance between conflicting objectives more responsive to the exigencies of contemporary urban problems.

This article's discussion of flexibilities under existing business law and its criticism of the community Self-Determination Act should not be taken as rejection of that Act's basically progressive approach. On the contrary, as the Act recognizes, many problems can be alleviated by government financial aids to ghetto economic development organizations. There is progress in recognition of the fact that organizations which are ghetto based and controlled offer greater hope for social change than past efforts to aid or rehabilitate individuals. There does, however, exist a wide variety of ghetto development organizations and a potentially flexible body of law. The abandonment of organizational variation should not be made the cost of government assistance.

THE EVOLUTION OF A NEW COMMUNITY: PROBLEMS OF GOVERNMENT

MARY J. MULLARKEY*

Introduction

The United States has had a long experience with new towns, ranging from the company town to Radburn to the current wave of new cities in California and the Washington, D.C. area.[1] However, all of these were private developments. The government, both state and federal, has taken no active part in them. Perhaps because we have not experienced the land shortage which de Tocqueville said would be the test of our democratic institutions, the United States has not seriously experimented with new towns as a means of curbing urban sprawl and preserving open space. In addition, the exceptional instances in which the federal government has become involved in town building, notably the Atomic Energy Commission and greenbelt towns of the 1930's, have been embarrassing failures for participatory democracy.

Because new towns have been left to private enterprise, the governmental problems have not been explored. In most states incorporation statutes reflect the attitudes of rural America of a century ago. There has been little attempt to see the local government structure as a means to promote the values of a planned community. The problem is an acute one: how to reconcile the controls necessary for planned development with the interests of the residents in effective

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1 For a concise summary of the American new towns before 1960, *see* C. Ascher, *Administration of New Towns in the Americas* in United Nations Technical Assistance Programme, PUBLIC ADMINISTRATION PROBLEMS OF NEW AND RAPIDLY GROWING TOWNS IN ASIA 52-64 (1960).

Among the new towns of the 1960's are Reston, Virginia, and Columbia, Maryland, both located near Washington, D.C., Foster City near San Francisco, Sunset near Sacramento, and Valencia, Irvine Ranch, Janss/Conejo, and Mission Viejo in the Los Angeles area. For an analysis of these towns, *see* EICHLER AND KAPLAN, THE COMMUNITY BUILDERS (1967).

local self-government. Bound up in this question is a maze of intergovernmental problems to be resolved when a new town is created.

The proposed statute is an attempt to provide some answers for these dilemmas, within the framework of private development, for a community of approximately 200,000 people in a one by two mile area, a community with a population mainly drawn from low income groups. The article itself describes past British and American experience in new town building, the present federal legislation bearing on the subject, and the problems posed by state incorporation laws. In addition, it discusses the role of the county and of local government in the interim stage before the community is complete in any sense.

The author's primary criterion has been to provide for flexibility and choice in the development process for both the developer and the persons immediately affected by the development. In the final analysis, to be successful the community must serve not only as an escape from the congestion of the older metropolis but as a take-off point, permitting the residents the ability to choose between that community and existing other communities.

I. Early Federal Ventures into New Town Development

The need for a special local government for a new community is illustrated by past federal experience with the creation of new cities. The federal government has in at least two instances planned and created whole towns: the Atomic Energy Commission towns and the New Deal Greenbelt towns.[2]

A. *The "Atomic Communities"*

In 1947 the Atomic Energy Commission became the unwilling father of three communities — Los Alamos, New Mexico; Oak Ridge, Tennessee; and Richland (Hanford area), Washington.[3] These towns were created to provide security housing for scientists working on

2 A third federal venture into town building, not discussed here, is the construction of towns in connection with reclamation projects of the Department of Interior. An example is Page, Arizona, built at the Grand Canyon Dam site.

3 In comparison to the prototype, the three towns are small. Richland: 28,000; Oak Ridge: 32,500; and Los Alamos: 13,000. S. Rep. No. 1140, 84th Cong., 1st Sess. (1955); S. Rep. No. 1749, 87th Cong., 2d Sess. (1962).

World War II nuclear projects and were wholly government owned and directed. After the war, the immediate reaction of both Congress and the Atomic Energy Commission was that federal operation was undemocratic and a waste of the Commission's time. It was agreed that the towns should be "normalized" as soon as possible.[4] But it was not until legislation in 1955 and 1962 that the federal government began to dispose of its interests.[5]

The administration of the towns in the interim period has been described as a form of "benevolent and complex paternalism".[6] The Commission had decided to operate the towns through contractors. In Richland, General Electric got the contracts to operate the plants as well as the town. The only concession to local government was a town council which served a wholly advisory function. Oak Ridge followed a similar pattern. Carbide & Carbon operated the plants and Roane-Anderson the town. Interestingly enough, Roane-Anderson happened to be a subsidiary of the Turner Construction Company which built Oak Ridge. Los Alamos was operated by the Zia Company, a non-profit corporation picturesquely named after an Indian god. Again the principal stockholder of Zia was McKee, the construction contractor for Los Alamos.[7]

Government investigations in the 1950's revealed serious mismanagement. At one time Zia, for example, employed 1500 people to operate and maintain a town of 8400.[8] But it appears that the residents of the towns were either satisfied with the administration or apathetic. A straw vote taken in Richland before the 1955 act showed 3-1 opposition to the idea of incorporating and accepting the responsibilities of independence.[9] The explanation lies partly in the transitory nature of the populace. A profile shows the residents of Los Alamos

4 See Joint Comm. on Atomic Energy, *Investigation into the United States Atomic Energy Commission*, S. REP. No. 1169, 81st Cong., 1st Sess. 48-57 (1949).

5 Oak Ridge and Richland were disposed of by the Atomic Energy Act of 1955, 69 Stat. 471, 42 U.S.C. secs. 2301-2394. Los Alamos was covered by a 1962 amendment to that act. 76 Stat. 664.

6 Walker, *Los Alamos Now Tries Normalcy*, New York Times Mag. 38 (Nov. 25, 1962).

7 *Supra*, note 4.

8 *Id.* Walker in the article cited in note 56, described Zia as combining "the functions of a New York Borough President's office, Con Edison, the Department of Sanitation and more, all rolled into one. It takes care of electricity, water, street repairs, plumbing, gutter cleaning—even in some instances, lawn mowing and weeding."

9 101 CONG. REC. 12066 (1955) (remarks of Sen. Gore).

to be highly educated with an average age of 36.[10] There were no old people and although none were classified as very rich, none were very poor. There was no racial mix; contact with non-whites was limited to some Indians among the 2000 day workers (janitors, etc.).

If there was any wide spread dissatisfaction in Los Alamos, it was with the chronic housing shortage. Although rents were very low, most families could have afforded better housing. For example a family with a $20,000 income payed $105 per month for half of a duplex. Housing was allocated on a point system based on job rating, number of children, etc. A promotion or a new baby resulted in a kind of musical chairs with houses.

Los Alamos had no mayor and formally was controlled by the judge and commissioners of Los Alamos county. The county administrator performed functions roughly the same as those of a city manager. The county itself is the smallest in the state, only slightly larger than the town.

The plan for disposing of the federal property was spread over several years. The federal government donated the municipal facilities to the towns and agreed to substantially improve some facilities before releasing them.[11] Richland and Oak Ridge were incorporated and Los Alamos apparently retained its county form of government. The main problem in the transfer was revenue. Because the laboratories remained federal property and were not subject to tax, the United States agreed to make compensatory payments for ten years after ownership of the towns ended. In 1962, the annual payments were $1.25 million for Oak Ridge and $1.1 million for Richland. Los Alamos assistance was estimated at $2.8 million.[12]

The purposes underlying the Atomic Communities were far less lofty than those prompting a new community program. The Atomic Communities were built for temporary housing and only when it became evident that the housing would be permanent did the goal of creating a normal town arise. The disturbing implication of the Atomic Communities experience is how difficult the first steps toward that goal were. Failure to provide an effective means of popular

10 *Supra*, note 6.

11 Report by the Atomic Energy Commission, S. REP. No. 1792, Appendix I, 87th Cong. 2d Sess. (1962).

12 S. REP. No. 1749, 87th Cong., 2d Sess. (1962).

representation made it difficult for the benevolent creator-dictator to find anybody able to assume control. Democracy apparently will not rise up and flourish as long as the residents are fairly well satisfied.

B. *The "Greenbelt" Towns*

In contrast to the Atomic Community, the Greenbelt town was a planned child of the federal government.[13] The "Heavenly City" of the "hardheaded, 'anti-utopian' " New Dealers[14] was only partially successful and to some extent that failure can be attributed to neglect of the local government mechanism.

The Greenbelt towns were a means of providing jobs and housing for the low income whites and in comparison with the prototype new community, the Greenbelt towns were very small.[15] New Dealers recognized the importance of good local government but did not exploit the opportunity to create a governmental structure which would complement the Greenbelt concept. Each town was provided with a city manager system which was then gaining support as a reform measure. But the innovation and imagination seen in the design and planning did not extend to the government. An early memorandum of the Resettlement Agency shows the concern that the local government "fit in" with existing units:

> A municipal government is to be set up, in character with governments now existing or possible in that region; coordination to be established in relation to the local and state governments, so that there may be provided those public serv-

13 The Greenbelt towns were the creation of the Resettlement Agency established by President Roosevelt under the Emergency Relief Appropriation Act of 1935. Three towns were built under the program: Greenbelt, Maryland, seven miles from Washington, D.C., Greenhills, five miles from Cincinnati, Ohio; and Greendale, three miles from Milwaukee, Wisconsin. A fourth town was planned for the New York metropolitan area but the township succeeded in enjoining its construction. Franklin Township v. Tugwell, 85 F.2d 208 (D.C. Cir. 1936). *See* 50 HARV. L. REV. 902-813 (1937). The court, following Schechter and Panama Refining, found an unconstitutional delegation of legislative power. The decision was not appealed.

14 W. LEUCHTENBURG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL 345 (1963).

15 Completed sizes of the towns:

Greenbelt—885 dwelling units (5 detached single family homes, 574 multiple units and 306 larger apartment buildings); Greenhills—676 dwelling units (24 detached single family homes, 152 one or two bedroom apartments, and 500 two, three or four bedroom row houses); Greendale—572 dwelling units (274 detached single family homes, 90 one, two, and four bedroom duplexes, and 208 multiple units). P. CONKIN, TOWARD A NEW WORLD 311-15 (1959).

> ices of educational and other character which the community will require; and finally, to accomplish these purposes in such a way that the community may be a taxpaying participant in the region, that extravagant outlays from the individual family income will not be a necessity, and that the rents will be suitable to families of modest incomes.[16]

This caution can be understood in light of the strident cries of socialism leveled at the plan. Analysis of one of the towns leads to the conclusion that the local government was powerless and resembled nothing so clearly as a civics class exercise.

In Greenbelt, Maryland, construction began in October of 1935; and, by April 1937, it had been incorporated with the state's first city manager. The county at the time was predominantly rural, sparsely settled, and unable to provide the needed services. The first "resettlers" moved into Greenbelt in late September of 1937, and elections for the five-man town council were held in November. Ten days residence was required for voting and the first election turned out 276 of 290 eligible voters.[17] A similar pattern held for the other two towns which were incorporated in 1938 and until 1948; all of the towns chose for the town manager the federal official who was acting as the community housing manager.[18]

There were soon indications of "some sense of irresponsibility on the part of the local governing body".[19] One observer claims this was the inevitable result of the existence of three or four governmental units.[20] But the weakness of the local government is traceable to its financial dependence. The federal government retained ownership of the lands and buildings and of course was not subject to tax. The financial arrangement devised required the town government to petition a federal agency for funds "in lieu of" taxes. When, in the first year, Greenbelt had a deficit in public transportation, which the federal government had agreed to underwrite, the recreation budget for

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16 As quoted in C. STEIN, TOWARD NEW TOWNS FOR AMERICA 168 (1957).

17 Larson, *Greenbelt, Maryland: A Federally Planned Community*, 27 NAT. MUN. REV. 413 (1938).

18 McFarland, *The Administration of the New Deal Greenbelt Town*, 32 J. AM. INST. PLAN. 217 (1966). For a discussion of Greendale, *see* Johnson, *A "Greenbelt" Blooms*, 48 NAT. CIV. REV. 338 (1959).

19 Stein, *supra* note 16.

20 Conkin, *supra* note 15.

the town was cut.[21] It is not difficult to understand why the local government felt irresponsible.

The federal government withdrew from the Greenbelt towns rather abruptly. A 1949 statute provided for the sale of the property to private groups with preference given to tenants' and veterans' groups.[22] The sale brought about half the cost of the towns and left the local governments without sufficient tax bases and without effective control over the undeveloped areas. Greenhills, for example, found itself unable to force the private purchaser to preserve the distinctive greenbelt. The Greenbelt towns today are undistinguished suburbs, commuter towns with no industry.

The Greenbelt towns and the Atomic Communities represent two extremes. One had no pretense at local government while the other was an elaborate show of democracy. The lesson from both is clear: a new community must be a viable political unit from its beginning, capable of controlling its development and governing whenever its creator pulls out. These initial ventures by the federal government were inadequately launched at the outset and thus it is appropriate that they stand as signposts pointing out the dangers of ill-considered federal action to create new communities.

II. Implementing A New Community

A. *Federal Legislation*

Despite the lessons of past experience, existing federal legislation has not solved the problem of constructing viable new communities. The main problems of present new town construction have been financial. A large initial investment is necessary and the return is slow and risky. Development costs and real estate taxes are high in the period before the project begins to generate a cash flow. That period may be as long as ten years. Reston, Virginia, ran into trouble because of lack of such patient money.[23] Columbia, Maryland, on the other hand, benefits from the long established personal credit of its creator James Rouse.

21 Larson, *supra* note 17.

22 63 Stat. 68 (1949).

23 For the details of Reston's financial ills *see* Von Eckardt, *Are We Being En-Gulfed?*, The New Republic 21-23 (Dec. 9, 1967).

The 1968 Housing Act provides federal guaranty of bonds or debentures issued by private developers of new communities.[24] However, there is a maximum of $50 million per project and a total limitation of $250 million on oustanding projects. Quite clearly $50 million is not enough to build the new community of 200,000, and it is doubtful whether the federal guaranty would stimulate additional unguaranteed loans by lenders who would take behind the government in case of default. It has been estimated that under the 1968 legislation, with the most favorable sale conditions, a town of 75,000 could be built. This model was primarily expensive single family homes.[25] Columbia with a $50 million initial investment predicts a holding population of 110,000. Such towns would still be below the 200-300,000 level that is probably required to meaningfully decentralize our metropolitan areas.

In addition, no current new town approaches the problem of the low income family, and the 1968 legislation has no provisions in this regard. The California new towns contain single-family detached-unit housing with an average density of 3-4 units per acre and a price range from $16,500-$23,000 at the minimum.[26] In Columbia, with its vaunted mix of housing, the initial offerings for the years 1965-1967 were houses priced from $18,000 to $45,000, garden apartments with monthly rentals from $120 to $175 and town houses selling from $22,00 to $28,000.[27] Prices have been reduced only slightly in the intervening two year period.[28] Multi-family housing does not appear to be realistically anticipated. The statements are familiar: "It's not the business of business to solve poverty."[29] Or "Columbia will accept its fair share of low income families — as long as they have jobs."[30] And as long as they pay the going rate.

It is only fair to add, however, that low cost housing only aggravates the financial problems of the developer. He is unsure of the market-

24 P.L. 90-448, § 401-416 (Aug. 1, 1968).

25 Address by William Poorvu, Harvard Business School consultant to the Department of Housing and Urban Development, at Harvard University, Mar. 27, 1968.

26 Eichler and Kaplan, *supra* note 1, at 49-50. Yet persons with incomes below $8,000 seem to live there. *Id.* at 107-110.

27 *Id.* at 72.

28 Letter from James Rouse, April 28, 1969.

29 *Supra*, note 25.

30 Address by William Finley, representing the Rouse Corp., developers of Columbia, Maryland, at Harvard University, April 10, 1968.

ability of an economic mix to his middle and upper income home buyers. This is the classic argument used by mass developers such as Levitt. In addition, he does not get as much profit from such housing and has the headaches of additional operating and maintenance expenses.[31] Legislation will be needed to provide low income housing in new towns; without this factor new town growth may be no more than bad urban renewal all over again.

Perhaps it is too much to put this problem at the feet of the new town developer when HUD has been unable to cope with the building of low income housing in general. Only about 35,000 rent supplements have so far been approved by HUD. Only $12.2 million was appropriated for such programs in fiscal year 1969. This is sufficient for the construction of rehabilitation of about 40,000 units — in contrast to the 300,000 units envisioned by President Johnson in his "War on Housing" message.[32] The Johnson budget for fiscal 1970 contains no major increases for housing and community development. HUD's share was actually dropped by $236 million.

If, then, new legislation will be necessary, one should consider alternative forms of action. The choice seems to be between a "beefed-up" version of the 1968 proposal used in connection with existing subsidy programs and a package low income new communities act. The latter approach is desirable because of its simplicity. More important, it would require the Congress to focus on the concept of new communities and the important implications which implementation could have for the country. From an activist standpoint the danger is that Congress may view the plan with alarm as a revolutionary flirtation with socialism and reject it.[33] That, however, is a risk inherent in our way of government and should be no excuse for starting from a compromise.

If the decision is made to devise a new comprehensive act, there are two ways of accomplishing that end. The federal government could bypass the states and, by an approach analogous to that used

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31 STERNLIEB, THE TENEMENT LANDLORD (1966).

32 State of the Union Message (1968).

33 For an example of the Congressional attitude, *see* the exchange of testimony between Robert Weaver, then head of the HHFA, and Sen. John Tower. *Hearings on S. 2468 Before the Subcomm. of the Senate Comm. on Banking and Currency*, 88th Cong., 2d Sess., 404-7, 417-419 (1964). Dr. Weaver was careful to distinguish the proposal from both the British new towns and the New Deal Greenbelt towns and to minimize the role of the federal government.

for the New Deal Greenbelt towns, create federal new communities. The alternative, of course, is to work through the states, combining the basic federal legislation with a system of uniform state legislation. The agency entrusted with administering the legislation (presumably the Department of Housing and Urban Development) would draft model acts which each state would be required to pass before construction of a new community in that state would be approved. Under the latter approach more deference is paid to the traditional notion that municipal governments are creatures of the state and there would be some leeway for needed variances among the states.

Perhaps such sensitivity toward the state's role is not justified at a time when 20% of total annual state revenues are drawn from the Federal Treasury.[34] Morton Grodzins has compared the relationship of local, state and federal governments to a marble cake rather than a three layer cake.[35] Until now federal aid to states has contributed to the fragmentation of governmental structure. Systems such as public education and highways undercut the local general government by use of special function units. Creation of a new community would have precisely the opposite effect. Instead of contributing to fragmentation, it would strengthen the role of the local unit, while providing a uniform approach to the national problems of housing and urban development.

Even from a traditionalist view of the federal structure, the federal government's determination of the form and development of the new community may not constitute undue interference with the role of the state if the assent of the state is a prerequisite to creating a new community.[36] The Supreme Court has emphasized the desirability of state experimentation with new mechanisms of government,[37] and the state clearly has the power to adopt federal standards as its own.

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34 COMMITTEE FOR ECONOMIC DEVELOPMENT, MODERNIZING LOCAL GOVERNMENT, reprinted in *Creative Federalism: Hearings on S. 671 and S. 698 Before the Subcomm. on Intergovernmental Relations of the Senate Comm. Government Operations*, 90th Cong., 1st Sess., part 2-B, at 970 (1967).

35 Grodzins, *The Federal System*, in The Report of the President's Commission on National Goals, GOALS FOR AMERICANS (1967 ed.).

36 Sec. 404(3) (A) of the 1968 Housing Act, *supra* note 24, requires that the plan receive "all governmental approvals required by State or local law or by the Secretary".

37 *See* Sailors v. Board of Educ., 387 U.S. 105 (1967) and Dusch v. Davis, 387 U.S. 112 (1967).

It is questionable whether the Secretary of the Department of Housing and Urban Development (HUD) could dictate the form of local government under his general rule-making authority. The 1968 Housing Act places an affirmative duty on the Secretary to determine that there is a sound and comprehensive internal plan for the proposed community which satisfies state and local requirements and which adequately provides supporting facilities for the future residents. The authority given appears broad enough to allow the Secretary to insist that the establishment of the local government follow certain guidelines. However, such reliance on agency regulations alone would open a new community to attack on the grounds that creation of the local government is a non-delegable duty of the state legislature. Yet federal legislation could extend the rulemaking powers of the Secretary to provide guidelines such as the passage of certain model enabling acts by the state before the developer can receive federal money.[38] This appears to be the best method of implementation.

B. *State Incorporation Statutes*

State incorporation acts may be real barriers to implementing a new community. State legislation is generally required to permit the incorporation of a new community. There is no provision for incorporation with the initiative of the landowners in the particular county unit.

California is the home of several privately developed new towns and the exception to this rule. In brief, California permits incorporation of any unincorporated portion of a county with 500 residents or 500 voters if the county has a population greater than two million.[39] The incorporation petition must be signed by twenty-five per cent of the landowners whose holdings in the area sought to be incorporated equal twenty-five percent of the assessed value of the total land.[40] After approval by the county board of supervisors and the Local Agency Formation Commission, a state agency, the petition is submitted to a vote by area residents.

The local government can be phased in as a part of the incorpora-

38 *See, e.g.* The analogy of the Department of Commerce, *Planning Enabling Act*, and the later requirement of comprehensive planning to receive aid under the urban renewal and related programs.

39 CAL. GOV'T CODE § 343.02 (*as amended* 1959).

40 *Id.*, § 34302.5.

tion petition. The incorporators can appoint a city manager or other elective city officers except councilmen.[41] A five member city council, with staggered terms of office, are elected if the incorporation is approved. At any subsequent municipal election the question of changing the form of government may be put on the ballot. The alternative forms are city manager government, elective mayor and four councilmen, and the election of a legislative body by or from districts in the city.

At the other end of the spectrum is Florida, which is also experiencing rapid urbanization. Its archaic structure would require a constitutional amendment before a new community could function and at present seems designed to make effective local government impossible. A few counties, notably Dade County (Miami), are given home rule by amendment to the state constitution, but the very narrow approach taken by the state supreme court has limited even the home rule counties.

The basic incorporation procedure requires a population of 1000 to incorporate. If two-thirds of the registered voters meet, they can incorporate by a majority vote.[42] Thus an incorporation move can be thwarted by voters staying at home.[43] If the incorporation is approved, a mayor and five to nine aldermen who serve one year terms are elected.

Although the state constitution provides that the legislature is free to establish or abolish municipalities[44] the Florida supreme court has circumscribed that power. It has read into the constitution a requirement that there be a settlement in fact before a municipality can be incorporated.[45]

The attitudes of most states toward incorporating new municipalities are less strict than that of Florida. In general, state courts decline to review a legislative designation of municipal boundaries except in rare instances such as *Gomillion v. Lightfoot*[46] where state gerryman-

41 *Id.*, § 34304.5.

42 FLA. STAT. ANN. § 165.01 (*as amended* 1967).

43 *See* Comment, *Legal Aspects of Municipal Incorporation in Florida*, 4 MIAMI L.Q. 78 (1949). *Cf. Constitutional Revision: County Home Rule in Florida — the Need for Expansion* 19 U. FLA. L. REV. 282 (1966).

44 FLA. CONST. art. 8, § 8.

45 State v. Davis, 109 Fla. 419, 147 So. 468 (1933). *See also* State v. Stuart, 97 Fla. 69, 120 So. 335 (1929).

46 364 U.S. 339 (1960).

dering excluded all Negroes from the city limits. Wisconsin, for example, had the same insistence as Florida on the existence of a settlement in fact as a prerequisite to incorporation.[47] But this was modified by subsequent liberal state supreme courts which recognized the need for "preemptive" incorporation to plan urban development.[48] The role of the court in reviewing municipal incorporations was reduced by the 1959 changes in Wisconsin incorporation law. The court is limited to applying minimum standards of population and density. The director of the state planning agency makes the more complicated decision of whether the incorporation is in the public interest.[49]

The need to revise state incorporation procedures is widely acknowledged. The Advisory Commission on Intergovernmental Relations has recommended adoption of a model draft which would subject proposed incorporations to review by a state agency.[50]

The interests of a new community would be served best by permitting incorporation immediately after gaining plan approval and prior to construction. This will give the developer's bonds favorable tax consequences as municipal bonds and make them more saleable. Early incorporation will prevent other incorporations in the site area and will provide the developer with municipal powers of eminent domain and land use controls. But an attempt to incorporate would run afoul of state minimum population requirements. In addition, the usual requirement of an incorporation election probably would prevent incorporating a new community. These two requirements are premised in the idea that municipal incorporation is a device to provide an increased level of services for an existing population. The justification for a new community program proceeds from an entirely different basis. It is a judgment that the future well-being of an area, state, or nation is enhanced by controlled development of cities. The particular site is picked, not because its residents need more services now, but because the site is relatively empty.

Although the interests of the residents in their property must be

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47 State ex rel. Town of Holland v. Lammers, 113 Wis. 398, 89 N.W. 501 (1902).

48 *See* Cutler, *Characteristics of Land Required for Incorporation or Expansion of a Municipality*, 1958 WIS. L. REV. 6.

49 Wis. Stat. sec. 66.014 (8) (b) (1963). *See* Johnson, *The Wisconsin Experience with State-level Review of Municipal Incorporations, Consolidations, and Annexations*, 1965 Wis. L. Rev. 462, 465-468.

50 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, 1966 STATE LEGISLATIVE PROGRAM.

recognized, their opinions as to whether a new community should be incorporated should be given no more weight than the opinions of citizens as a whole. The real constituency of a new community is the people now living in the central city and the current residents are not an adequate substitute for them.

III. The Structure of the Problems

A. Supplanting the Existing Local Unit

In deciding upon the structure for a new community government, the first choice is whether to develop the new community under the sponsorship of an existing unit of government. The site will undoubtedly fall within the confines of some local unit. As of 1967 there were 81,253 local governments in the United States.[51] All states except Rhode Island are divided into counties. About half of the states have rural municipalities.

While it is safe to asume that the new community will be located in a county, it is not possible to say what kind of a county it will be.

> County governments differ in every significant way: number of constituents, area governed, number of competing or overlapping government units within the county, form, and means of selection of the governing board, services provided, the number and functions of independent county officials, and source of revenue.[52]

Despite the wide range of functions they perform, most counties still act largely as administrative instrumentalities of the state. Thus it would be unwise to rely on the county to govern the new community. In some cases the county is competent but in most cases it is a rural unit incapable of handling the problems of a fast growing city.

An increasing number of states are devising metropolitan area governments of which a new community may be a part.[53] But this does not solve the new community's governmental problems. Generally these plans create an overlay of government. The area government

51 U.S. Dept. of Commerce, Bureau of the Census, Census of Governments 1967, at 1 (prelim. rept. Oct. 1967).

52 Avery v. Midland County, 390 U.S. 474 (1968) (dissent).

53 *See* Miller, *Metropolitan Regionalism: Legal and Constitutional Problems*, 105 U. Pa. L. Rev. 588 (1957). *See also* Note: *The Urban County: A Study of New Approaches to Local Government in Metropolitan Areas*, 73 Harv. L. Rev. 526 (1960).

has very limited powers and the constituent municipalities retain their autonomy except in metropolitan matters.[54]

1. The British Experience

When faced with this structural choice, the British new towns program opted for development of new towns under a central agency. The original 1946 New Towns Act anticipated turning the new town over to the local authorities when it was essentially developed. But under the 1959 New Towns Act, the new town is to be transferred to the Commission for the New Towns when completed.[55] The choice which the British were making was between two kinds of public ownership: ownership by local authority versus ownership by central agency. The central agency was chosen because it was considered to be unrealistic for the government to continue subsidies and not get the profit from industry and commerce. Furthermore, the local governments lacked expertise and had no statutory authority to delegate control to the equivalent of a development corporation general manager. It was feared that if the local authority owned the housing and land, it would dominate the town politically and result in insecurity for those living in the project.[56]

In considering the British example it is worth remembering that the British do not find a countervailing consideration in the values of grassroots democracy, keeping the government close to the people. The dominant notion is still that it is the business of government to govern.[57]

The British plan was not successful in avoiding bitterness and opposition by existing local administrators.[58] Because the public development corporation has very limited powers, an aggrieved minor official can effectively delay new town development for years. Reform may come from review by a single central commission, but Rodwin seems to find that the real problems of delay are inevitable when a new town is constructed near an established town.

54 *See, e.g.*, the approach of the state of Washington. Wash. Laws Ch. 73 (1967).

55 Goddard & Smith, THE MUNICIPAL YEAR BOOK 1967, 1741 (1967).

56 Layton, *The Future Ownership and Administration of the New Towns*, 7 HOUSING REV. 53 (Mar.-Apr. 1958).

57 *See* Banfield, *The Political Implications of Metropolitan Growth*, 90 DAEDALUS 61 (1961).

58 L. Rodwin, *The British New Towns Policy* 74-75 (1956), chronicles the complex of approvals required for execution of plans.

2. Relationships with Existing Governmental Units

To have the most freedom in developing new ideas in a new community it would seem advisable to raise the new community independently. But its important connections with the existing units cannot be ignored. The success of a new community is bound up with its relations with the local government. In addition, a county may be very reluctant to have a new community for two reasons. First, a new community will create a demand for services which the county is ill-equipped or unwilling to handle. Second, the political power base of the county will be undermined. Fears on the first score may be unfounded. A recent study done by Howard County, Maryland, in which Columbia is located, reportedly shows that the county would save $189 million in the next twenty years if the entire county were developed along the lines of Columbia.[59]

The vested interests of the politicians are not so easy to dismiss. It is obvious that a successful new community will dominate the county physically. It will become the economic and cultural focal point of the area, and the residents of a new community will be voters in the county elections. Under a recent Supreme Court decision extending the one man-one vote rule to counties, the votes of a new community will be able to control the county government within a short time.[60]

But it would be unfair to dismiss all local opposition to the creation of a new community as due to cravings to remain in the political limelight. In most counties a new community would be a substantial disruption of the accepted way of living. Taking the viewpoint of a county official, one can understand a reluctance to urbanize not unrelated to a genuine concern for the relocation problems of people living within the proposed site.

The 1968 Housing Act provides no guidance to the role of the county except to require that all necessary local approval be obtained.[61] Suppose a site for a new community were selected and a plan devised which received the approval of both the state and federal government, but the local authorities refused to approve it. Could a new community be constructed?

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59 *Supra*, note 30.
60 Avery v. Midland County, *supra* note 52.
61 *Supra*, note 24.

Some recent cases indicate that a refusal by the local zoning authority to change the ordinances to permit the building of a new community may be successfully challenged. The supreme court of Pennsylvania held unconstitutional a four acre minimum lot size saying:

> The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent further burdens, economic and otherwise, upon the administration of public services and facilities can not be held valid.[62]

Compare the dissenting opinion in *Vickers v. Tp. Committee of Gloucester Tp.*, where the majority upheld an ordinance excluding trailer camps from the township. The dissent saw the prohibition of trailers as a symbol of the unrestricted freedom of municipalities to construct protective barriers and commented:

> In my opinion legitimate use of the zoning power by such municipalities does not encompass the right to erect barricades on their boundaries through exclusion or too tight restriction of uses where the real purpose is to prevent feared disruption with a so-called chosen way of life. Nor does it encompass provisions designed to let in as new residents only certain kinds of people, or those who can afford to live in favored kinds of housing, or to keep down tax bills of present property owners. When one of the above is the true situation deeper considerations intrinsic in a free society gain the ascendency and courts must not be hesitant to strike down purely selfish and undemocratic enactments.[63]

The reasoning supporting such statements is far from clear. The Pennsylvania court found that the ordinance could not be justified as an exercise of police power and was confiscatory of private interests. The dissent in *Vickers* seems to go off on much broader grounds, expressing a concern to prevent "community-wide economic segregation" by promoting a variety of "respectable, healthy and useful" housing consonant with democratic living. A new community could hardly fail to meet this test especially in view of the President's 1968 Housing

62 National Land & Investment Co. v. Kohn, 419 Pa. 504, 532, 215 A. 2d 597, 612 (1966).

63 37 N.J. 232, 264, 181 A.2d 129, 147 (1962) (Hill, J. dissenting).

Message declaring the construction of new communities to be in the nation's interest and calling on all levels of government to support the 1968 New Communities Bill.[64] In short the opposition of the existing unit may not be an insurmountable obstacle.

B. *Creating A New Local Unit*

Although local self-government once was considered to be an inherent right,[65] the idea has been rejected in most states. Unless local self-government or municipal home rule is provided by the state constitution, it does not exist. However, as a matter of practice most states provide local self-government for municipal corporations.[66]

Suppose a private developer builds a city and decides to operate it without a representative government. He trusts that the market operation and his own profit motive will cause him to respond to the residents' needs in a satisfactory manner. But a litiguous resident sues the state to compel that the city be given a local government. Assuming that he has standing, his argument is that it is a denial of equal protection for the state to provide similarly situated municipalities in the state with local governments but not provide his city with one. The situation is analogous to that in *Griffin v. Illinois* where the Supreme Court held that although the state was not constitutionally required to provide an appeals procedure, if it did provide one it could not discriminate between rich and poor defendants.[67]

The fact that the property may be privately owned is no defense. In *Marsh v. Alabama*, the Supreme Court held that a company town which provided all the services normally provided by a municipal government would be treated as a municipal government for pur-

64 Lyndon B. Johnson, *The Crisis of the Cities*, H. Doc. No. 261, 90th Cong., 2d Sess. (1968).

65 The following quotation is representative of the inherent right theory:

> Self-government is a matter of absolute right on the part of localities. The state cannot take it away, because the people, originally possessing the right, have not given the legislature, through their constitution, the power to take it away. The people of the counties, towns and villages are entitled of right to determine who shall rule over them. They cannot be deprived of this right by the legislature or by the heads of departments. This right is the very basis of all government in this country. F. PIERCE, FEDERAL USURPATION (1908).

66 MCQUILLIN, MUNICIPAL CORPORATIONS § 1.93 (3d ed. 1949).

67 351 U.S. 12 (1956).

poses of first amendment freedoms.[68] It requires only one further step to say that the private town must provide a government similar to that provided by other municipalities. It is clear from *Midland County* that if the plaintiff were a resident of another city he would be entitled to a vote in choosing the general government. In reaching this decision Mr. Justice White explained:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decision making to their governmental subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left wholly or partly to those who govern at the local level. What is more, in providing for the governments of their cities, counties, towns, and districts, the States characteristically provide for representative government — for decision-making at the local level by representatives elected by the people. . . . In a word, institutions of local government have always been a major aspect of our system, and their responsible and responsive operation is today of increasing importance to the uality of life of more and more of our citizens.[69]

The broad sweep of this language seems to provide the bridge to the conclusion that a qualified citizen cannot be denied a vote for representative government merely because he lives in one city rather than another.

Columbia is a good example of how a new town developer tries to solve local government problems without losing control of the town. James Rouse has called his device "a private government".[70] He set up a nonprofit corporation, the Columbia Park and Recreation Association, with a nine member board. Originally seven members were chosen by the development corporation and two were ex-officio. As the town progresses, control of the board is gradually passed to the residents so that when the development is half completed, the residents will have a majority of the board. The Association has power to finance, construct, maintain and operate roads, walkways, parks, community service facilities and energy distribution systems.[71] The

68 326 U.S. 501 (1946).

69 Avery v. Midland County, *supra* note 52, at 481.

70 *Hearings Before the Subcomm. on Housing of the House Comm. on Banking and Currency* at 1054, 89th Cong., 2d Sess. (1966).

county government provides schools, police, health, welfare, planning, zoning, and some support for the volunteer fire department.[72]

When asked at what point residents could begin to determine the structure and alter the development of the town, a Columbia spokesman replied that the residents could not prevent final completion of the plan. Lots are sold with fifty year restrictions limiting use to a structure substantially identical to the original building.[73] One might question the need for such long restrictions since the town should be completed within ten or fifteen years and is expected to begin showing a profit by the year seven. The wisdom of the restrictions is also questionable for it would appear to allow for no progress or change in living styles during the next fifty years. However, the length of time of the restrictions is not unusual; compare the original Radburn Association agreements.[74]

The disturbing thing about the Columbia "private government" is that it gives the semblance of government while withholding really important decisions from the people. The explanation given is that the private developer cannot build a four foot sewer line five miles long and then permit the residents to cut off the population at 10,000. That is, that cannot be allowed to happen if the company is out to prove that a private developer can build a new town and make "a hell of a profit".[75] From a somewhat less mercenary point of view it would seem that there comes a point at which the interests of the residents take precedence.

But if one cannot say with certainty that a local representative government is constitutionally required, is one desirable? Experience with subdivisions indicates that a representative government simply

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71 Eichler and Kaplan, *supra* note 1, at 75.

72 *Supra* note 30.

73 *Id.*

74 The Radburn covenants were to last from 1929 to 1960 with provision for automatic renewal. The Radburn Association declaration is reprinted in CASNER AND LEACH, CASES AND TEXT ON PROPERTY 1410-24 (1959 Supp.).

75 *Supra* note 30. It is not clear what constitutes "a hell of a profit" but the company expects to make something equivalent to the 20% which it could realize by building a shopping center. Since the company has no equity in the venture, a percentage return cannot be estimated.

makes a town work better.[76] Critics of new town schemes often point to neglect of the role of local government as a major failing, citing the manner in which crucial decisions that affect living conditions are determined.

> Who defines the shape and substance of beauty, who determines the balance of each community, who arbitrates good taste, who decides the values of life? The advocate of greenbelts have always answered with injured innocence "the people," but they have been peculiarly reluctant to specify the means by which the people decide.[77]

Finally, there is the example of past failures. The Federal Greenbelt towns and the Atomic Communities discussed previously illustrate the consequences of failure to anticipate the complexity of the necessary transition to representative government.

IV. A Proposal for the Local Government of the New Community

The proposal is in the form of a model incorporation and local government act. It is meant to be suggestive and is incomplete in a number of details such as salaries and staffs of elected and appointed officials.

In brief, the plan calls for the establishment of administrative areas

76 *See* W. H. Whyte, Jr., The Organization Man (1956), for a comparison between a package subdivision in which there is no form of government and another in which the developer deliberately stimulated participation. In the former case, the subdivision

> . . . remains a development, more than a community. Understandably, no group has turned into a protest group against the developer; there have been mutterings about paternalism, but they have never coalesced into any active movement. As for the politics of the township of which Drexelbrook is a part, there occasionally is some ferment about matters which touch the immediate interests of the residents, like schoolbus arrangements, but other than this, residents don't tatke much interest. Besides, they don't have the time.

In the second case:

> From the beginning [the developers] decided that the affairs of the town would be turned over to the citizenry. This would put the tenants in the curious position of being able to tax the landlord . . . But the autonomy was good for all concerned. For the tenants the result was a rich diet of issues on which to cut their teeth, and for the developers a disciplining force that helped them resist the temptation to cut corners.

77 Wood, *The New Metropolis: Metropolitan Government 1975*, 52 Am. Pol. Sci. Rev. 108-122 (1958).

within the community. The ultimate goal is a strong mayor with a system of local city halls in the administrative areas. The development corporation can petition for incorporation immediately after the plan has been approved by the federal government. State approval of both the plan and the incorporation will be done by a single state agency. Representation on the city government is planned so that the development corporation will lose control when the town's population reaches half of the projected final population.

Some high expectations for the new community governments have been expressed:

> The challenge for the new cities is thus clear: Devise and adopt a government structure that will not only retain but indeed reinforce the democratic process in contemporary urban life and, at the same time, will function effectively in administering the complex machinery of the city. . . . It will have to be so structured as to be able to respond effectively and quickly to critical problems as they arise, and be as immune from partisan pressures as feasible. It will have to combine the best characteristics of corporate management with the tradition of representation and civic participation of residents.[78]

Finally, a caveat may be in order:

> No community ever approaches its government problem *in toto*, for it never exists that way historically. Reorganizations, consequently, are only temporary in a dynamic society. The territorial scope of a community shifts as its functional interdependencies change. But a change in its corporate existence can occur only when there is public recognition of the problem and the necessity for change, and the willingness to use public means to bring about the change. . . . There is no historic, legal or cultural pattern for creating corporate units which avoids complex jurisdictional problems as the community develops.[79]

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78 Contini, *New Perspectives for Urban America* in Subcomm. on Urban Affairs of the Jt. Economic Comm., *Urban America: Goals and Problems* 268, 90th Cong., 1st Sess. (1967).

79 Reiss, *The Community and the Corporate Area*, 105 U. PA. L. REV. 443, 447 (1957).

A NEW COMMUNITY LOCAL GOVERNMENT ACT

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SECTION 1: *Short title*

This Act may be cited as the New Community Local Government Act of ————.

SECTION 2: *Definitions*

(1) "New Community" shall refer to any town financed under P.L. ———— and planned and constructed in accordance with regulations issued thereunder.

(2) "The State Commission" refers to a State Commission on New Communities created pursuant to Section 3 of this Act or to a state agency approved by the Department of Housing and Urban Development as capable of exercising the powers and duties given the model State Commission on New Communities under the terms of this Act.

COMMENT: The statutory reference is to any federal act providing a guarantee of the financing of new communities.

SECTION 3: *Creation of a State Commision on New Communities*

(1) The governor shall appoint three permanent members to the Commission on New Communities. These members shall serve for overlapping terms of five years.

(2) The governor shall appoint two additional members to the Commission on New Communities who are residents of the county in which the New Community is to be located. These members shall serve on a temporary basis.

COMMENT: Some states already have state incorporation agencies which could be utilized. *See* Alaska Const. Art. X, sec. 12; Alaska Stat. secs. 07.10.010-.140, 44.19.250, 44.19.260 (1962); Cal. Govt. Code secs. 54773-99.2; Minn. Stat. Ann. sec. 414.01 (Supp. 1965); Wis. Stat. secs. 66.014-.016 (1965). It should be within the discretion of the Department of Housing and Urban Development whether to insist on the creation of a separate agency.

SECTION 4: *Powers of the State Commission*

A. Suitability of Area

(1) The State Commission shall determine whether creation of a New Community is in the public interest.

(2) In reaching its decision the State Commission shall be guided by, but not limited to, the following considerations:

(a) the impact of the creation of the New Community on the metropolitan area; whether the proposed New Community will attract away from overcrowded cities population which cannot be accommodated;

(b) the impact of the creation of the New Community on the remainder of the county: whether the proposed New Community will stimulate the economic and social growth of the area;

(c) whether the New Community when completed will have a satisfactory tax base to maintain the desired level of services with a tax rate substantially similar to other tax rates in the area;

(d) whether adequate provision has been made for the compensation and relocation of citizens now living on the site of the proposed New Community.

COMMENT: The standards given the State Commission are very general in keeping with the experimental nature of the New Community program. There is no requirement of a minimum population for the reasons discussed *supra* at text following note 50. The only unusual requirement is the last one, which places an affirmative duty on the State Commission to see that the current residents are protected. The adjustments may be made by cash payments or by options to live in the New Community at reduced rates.

B. Review of Plan

(1) The State Commission shall determine the validity of the required signatures attached to the plan for the New Community submitted under Section 6.

(2) The State Commission shall review and redefine if necessary the administrative areas indicated on the plan submitted.

C. Procedure

(1) Within 60 days of a determination that the signatures are valid, the State Commission upon due notice shall hold a public hearing in the county in which the New Community is to be located.

(2) Within 30 days after the conclusion of the hearing the State Commission shall approve or disapprove the proposed New Community plan. The decision shall be by majority vote and the State Commission shall state in writing the reasons supporting its decision. A copy of the State Commission's decision shall be furnished to the developer who submitted the plan.

(3) If the plan is not approved, the State Commission shall consider any revision of the plan submitted to it within 30 days after its decision.

(4) The decision of the State Commission shall become final:
   (a) immediately, if the plan is approved; or
   (b) after 30 days if the plan is not approved and no revision is offered; or
   (c) when the second decision is rendered if a revised plan is offered.

D. Appointment of Mayor for New Community

The permanent members of the State Commission shall have the power to appoint the first mayor of the New Community according to the procedure of Section 8.

COMMENT: The State Commission functions as a regulatory body and has no power to redraw the outer boundaries of the New Community. Its decisions will be subject to judicial review on the same basis as other state agencies. In practice, a great deal probably will depend on informal adjustments among HUD, the State Commission and the private developer to arrive at a plan which is satisfactory to all three.

SECTION 5: *Effect of Disapproval of a Plan for a New Community*

If the State Commission in its final decision disapproves the New Community plan submitted, no new plan covering whole or part of the same area will be considered by the State Commission for a period of two years from the date of the submission of the plan which was disapproved.

SECTION 6: *Governmental Approval for Construction and Incorporation of a New Community*

(1) Any private developer wishing to create a New Community shall obtain the approval of the Department of Housing and Urban Development and shall submit a plan for approval to the State Commission.

(2) In addition to other requirements which may be established by the Department of Housing and Urban Development or by the State Commission, the plan submitted must:

(a) bear the signatures of at least 25 per cent of the landowners in the designated site. Such landowners must own at least 25 per cent of the assessed valuation of the total area included in the site. If the property is under contract of sale, the purchaser shall be considered to be the landowner for purposes of this section.

(b) divide the proposed New Community into administrative areas. An administrative area shall be a contiguous land area and there shall be at least five but not more than nine such areas. In as far as possible the areas shall be of equal size in terms of the estimated final population.

(c) indicate the predicted population level for the New Community as a whole and for each administrative area at every two years until the predicted year of total population.

COMMENT: Reducing the number of approvals required to the minimum, one state and one federal, should avoid the delays experienced in British new town construction because of overlapping political jurisdictions. The requirements for the plan of the New Community of course are not fully stated here. The three stated requirements are necessary for incorporation and phasing the government.

Paragraph (2)(a) insures that there is some popular support for the New Community in the area. Yet it should be relatively easy for the developer to buy this many friends. If he cannot, then it appears that the basic assumption that private enterprise can create New Community fails. Furthermore because the success of the New Community will be dependent on good relations with its neighbors to a large degree, it is unlikely that a venture which cannot attract the support of 25 per cent of the landowners will be able to help develop that area.

The administrative areas required by paragraph (2)(b) are to be the basic units of the town.

SECTION 7: *Incorporation of a New Community*

(1) After the plan for a New Community has been approved by the Department of Housing and Urban Development and by the State Commission, the New Community shall be incorporated.

(2) This municipal corporation shall not be dissolved or altered without the consent of the Department of Housing and Urban Development.

(3) The Board of Directors of the development corporation shall serve as the officers of the municipal corporation until replaced by appointments made by the State Commission.

(4) All services being extended by the county to the site of the New Community at the time of incorporation shall continue until the end of the fiscal year or until terminated by the New Community.

COMMENT: The question of incorporation is not submitted to the residents. Again this is a departure from traditional incorporation procedure. The rationale supporting a New Community goes beyond the needs and abilities of the local residents. Neither the benefit nor the responsibility of the New Community is directed at them. This does not imply that the residents have no interest and the procedure, provided in Section 4(C)(1), recognizes this. It may be that an unfair balance is struck by requiring landowners' signatures on the plan rather than those of voters. But an aggrieved resident would probably have standing to appeal a decision of the State Commission. *See* section 12 of the Model State Administrative Procedure Act.

SECTION 8: *Appointment of the First Mayor and Creation of the City Council*

(1) It shall be the duty of the acting New Community officers to notify the State Commission when residents begin moving into the New Community.

(2) Within one year after receiving such notification, the permanent members of the State Commission shall appoint a Mayor for the New Community.

(3) The Mayor shall serve for a term of five years or until the population of the New Community is equal to 25 per cent of the predicted final population of the New Community, whichever occurs first. His successor shall be elected in accordance with the general law of the State.

(4) The first Mayor shall exercise all the powers and duties given under State law and in addition he shall serve as liaison between the New Community and the Department of Housing and Urban Development and between the residents of the New Community and the developer.

(5) The appointment of the first Mayor shall be subject to the approval of the Department of Housing and Urban Development.

(6) At the time of the appointment of the first Mayor, the city council shall be created. The State Commission shall specify the number of councilmen. Each administrative area shall have one councilman. If the predicted population of an administra-

tive area is substantially greater than the average population of the administrative areas, the State Commission shall give that area one or more additional representatives.

(7) The developer may appoint all members of the first city council. If the developer fails to appoint all the councilmen within 30 days after the city council is created, the Mayor shall have the power to fill all vacancies.

(8) Whenever the population of an administrative area is equal to 25 percent of the final population of that area or whenever two years have elapsed since residents began moving into the administrative area, the Mayor shall call a special election to permit the voters of the administrative area to elect their representative(s) to the city council. Each elected councilman shall replace one of the appointed councilmen.

COMMENT: The appointment of the first mayor is probably the most controversial feature of this plan. It is argued that the state has no real interest in the new Community and that the interests of the residents will be adequately protected by the private developer's profit motive. The latter argument must be rejected. To begin with, it must be recognized that the developer may not be a "community builder" with a highly sensitive social conscience. A resident who has invested a large amount of money in his new home, or one who has found a job in the New Community when he had none in the city before, cannot make a strong threat to leave if his complaints are not heard. Furthermore a New Community hopefully will be directed toward low income people, a group which is frequently victimized by slum landlords. If, in their old environments, these people have been unable to exert effective pressures on private enterprise to provide them with suitable homes, then there is no reason to assume that they suddenly will master the techniques.

It is further argued that the orderly development of the New Community will be assured by withholding increments on federal assistance. While in theory this is effective, one wonders whether the threat would be carried out in practice. Most federal aid programs include this condition, but it is not used because it is such a *big* punishment.[80] While this weapon may be reserved for serious problems, an appointed mayor can serve as a more flexible means of protecting the

80 *See*, in this issue, F. Fisher, *The Carrot and the Stick: Conditions for Federal Assistance*, 6 HARV. J. LEGIS. 401 (1969).

people's interests. It makes little difference whether he is appointed by the federal government or by the state with federal approval, but the latter reflects the thinking that states are responsible for the local governments. In practice the appointed mayor will be a professional city manager-type and a person acceptable to all three parties — state, federal and private.

The first mayor is appointed rather than elected not only because a man of expertise is needed but also to delay the psychological effect of moving into "someone else's town". If the mayor were elected by the first few residents they might become an established power group at a time when it would be preferable to have a fluid society.

A more serious question may be whether the appointed mayor will be too great a check on the developer. Would he cause the developer to proceed inexorably on a plan leading to financial disaster when, as in the case of Reston, compromise could save half a loaf? The answer is no, because of the developer's control of the city council.

Until people begin moving into the city, the developer is in full control. From that point on, the speed with which he would lose control is largely dependent on him. The formula in Section 8 calls for the replacement of one of the developer's appointees every time an administrative area has 25 percent of its final population or has been populated for two years. The developer could build pieces of every area at once and thus lose all the votes on the city council in two years. However, it is more likely that he will intensively develop one or two areas at a time and retain majority control for a long period.

SECTION 9: *Adjustment of Representation on the City Council*

(1) In the year in which the total population of the New Community equals 50 percent of the predicted population, or in the year in which the plan specified that the population would equal 50 percent of the total population, whichever occurs first, the number of councilmen appointed by the developer if greater than 50 percent of the total councilmen shall be reduced to 50 percent (or a lesser percent if there are an odd number of councilmen). The remaining councilmen shall be reapportioned among the administrative areas according to population.

(2) Every two years thereafter the city council shall be reapportioned in a similar manner. For every 10 percent increase in the population of the New Community the percentage of the council appointed by the developer shall be decreased by 10 percent.

(3) In the year in which the total population of the New Community equals 100 percent of the predicted population or in the year at which the plan specified that the population would equal 100 percent of the total population, whichever occurs first, all members of the city council shall be elected by the residents. The councilmen shall be reapportioned among the administrative areas according to population.

COMMENT: This method of phasing out is meant to avoid problems created if the development proceeds at a slower pace than anticipated (or is not completed) and if development does not occur in all the administrative areas.

One problem with the whole method of phasing out the developer is that it may not satisfy the one man-one vote requirement. The *Midland County* case,[81] extends that requirement to counties and to all units of general government. The Supreme Court had earlier expressed approval of state experimentation with different forms of government but this case may indicate some hardening of attitude. However the malapportionment in Midland County was of an extreme not reached here. The three districts in Midland County ranged from 828 to 67,906 to 852,414[82] By comparison the difference among the administrative areas probably is not great enough to be called a "substantial variation from equal population."[83]

SECTION 10: *Area City Halls*

(1) Within two years after residents begin to move into an administrative area, an area city hall shall be created.

(2) The Mayor shall call for an election in the administrative area and the voters shall nominate and elect a Deputy Mayor who shall hold office for a term of two years.

(3) The area city halls shall provide the full range of services provided by the general city government. The Mayor shall appoint area heads of agencies corresponding to the general city agencies. Such administrators shall be responsible directly to the Mayor.

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81 *Supra* note 52.
82 *Id.*
83 *Id.*

COMMENT: This article is intended to implement the recommendations of the Riot Commission Report[84] and is similar to Mayor Lindsay's plan for reorganizing New York City. The objective is that each administrative area will have its own city hall, a "one stop service center" where any citizen having a problem can go. This should prevent the anonymous shuffling of complaints or questions through agencies scattered throughout the town. The area representative to the city council will also have his offices in the area city hall.

This device is a compromise. In a highly urbanized setting it is no longer possible to return to the nostalgic intimacy of the New England town meeting, because a unit which is small enough to meet together to decide all issues has a jurisdiction too limited to solve problems. In terms of a formal governmental mechanism, the interests of the citizen are best served if he can get results. Participation in a process which can produce only token results is undoubtedly an educational experience, but that function can be served outside the formal government through citizen participation groups.

Each administrative area in the prototype will be larger than the average city. Hopefully by making the deputy mayor accessible to area pressure and by giving each area city hall a high degree of autonomy, something equivalent to the intense interest in government shown in some suburbs will be realized.

SECTION 11: *Powers and Duties of the Deputy Mayor*

(1) Within the administrative area the Deputy Mayor shall have all the powers and duties given by state law to mayors of cities, PROVIDED THAT when in the determination of the Mayor and city council the health, safety or welfare of the citizens requires that a matter be the subject of uniform city or metropolitan legislation, the Deputy Mayor shall have no power to set aside that determination.

(2) All revenue powers are expressly reserved to the general city government. Each fiscal year the city council, after reserving funds for the operation of the general city government, shall allocate to each administrative area an amount to be expended by the Deputy Mayor of that administrative area. Expenditure of funds set aside for an administrative area shall not be subject to review by the city council.

84 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 294-99 (1968). *See also* Babcock and Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW AND CONTEMP. PROB. 220 (1967).

(3) The Deputy Mayor shall appoint an advisory committee composed of residents of the administrative area which shall aid him in governing the administrative area.

COMMENT: Of course it is most difficult to formally allocate functions between the city and the administrative areas but this distinction can probably be worked out through compromise and litigation. Fire, police, air and water pollution are matters which require a city-wide approach. Many problems require an initial over-all determination but can permit local variation. For example, the density for the city may be established by areas, but within that area the people should be free to distribute densities. Deciding whether shops in homes will be permitted or who will get liquor licenses seems to be of purely local concern.

Taxing powers and financial independence would make the area city halls most effective and responsive to their constituents. Yet the problem of financial barricades illustrated by the wealthy suburbs and the poor center city must not be duplicated. City-wide taxing powers are necessary to distribute benefits and burdens but precluding review of how the money is spent within an administrative area should permit each area to satisfy its particular wants. Thus one area may spend its money on free summer concerts while another provides facilities for residents to repair their own cars.

SECTION 12: *Creation of a New Community School District and School Board*

(1) When the first Mayor is appointed, a school district shall be created for the New Community in conformity with the state law.

(2) The School Board shall consist of nine members of whom four members shall be appointed by the Mayor for staggered four year terms and five of whom shall be elected by the parents of school aged children in the school district for four year terms.

(3) Any citizens' group including the development corporation of the New Community, may submit to the Mayor the names of qualified persons to be appointed to the School Board.

(4) The first Mayor shall appoint the four members of the School Board and call for the election of the other five members within one year after he assumes office.

COMMENT: This article incorporates the recommendations of the Bundy Report on the New York City schools[85] except that the mayor's appointments are not limited to a list drawn up by a central education commission.

SECTION 13: *Election Procedures*

All elections shall be governed by the relevant state election procedures EXCEPT THAT the residency requirements shall be waived for the first election held in each administrative area and for the first election of the Mayor and for the first election of the School Board.

85 Report of the Mayor's Advisory Panel on Decentralization of the New York City Schools, RECONNECTION FOR LEARNING (1967).

LAND USE CONTROL FOR THE NEW COMMUNITY

BOAKE CHRISTENSEN*

Introduction

Rapid deterioration of conditions in the core of the central cities of the U.S., as well as intensification of the need for new housing, have increased interest in the concept of a new community. This article was prepared as a part of an investigation of the potential of such a community to serve particularly the needs of lower and middle income groups, done under the auspices of the Harvard Graduate School of Design. It considers the techniques for public land use control for this new community, assuming that it will be developed by a private corporation rather than by a public agency and that the endeavor will be undertaken without basic change in the existing governmental framework.

The first section evaluates the relationship between planning and the present techniques for implementing planning decisions. A judgment is made that a sharp departure from the traditional controls is necessary to permit successful implementation of the new community concept. The remainder of the paper outlines the various components of a system of flexible land use controls contained in a proposed ordinance, appearing in an appendix to this article, for controlling the development of a new community and the legal issues that are raised. Only such a system can provide the developer with enough leeway to encourage this type of new urban development.

I. PLANNING AND CONTROLS

In order to evaluate the alternative land-use control techniques for the new community, one must first examine the antecedents that produced the contemporary body of law and the historic relationships between "planning" and "controls." This review will suggest that the conceptions associated with "planning" and those conceptions identified as "controls", although in theory intimately linked, have remained separated in practice.

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A. Origins of City Planning

City planning in the United States finds its primary origins in three movements that took form in the late nineteenth century. One movement emphasized visual and physical amenities and was bracketed under the heading of "City Beautiful;" another characterized as the "City Efficient," focused on values more social and functional; the third was concerned with the problems of the slums.[1]

The City Beautiful movement developed from a series of proposals for parks in many of the major cities.[2] A major impetus to the movement was the Columbian Exposition in 1893, whose physical setting suggested that a unity of environment could provide solutions for all urban ills. Daniel H. Burnham, the principal architect of the Exposition, and others were engaged in producing city plans emphasizing parks, gardens, architecture, sculpture, site and street planning and beautification.

At the same time, and in contrast to this preoccupation, there developed the City Functional or City Efficient movement. The city engineer was included within the group which proposed a different set of values; one that was more exclusively functional. The growing urban population stimulated a need for the expansion of facilities for transportation and utilities. Spokesmen emphasized sanitation, safety and efficiency in the rebuilding of the city, issues that had been neglected by the beautifiers.

> But, like the beautifiers, the functionalists also had their myopias: a pyramiding of physical improvements, unrealistic or ignored population and economic base anticipations, disregard for the residential environment in favor of the technological, and failure to propose legislative or administrative powers to bring about the plan's realization.[3]

A third group, the social reformers, concentrated on the slums. Their efforts led New York City in 1900 to legislate minimum standards for housing and construction safety.

The three disparate movements were never coordinated in a sys-

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1 For a discussion of the history of the planning movement in America see Johnston, *A Preface to the Institute*, 31 J. AM. INST. OF PLANNERS 198 (1965).

2 *Id.* at 207.

3 *Id.*

tematic way.[4] Instead, the emphasis within the city planning movement soon became one of concentration on physical facilities rather than one of direct concern for the social and economic influences that shaped life in the cities.

The planners' emphasis on the physical, as opposed to social, development of the city has been attributed to the long run impact of early basic investment decisions regarding transportation, utilities, and buildings.[5] However, the physical cast of the city planning movement may be attributed more directly to the professions attracted to the movement as it became institutionalized. Architects, landscape architects, conservationists, and engineers quite naturally had a fundamental overriding interest in the locational and physical aspects of the city.[6]

B. Origins of Zoning Control

The first zoning controls were also established at the end of the nineteenth century.[7] The 1916 New York City Zoning Resolution marked the commencement of efforts to establish comprehensive zoning. It focused on the chaotic intermingling of incompatible uses and the congestion that had produced inadequate light and air between buildings and in the canyon streets.[8] The Commission on the Height of Buildings, led by Edward M. Bassett, at first put forth a plan of building restrictions by resort to the power of eminent domain. However, the method was considered unworkable and the police power was invoked to establish height, area and use restrictions for the city.[9]

This basic choice had landmark significance. It set the limits and direction of planning controls in America. The controls had to be such as would not justify compensation to individual owners, and they had to bear a clearly demonstrable relation to the public health,

4 D. MANDELKER, MANAGING OUR URBAN ENVIRONMENT 456 (1966).

5 Webber, *The Prospects for Policies Planning*, in L. DUHL (ed.), THE URBAN CONDITION (1963).

6 *Id.* at 326.

7 In California, Hadacheck v. Sebastian, 239 U.S. 394 (1915) and Ex Parte Quong Wo, 161 Cal. 220, 118 P. 714 (1911) upheld the restriction of certain building uses from districts which were established in the cities. A Massachusetts statute prescribing building heights for some Boston streets was upheld in Welch v. Swasey, 193 Mass. 364, 79 N.E. 745 (1907), aff'd 214 U.S. 91 (1909).

8 For a description of the conditions that led to the New York City zoning, *see* E. BASSETT, ZONING 23 (2d ed. 1940).

9 *Id.* at 26; *see also* conclusion from the Commission's Report reproduced in J. DELAFONS, LAND USE CONTROLS IN THE UNITED STATES 15 (1962).

safety or welfare.[10] This limitation on the law of land use was firmly institutionalized in the 1920's with the publication of the Standard Zoning Enabling Act and the Standard City Planning Enabling Act by the United States Department of Commerce, also partial creations of Bassett.[11] There was no provision for the purchase of development rights. In addition, the zoning ordinance might be voided if there was no chance for profitable use within a reasonable time.[12] Thus no flexibility for long term development was permitted.

These acts reflect the generally accepted tenets of the planning movement of the day. It was believed that the private development of the city could be determined through the control of the development of communication, utilities and open spaces by government agencies using a master plan.[13] However, the Standard Planning Act did not see the master plan as a legal guide for the city's planning actions. There is no provision for its approval by the municipality.

> The paradoxical conclusion emerging from the Bassett position is that it makes discussion of the legal aspects of the master plan superfluous. . . . The master plan becomes solely an engineering technique which the [planning] commission is encouraged to use.[14]

Thus there is no legal mechanism in the Planning Act to control affirmatively the development of land.[15]

This quotation aptly illustrates the larger point that the foundation of the planning movement was influenced not by planners but by

10 Delafons, *supra* note 9.

11 U.S. Dept. of Commerce, A STANDARD CITY ZONING ENABLING ACT (rev. ed. 1926) [hereinafter cited as STANDARD ZONING ACT]; U.S. Dept. of Commerce, A STANDARD CITY PLANNING ENABLING ACT (rev. ed 1928) [hereinafter cited as STANDARD PLANNING ACT].

12 *See* Arverne Bay Construction Company v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

13 Sections 6 and 7 of The Standard Planning Act provide that: "It shall be the function and duty of the commission to make and adopt a master plan for the physical development of the municipality [section 6] . . . The Plan shall be made with the general purpose of guiding and accomplishing a coordinated, adjusted, and harmonious development of the municipality and its environs which will . . . best promote health, safety, morals, order, convenience, prosperity, and general welfare, as well as efficiency and economy in the process of development . . ." [Section 7].

14 Haar, *The Master Plan: An Impermanent Constitution*, 20 LAW & CONTEMP. PROB. 353, 364 (1955).

15 The Act authorizes the planning commission to exercise subdivision control power. However, the emphasis is only on the infrastructure of development. *See* notes 113-116, *infra*.

lawyers. The developments of the past fifty years, in a sense, represent the capture of planning by a body of legal interpretation which is now recognized as a subsidiary portion of the study of property law.[16]

The impact of this point cannot be over-emphasized. Zoning, that concept which was born to separate incompatible uses and to provide light and air, has suffocated planning. Almost immediately its objectives were recast from that of control of congestion and the abuse of incompatible uses to that of the affirmative restriction of land use. Shortly after the adoption of the Standard Act by the states, one of the standard works in the field had to caution that zoning was not itself the city plan but a device for giving effect to it.[17] The detrimental characteristics were evident even in the 1920's. Clarence Stein, in a 1924 speech before the American Institute of Architects, stated that

> zoning immediately passed beyond the matter of conserving that which would accrue to the advantage of the common welfare and proceeded to utilize the principle and the power to conserve, stabilize and enhance property values.[18]

However, the zoning effort progressed with rapidity. By 1937, 1322 American cities had adopted zoning ordinances.[19] Yet, the familiar products of the Thirties and Forties were "piecemeal plans and detailed zoning ordinances that were unrelated to even the sketchiest framework of a general plan."[20] Planning, as envisioned by the Standard Planning Act, was not in fact funded by the cities. During this period, only two or three cities made an effort to produce a master plan. Probably not a single city in the United States was significantly influenced before the end of the Second World War by a master plan even roughly resembling the ideal held forth by the planning move-

16 Significant comment on the governmental implementation of the plan has been made primarily by lawyers, not by planners. A footnote, quoted from N. WILLIAMS, THE STRUCTURE OF URBAN ZONING AND ITS DYNAMICS IN URBAN PLANNING AND DEVELOPMENT 9 (1966), illustrates this point: "For contrasting theories of the scope and function of the plan, see Bassett, 'The Master Plan' (1938); Haar, 'The Master Plan: An Impermanent Constitution' (1955); Dunham, 'A Legal and Economic Basis for City Planning' (1958); See also Bettman, 'City and Regional Planning Papers' (1946). (Curiously enough, all written by lawyers)."

17 *See* L. SEGOE, ET. AL., LOCAL PLANNING ADMINISTRATION (1941); *See also* Haar, *supra* note 14, at 362, citing Bettman, *Notes on A Model County Planning Enabling Act* (unpublished).

18 Quoted in Delafons, *supra* note 9, at 28.

19 *Id.* at 23.

20 T. J. KENT, THE URBAN GENERAL PLAN 2 (1964).

ment.[21] Illustrative of this hypothesis is the fact that the budgets for planning agencies allowed primarily for the development and the administration of zoning ordinances.[22]

Of course, any governmental planning actions affecting property rights would create a body of legal precedent. But the headlong rush of most states into land-use control through zoning without the assistance of underlying principle or theory, and without guidance from the Supreme Court, has produced an intricate and confusing body of law from which the planner may reassert himself only with difficulty.

The influence of the courts has confused further the relationship between planning and the controls for implementing planning decisions. The courts' role in the planning process has been intensified by the presumption that "the zoning law or ordinance is in derogation of the owner's common law rights in the use of his property and must therefore be strictly construed."[23] The courts' close supervision of the zoning process has caused planning to become enveloped in a body of rigidities that greatly narrow the approaches open to the planners.

Only recently have the courts in certain states substituted a stronger reliance on a presumption in favor of the validity of legislative acts.[24] But closer analysis reveals that reliance on a presumption of legislative validity will not terminate the courts' close involvement in the planning process. A presumption of validity is only the first step in a two-step judgment which must be made by a court, assuming that it employs a test of balancing the social gains against private benefits for the purpose of ascertaining the validity of legislative actions. A presumption relieves the court of the necessity of determining whether an "efficient" decision has been made, i.e., whether society's gains outweigh the private losses, and thus whether there is a basis for governmental action. Making this presumption is critical, for it permits greater legislative discretion in establishing an innovative approach to planning law. However, a presumption of validity does not properly end the examination, although the opinions suggest this. There still remains the question whether the private party may deserve compensation for the regulation imposed on him despite the fact that the

21 E. BANFIELD AND J. WILSON, CITY POLITICS 190 (1965).

22 *Id.* at 189.

23 A. N. AND C. A. RATHKOPF, 1 ZONING AND PLANNING 8-1 (3d ed. 1962).

24 For an opinion vigorously dissenting from his court's employment of a presumption in favor of legislative action, *see* Vickers v. Gloucester Township, 27 N.J. 232, 181 A.2d 129 (1962) (Hall, Jr., dissenting).

question of overall benefit is resolved in favor of governmental action.[25]

Planning decisions are also confused because court opinions tend to suggest that a decision on the merits of a planning action has been reached even when a presumption of legislative validity has been invoked.[26] A suggested conclusion is that judicial review of any system of land-use control that relies on the elusive standards of the police power tends to muddle critical planning issues.[27] A system of positive controls is needed and it is hoped that the proposed ordinance for the development of new communities can help in this process.

C. Evolvement of Planning and Controls

This confusion about the role of zoning in planning continues through the present day. It is compounded by the fact that (1) no unitary planning theory exists and (2) no clear conception links legal controls to the planning theories.

Today the profession is divided into three major schools regarding the substantive content of planning. The traditionalists continue to emphasize the all-encompassing master plan for guiding the physical growth and development of the community. Such plans deal with all aspects of the physical environment, including the general location of commercial and living areas, the community facilities and the circulation system.[28]

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25 *See* Michelman, *Property Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 HARV. L. REV. 1165, 1194 (1967), for a critical evaluattion of the balancing process in measuring compensation.

26 *See* J. KRASNOWIECKI, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT 16 (Technical Bulletin 52, Urban Land Institute [1965]).

27 Williams, *Planning Law and the Supreme Court*, 13 ZONING DIGEST 57, 62 (1961), contains some interesting observations on the judicial shaping of the planning movement: "There are practically no recent Supreme Court decisions in the field; apparently the Court has been following a rather consistent policy of refusing to review such cases, presumably on the theory that essentially local conditions are involved . . . The general impression from all these decisions in planning law is one of confusion . . . In the absence of the Supreme Court's relatively sophisticated style of legal pioneering, it has been up to the state courts to develop a rational and consistent policy of constitutional interpretation. I do not believe that there is anybody, among the few people who follow the field closely, who is happy with the results."

28 *See* Kent, *supra* note 20, at 2, "the preparation and maintenance of the general plan is the primary, continuing responsibility of the city planning profession . . . our most significant contribution to the art of local government." For a general criticism of this approach, *see* Petersen, *On Some Meanings of "Planning"*, 32 J. AM. INST. OF PLANNERS 130, 181 (1966).

A second school of planning thought takes a less encompassing view of the scope of the environment which planning should affect directly. This school emphasizes the shaping by planning decision of the lines of communication and modes of employment. The strategic location and capital design of the above is thought to influence the basic structure of the city, so that all other development will be shaped accordingly.[29]

A third body of planning thought discounts efforts to shape the long-range development of a metropolis and concentrates rather on incremental short-range improvement. These incrementalists argue that long-range planning is impossible, for it cannot be

> practical except for relatively simple problems and even then in somewhat modified form. It assumes intellectual capabilities and sources of information that men simply do not possess, and it is even more absurd as an approach to policy when the time and money that can be allocated to a policy problem is limited, as is always the case.[30]

The most significant factor of the incremental analysis is that no attempt is made at comprehensiveness. Moreover long term consequences of alternative policies are ignored at an earlier point in decision making than in other schools of thought. Finally, the analysis assumes that multiplicity of adjustment by various groups gives the process a tolerable level of rationality in the whole of the social context.[31]

Not only is there sharp disagreement concerning the scope of planning; there is as well a lack of accord on the substantive emphasis of the planning process. Traditionally, the planners have emphasized the shaping of the entire environment by the general all-encompassing plan. The emphasis has been on the physical factors of that plan and a belief that the social factors may be shaped merely by the proper manipulation of the physical environment. This view has increasingly been subjected to critical examination.[32]

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29 Crane, *The City Symbolic*, 26 J. AM. INST. OF PLANNERS 280 (1960); Bacon, *Architecture and Planning*, 35 J. AM. INST. OF ARCHITECTS 68 (1961).

30 Lindbloom, *The Science of Muddling Through*, 19 PUB. ADMIN. REV. 79-80 (1959).

31 For a summary and analysis of the Lindbloom view, *see* Hirschman and Lindbloom, *Economic Development, Research and Developent, Policy Making: Some Converging Views*, 7 BEHAVIORAL SCIENCE 211, 215-216 (1962).

32 Gans, *Social and Physical Planning for the Elimination of Urban Poverty*, 1963 WASH. U. L. Q. 2, 14.

Recently planners have argued that the physical-social systems interact; that slum housing, for example, is the result of the residents' social and economic conditions and not that the physical determinism of the slum dictates the social consequences.[33] As a result of such observations, critics now attack the very premises of planning and observe that, perhaps, the goals of the planners, the neighborhood and the public facilities, are more important to the planner than to the people served.[34] In addition, there is little research data to indicate the actual psychological impact caused by a variation of the aesthetic environment which is the chief concern of the planner.[35] Group formation has been observed to be affected by status differentiation and selection of friends farther afield rather than by the orientation of buildings. Interracial attitudes have been observed to become more favorable on closer contact, but accommodation rather than integration is the result observed.

The major formulation of these differences is in the distinction between social planning and physical planning. This dichotomy may be no more than the result of a method, rather than a goal, orientation.[36] As the emphasis on problem-solving replaces the concern with orthodox techniques, a uniform view will probably develop. Yet today's control techniques are shaped by the planner's own earlier theories of physical determinism. A master plan dealt primarily with zoning. It did not even consider other subjects which also depended on the exercise of the police power for their justification, such as building codes, factory laws and housing laws.[37]

These arbitrary distinctions are now imbedded in planning law. The distinctions drawn by Bassett concerning the proper elements for the work of planners can be traced into the precedents that now shape planning law. Professor Dunham, especially, notes this distinction and argues that only those regulations affecting the *interaction* of land uses are justifiable as planning decisions.[38] Dunham is critical of those

33 Petersen, *supra* note 28, at 131.

34 Gans, *supra* note 32 at 6. *Also see,* Davidoff, *Advocacy and Pluralism in Planning,* 31 J. AM. INST. OF PLANNERS 331 (1965).

35 The observations of this paragraph are reported by Rosow, *The Social Effects of the Physical Environments,* 27 J. AM. INST. OF PLANNERS 127, 131-2 (1961).

36 Gans, *supra* note 32 at 16-17.

37 Bassett discusses only streets, parks, sites for public buildings, zoning districts, routes for public utilities, and pierhead and bulkhead lines as the elements of the Master Plan. E. BASSETT, THE MASTER PLAN 50 (1938).

38 Dunham, *A Legal and Economic Basis for City Planning* 58 COL. L. REV. 650, 658 (1958).

who attribute any function to planning except one of concern for the interaction of land uses;[39] but he carries the logic of his analysis further: since planning restrictions are exercises of the police power, and since planning may only be concerned with the interaction of land uses, then the only valid planning decisions affecting private property are those that prevent one land use from putting an external nuisance-like harm on another. Further Dunham distinguishes harm prevention restrictions from restrictions that extract a public benefit from the landowner,[40] traces this distinction through a series of decisions, and concludes that planning decisions affecting private property are valid only if they separate incompatible uses or otherwise compel a land use to bear the full expenses of the costs it imposes.

The harm-benefit distinction that Dunham draws is subject to trenchant criticism[41] yet is significant because it demonstrates the narrow scope the law permits to planning decisions affecting private property. Bassett understood zoning as only one element in the planning process. Dunham shows that zoning restrictions are focused not on broader developmental policies but on the interaction of immediate land uses and the separation of incompatible uses. The analysis further points out that land-use controls continue to emphasize the analogy to nuisance law which was originally employed in the landmark zoning case in support of the technique.[42]

Although the justification for the legal restrictions that Dunham describes may be traced indirectly to the traditional physical-oriented planning theory, that theory is now discredited.[43] Yet the legal controls remain, providing no direct support for traditional planning theory, and narrowing the scope of the functions that may be assigned to the planner. Thus, as planning theory has changed, and the controls have narrowed the issues for planners, the planner is finding it difficult to sense that the controls for implementing his decisions have any relationship to his planning functions.

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39 *Id.* at 662.

40 For example, a valid restriction is one which compels an owner to provide a parking lot for the parking needs of activities on his own land. On the other hand, compelling a landowner to use his land as a parking lot in order to obtain a parking lot in the community is an invalid restriction. *Id.* at 666-667.

41 *See* Michelman, *supra* note 25, at 1196-1201.

42 Village of Euclid v. Ambler Realty Co. 272 U.S. 365, 387-388 (1926).

43 *See* Gans and Davidoff, *supra* note 34.

D. Current Criticisms of Land-Use Controls

Criticisms that are made of the control techniques for implementing a planning decision will sharpen the considerations for modifications of these techniques for implementation of new community planning. The techniques for the land-use control, developed to meet the problem in the nation's largest city over fifty years ago, are crude and inadequate, yet they remain the principal governmental tools available today to control development patterns in an urbanizing society.

Two new trends, in particular, since World War II highlight the inadequacy of these traditional land-use control techniques. First, major redevelopment activities in large cities are being regulated by detailed covenants, rather than by the traditional techniques which are seen as inconvenient hindrances and obstacles to efficient planning.[44] Secondly, home building patterns have been revolutionized so that suburban development no longer tends to proceed on the lot-by-lot basis, but rather subdivision by subdivision.[45]

Fundamentally, the concept of zoning advocated by Bassett, and embodied in the system of land-use control today, is one of separatism of distinct uses by a legal and administrative framework.[46] The concept emphasizes the distinctions between uses rather than the relationships which may link them together. The result of this process has been to encourage the fragmentation of urban and suburban life and to prevent the development of a more cohesive environment.[47]

The goal of a residential area completely without commercial enterprise is achieved in some redevelopment planning.[48] District exclusions are not absolute, however, with such non-dwelling uses as schools, hospitals, churches and other public activities permitted in residence districts. Also professional people are permitted to practice in their dwellings by most ordinances.[49] However, even the flexibility

44 *See* Brownfield, *The Disposition Problem in Urban Renewal*, 25 LAW & CONTEMP. PROB. 732 (1960).

45 "By 1964 more than half the new homes were constructed by builders who build over one hundred homes a year; . . . The typical builder was working in a subdivision of 192 lots." Hanke, *Planned Unit Development and Land Use Intensity*, 114 U. PA. L. REV. 15, 16-17 (1965).

46 *See, e.g.*, Bove v. Donner Hanna Coke Corp. 236 App. Div. 37, 43, 258 N.Y.S. 229, 236 (1932).

47 Discussed in Goldston and Scheuer, *Zoning of Planned Residential Developments*, 73 HARV. L. REV. 241, 246 (1959).

48 See the discussion in Delafons, *supra* note 9, at 83.

49 *See e.g.*, CHICAGO ZONING ORDINANCE, Chapter 194A, MUNI. CODE, Art. 7.3-1 (1963).

introduced by the more complete up-dated ordinances is inadequate to satisfy the planner's desire to locate and restrict other related uses, such as neighborhood commercial stores, in residential areas.

The setback, sideyard, and height restrictions intended to preserve light and air, also greatly limit the flexibility of the planner and the architect. "Some builders and lenders assert that in reality the zoning ordinance rather than the architect, designs the building."[50] Bulk controls, restricting lots to certain minimum sizes and requiring minimum street frontages, intended to limit densities, but which rather provide class separation, are not acceptable to planners who are attempting to create economically and sociologically improved living conditions for large numbers of people.

The more fundamental objection to present land-use control techniques, however, lies in the relationship between zoning and planning. Conceptually, planning is intended to precede zoning. Section 3 of the Standard Zoning Enabling Act requires that zoning restrictions be based on a "comprehensive plan." No requirement, perhaps, has evoked such a confusion of interpretation from the courts.[51] Some courts even hold that the zoning map itself is intended to be the comprehensive plan:[52] One argument offered to support such a holding is that the enactment of authority to plan followed the enactment of authority to zone, and, therefore, a "comprehensive plan" could not mean anything so inclusive as a master plan.[53]

The conclusion reached by the planners is that planning has become a tool of zoning. A commentator notes, "The conclusion of conference after conference was that planning should always precede zoning. The objective was correct but its accomplishment was negligible. The

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50 Goldston and Scheuer, *supra* note 46, at 243.

51 *See* Haar, *In Accordance With a Comprehensive Plan*, 68 HARV. L. REV. 1154 (1955).

52 *See, e.g.*, Levinsky v. Bridgeport, 144 Conn. 117, 127 A.2d 822 (1956).

53 A New York court recently refused to accept this view: "Thus, in the Town's view, as expressed by this zoning expert, its 'comprehensive zoning plan' is synonymous with 'comprehensive plan.' . . . To say that the Town's 'comprehensive zoning plan' is interchangeable with 'comprehensive plan' is to say that zoning regulations adopted pursuant to Section 261 (which constitute the 'comprehnsive zoning plan') must be in 'accordance' with themselves. This Court cannot believe that the Legislature intended or contemplated such a meaningless interpretation of these provisions." Levine v. Oyster Bay, 46 N.Y. Misc. 2d 106, 113, 259 N.Y.S. 2d 247, 254 (Sup. Ct. 1964).

strength of the concept, myth if you will, has been that over and over again general plans have grown out of the zoning map."[54]

Once the actual rather than theoretical relationship between planning and zoning is recognized, the administrative structure for zoning must be viewed as a most unbelieveable creature. The concept of zoning assumes that this control technique can be administered by a board of politically-appointed laymen without technical training. These men proceed to plan without basic guidance other than the zoning map which they regenerate by their own decisions.[55] An analysis of the administrative structure of zoning evoked this comment:

> The running ugly sore on zoning is the total failure of this system of law to develop a code of administrative ethics. Shorn of all pretentious planning jargon, zoning administration is exposed as a process under which multitudes of isolated social and political units engage in highly emotional altercations over the use of land, most of which disputes are settled by crude, tribal adaptations of medieval trial by fire, and a few of which are concluded by confused ad hoc injunctions of bewildered courts. Zoning has been murdered by legislative bodies, by zoning boards of appeal, which are probably the principal culprits, and by many courts.[56]

An advantage of the system of detailed pre-regulation of districts and elaborate use lists is thought to be an assurance of fairness, a lack of arbitrary action, a degree of predictability and relative ease in administration. This theory, however, is deeply undercut by the multitude of zoning amendments, improper variances, special exception permits, floating zone approvals, and unenforced violations.

> What remains is the structure of certainty without the substance — a mere facade of respectable predictability making the practice of unguided administrative and legislative discretion.[57]

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54 Feiss, *Planning Absorbs Zoning*, 27 J. AM. INST. OF PLANNERS, 121, 124 (1961).

55 *Id.* at 122; Feiss poses the question, "In the zoning of any city, why should we expect a citizen group to vote on the technical changes involved in densities and coverage, in the mathematics of setbacks and floor-area ratios, any more than we would expect a citizen group to pass judgment on the engineering design of a suspension bridge." at 122-123.

56 Mickalski, *Zoning — The National Peril*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 1963, 62, 62-63 (1964).

57 Reps, *Requiem for Zoning*, in AMERICAN SOCIETY OF PLANNING OFFICIALS, PLANNING 1964, 56, 65 (1964).

The structural weakness of the system of land-use controls is reflected in the confusion in administrative practice that has developed in an attempt to respond to the problem of land-use allocation with inadequate control methods.[58] However, everyone does not agree that the fault lies entirely with the techniques of control. The planners generally agree that the controls themselves are the linch pins of the entire planning process. Another view suggests that it is difficult to evaluate effectively the American system of land-use controls in implementing a development plan because the controls have never been used in such a manner.[59]

Nevertheless, nearly all agree that a modification of control technique is necessary, particularly for implementation of plans in undeveloped areas. The variety of proposals is enormous. One proposal calls for the complete abandonment of private initiative for development in favor of governmental purchase and design control of all land at the urban fringe. Other proposals have emphasized a continuation of the present framework of land-use controls but advocate the addition of new techniques of control, such as land banks, holding zones, and emphasize, especially, the restructing of the administrative organization and the adopting of procedural guarantees regulating the use of land.[60]

The criticisms and recommendations reveal that the planning and control processes are out of step. The bulk controls are so rigid and inflexible that architectural decisions are adversely affected. Use allocation has not been controlled effectively by the districting device. The weaknesses of the control procedure are revealed in the administrative chaos that surrounds land-use allocation. These fundamental observations should be a point of departure for recommendations for the land-use control mechanism for the New Community.

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58 Mickalski, *supra* note 55 at 62-63.

59 Delafons, *supra* note 9 at 84.

60 Reps, *supra* note 56. AMERICAN SOCIETY OF PLANNING OFFICIALS, NEW DIRECTIONS IN CONNECTICUT PLANNING LEGISLATION (1967). The latter study is the most comprehensive and valuable of any recent effort. The legal and administrative analysis, directed by Richard Babcock, is trenchant, the recommendations are particularly powerful in emphasizing modifications that will ensure greater expertise in local land-use control administrative agencies.

II. The New Community

A. Basic Assumptions about Land Use Control

The first assumption is that for the immediate future new communities will be built by private enterprise, despite the fact that proposals for new communities often include suggestions for state chartered public development corporations.[61] A public development corporation could control directly the initiative for the location of the new community. It could avoid many of the problems of land assembly. It could proceed with less concern for the burden of carrying the costs of land investment, design, and infrastructure. It would be in a position to influence more completely the development plan of the community. Yet there exists a question whether a public development corporation may validly exercise the power of eminent domain to acquire land for new community development. Thus one may expect the continuance of the traditional preference for a legal doctrine that leaves private initiative in land allocation unrestricted, except when the public interest is seriously damaged by specific land uses.[62] It is likely for this reason, and because of the private enterprise ethic, that initiative for new communities will remain with private enterprise.[63]

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61 *See* Slayton, *New Cities: Policies and Legislation*, in American Society of Planning Officials, Planning 1967, 171 (1967).

62 *See*, Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171 (1959); Opinion of the Justices, 332 Mass. 769, 126 N.E.2d 795 (1955); *But see*, San Francisco v. Hayes, 122 Cal. App. 2d 777, 266 P.2d 105 (1954), *cert. denied*, 348 U.S. 897 (1954); and City of Frostburg v. Jenkins, 215 Md. 9, 136 A.2d 852 (1957). Although it is assumed that the new community will be developed by a private corporation, it is unrealistic to assume that development may occur without the use of the power of eminent domain. The decision as to location of the new community must be made by government with a broadly based jurisdiction, most probably, the state. Once a decision to locate is made, land assembly without eminent domain would be possible only at prohibitive cost. The developer's decision alone on location is insufficient, although that is the practice followed to date. The approximately 15,000 acres for Columbia, Maryland, were assembled in secret over a period of one year at an average cost of $1500 per acre. The developer then revealed his intensions and requested rezoning to a New Town District. See Testimony of James Rouse in *Hearings Before Subcommittee on Housing, House Committee on Banking and Currency*, 89th Cong., 2d Sess. on H.R. 12946 part 1 (1966) reprinted as *The City of Columbia, Maryland*, in H. Eldredge (ed.), 2 Taming Megalopis 838, 842, 846 (1967).

63 For example, the representative of the National Association of Home Builders opposed the loans to land development agencies proposed for new community development in the 1966 Model Cities Bill. (See Title II, Section 207, H.R. 12946,

An additional assumption is that new community development will occur without significant modification of governmental organization, particularly of state-local relations. Two alternatives for control of new community development might be considered. One would require immediate incorporation of the new community and subject the developers to direct state review of the land-use allocation process. A second would permit a local unit of government, a city where its boundaries include undeveloped area, or a county, to control the land-use allocation process. The second alternative, perhaps, would decrease local resistance to the new communities. If the second alternative were followed, the new community would be incorporated at some point after partial construction to further the object of establishing a close relationship between the citizens and their government.

Serious problems are posed by assuming that a county government will easily approve the rezoning of a large area to permit the creation of a new community. Initial reaction to James Rouse's proposals for a planned community ordinance for Columbia, Maryland, met

> considerable opposition, partly on grounds that this method was not appropriate under existing laws. Months of debate and discussion during which Rouse appealed successfully to the general public through speeches and advertisements, produced a different approach which had the support of the [Planning] Commission.[64]

89th Cong., 2d Sess.). The section would have authorized 15 year federal loans to state chartered development agencies, public corporations or municipalities for the purchase of land for new communities. *See Hearings on H.R. 12946. Before Subcom. on Housing, House Comm. on Banking and Currency,* 89th Cong., 2d Sess., part 1, at 508 (1966). The provision was not adopted. Subsequent legislation in the 1968 Housing Act was limited to guaranteeing borrowings of private developers for new towns and supplemental grants to states and localities in connection with federally aided water, sewer and open space projects that assist new communities. Title IV, Housing and Urban Development Act of 1968, 42 U.S.C. § 3901 et. seq., 82 Stat. 476, 513.

64 E. EICHLER & A. KAPLAN, THE COMMUNITY BUILDERS, 76 (1967). In Rouse's testimony before the House Subcommittee on Housing, *supra* note 62, he stated: ". . . when we completed our plans for a whole new city, presented them to the people of Howard County and requested a change in the County zoning laws to create a new zoning classification known as a 'New Town District,' not a single person in Howard County opposed this zoning request. The same people who abhorred and fought the invasion of urban sprawl, accepted, and supported the development of a whole new city . . ."

It would be unrealistic to suggest that the same success would follow a developer who proposed a new community which would offer facilities for an economic and a racial mix.[65] Thus, the assumption that a county government is a proper agency to approve a new community proposal might be questioned. Significant resistance surely must be expected. The countering argument, however, must be that the new community will be located in an area that would be subject to urbanization, and hopefully, the local citizens would prefer controlled development, even with the above features.[66]

Thus a further assumption is made that the development corporation will be required to seek approval of its proposals from local government[67] and that the local government will control the land-use allocation process. The ordinance recommended in this article is drafted for addition to a county code. However, the procedures in the ordinance would be applicable if added to a city ordinance. The legal issues as to the procedures for control of land-use are similar in either case.

An additional assumption is that a federal program of subsidies and guarantees will have as an inducement the requirement that the developer create a new community primarily for lower and middle income groups as outlined in the introduction. After receiving local government approval of his plans, the developer may insure the adherence to the federal requirements by the use of covenants, similar to those utilized in urban renewal.[68]

65 "As of July 1, 1965, Columbia planned to offer in the first two years houses priced from $18,000 to $45,000, garden apartments with monthly rentals from $120 to $175, and town houses selling from $22,000 to $28,000. No lower priced housing is to be offered until market experience has been gained." Eichler and Kaplan, *supra* note 64, at 72. At present townhouses sell for $14,900-$35,000 and apartments begin at $113. Letter from Bruce Holonklin, The Rouse Company, dated April 28, 1969.

66 This reaction provided success for Columbia, Maryland. *See* Rouse, *supra* note 62, at 846, and Hoppenfeld, *A Sketch of the Planning-Building Process for Columbia, Maryland*, 33 J. AM. INST. OF PLANNERS 398, 401 (1967).

67 The federal program for aid to new communities currently includes the following requirement: "No development shall be approved as a new community by the Secretary under this section unless the construction of such development has been approved by the local governing body or bodies of the locality or localities in which it will be located and by the Governor of the State in which such locality or localities are situated: Provided, That if such locality or localities have been delegated the general powers of local self-government by State law or State constitution . . . the approval of the Governor shall not be required." 12 U.S.C. § 1749cc-1 (c).

68 *See* Brownfield, *supra* note 44.

It is also assumed that new community development will occur under single ownership and under the management of a private development corporation within an elaboration of the framework of federal legislation discussed above. Further, we will not consider the broader problems of developing criteria for locating the new community.

B. The Effects of the Design Process

Worldwide experience with large scale projects similar to the size of a "new community" envisioned in this discussion dictates fundamental assumptions that must be made in constructing the land-use controls for the new community. The present concepts of detailed bulk preregulation within the broader restrictions of use districting are unfeasible in the design process of a large development. Perhaps when the new community is completed, a scheme similar to the traditional zoning tool might be reintroduced as a technique of maintaining the relationships which have been created, but use-district zoning has no usefulness for pre-construction regulation.

The design process for Columbia, Maryland, was undertaken within the limitations of a county government-approved general plan that allowed "considerable freedom in the detail of urban design and functional relationships within major categories (residential, commercial, and so forth)."[69] The original Columbia planning team was composed of typical experts: planners, real estate developers, architects and engineers. However, it was discovered that no small group of typical experts could adequately investigate and consider the multitudes of interactions of facilities and systems of a physical city.

> The ideas [on urban life patterns] lay in many minds in separate fields of interest . . . The idea emerged of creating a *group* from a cluster of individuals, each with "expertise" in generally defined areas such as education, health, recreation, and so forth . . . Included in the group were advisors from the fields of government, family life, recreation, sociology, economics, education, health, psychology, housing, transportation, and communication . . . Critical to the successful functioning of the group was the full-time involvement of the

69 Hoppenfeld, *supra* note 66, at 407.

> psychologist . . . he represented the one "field of interest" which is the yeast of the mix, that is, the systems concept and the need for interrelatedness.[70]

Experience suggests a conclusion that the planning of large developments is an on-going process that requires continuous feed back into the plans of information gathered and experiences learned as the plan develops. A fixed preregulated land-use control mechanism would be wholly unsatisfactory. In the new community of Vallingby, Sweden, for example, the actual population, employment and densities varied as much as fifty per cent from the original planned norms.[71] The planners' designs for Vallingby emphasized retail trade in neighborhood centers yet after a short period of years it was necessary to expand facilities at the larger centers because of consumer preference for trade there.[72]

Godschalk observes that the Dutch, especially, have permitted an adaptive process of planning to govern their *polder* developments. Information from each stage in the development of the *polders* is used to modify the plans for the subsequent stages. There has been an increasing understanding of the social and economic forces causing enlargement of scale.[73] Godschalk concludes, primarily on the basis of observations of European experiences, that limited size and bounded scale which were a possibility in the planning process of new town developments immediately after World War II are no longer possible in a dynamic industrial urban society. He foresees the need for a planning-design process that permits development stages to build on previous work in a continuously adaptive sequence.[74] The conclusions of Morton Hoppenfeld, based on his experience in the work group that planned Columbia, are similar.[75]

The experiences reviewed by planners suggest that the governmental regulations must not establish more than the minimal degree of pre-regulation of a new community plan. Only the broadest of criteria should be imposed on the development corporation as it carries out the design process. Generally, the criteria should be estab-

70 *Id.* at 402.
71 Godschalk, *Comparative New Community Design*, 33 J. AM. INST. OF PLANNERS, 371, 386 (1967).
72 *Id.* at 383.
73 *Id.* at 375-376.
74 *Id.* at 385-386.
75 Hoppenfeld, *supra* note 66, at 402.

lished as standards and policies rather than in the form of detailed regulation.[76] Certain basic limitations on density and commercial and industrial uses may be included.

C. The Ordinance

The proposed ordinance is recommended for adoption by a county government to provide control of the land allocation process of new community development. One of the basic objectives of the ordinance is to protect the public interest and yet to provide assurances to the developer. The ordinance is written to permit the maximization of feedback as the development of the new community proceeds. The ordinance emphasizes procedural requirements to assure a meaningful opportunity for review of legislative and administrative decisions in the absence of pre-regulated use and bulk restrictions.

A two step approval process for a community development plan will satisfy the requirement of protecting the public interest and yet still provide assurances to the developer of a new community. The ordinance permits a developer to offer relatively generalized plans to the legislative body for approval in accordance with certain pre-established criteria.[77] At the time the preliminary plan is offered to the legislative body a public hearing will be scheduled and an opportunity presented for objections to be raised. After such a hearing the preliminary development plan could be approved and a rezoning to a new community granted with any modification deemed necessary by the legislative body to satisfy the criteria established to protect the public interest.

After preliminary plan approval, the developer would be required to submit a final development plan to the planning commission for its approval. If the final plan remained within certain pre-established deviation limits of the preliminary plan no further public hearings

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76 For discussion of the use of standards and policies to govern land-use regulation, see AMERICAN SOCIETY OF PLANNING OFFICIALS, *supra* note 59 at 35-45; Bair, *Is Zoning A Mistake?*, 14 ZONING DIGEST 249, 253 (1962); Reps, *supra* note 56, at 64.

77 *See* Section 4, Land Use Standards, and Section 7(b), requirements for a Preliminary Development Plan.

would be required.[78] In the case that the submitted final plan deviated more than the tolerable limit, an additional public hearing by the legislature would be required before approval would be given the final plan.

Final plan approval would be permitted by stages so as to permit the greatest degree of flexibility and feedback for the design process. Generous tolerations for shifting of locations and uses of land within the community after preliminary plan approval are necessary to insure that the feedback process is meaningful. Final plan approval by the planning commission would fix the uses of the various buildings and structures designated on the plan in the same manner as if zoned.

III. Flexibility in Land-use Control

The review of the design process of large scale developments suggests that a land-use control ordinance for a new community should be flexible, consisting of a plan review procedure guided by general standards. The objectives of the ordinance recommended in this article are: (1) to provide policy and principle for guidance of the developer and the governmental authorities, (2) to avoid the requirement for separation of uses by districts and the need for detailed bulk pre-regulation, and (3) to provide rigorous procedural safeguards to guide the exercise of the legislative and administrative discretion and to facilitate the judicial review process.

The discussion will proceed first to examine the legality of legislative rezoning of the new community area without establishing use districts, leaving for the planning commission final approval of the relationships within the new community. Next an examination will be made of the authority for planning commission approval of the internal relationships of the new community. The analysis will then consider the probability of achieving the desired objectives within existing enabling legislation.

78 *See* Section 8(c) (2) in the proposed ordinance. The criticism of the zoning administrative process such as that reflected in the text accompanying notes 55-58, *supra*, cuts against the proposition that there is an advantage for the planning process by permitting greater discretion in the planning commission. Of course the local agencies must be adequately staffed before they may function effectively. The careful procedural recommendations contained in the new community ordinance will help to insure that the discretion of the planning commission is not abused. A program for new communities provides an opportunity for involvement of the state to insure that the local administrative agencies maintain a level of adequate expertise. See the recommendations contained in American Society of Planning Officials, *supra* note 60, at 155-181.

A. Zoning Without Use Districts

The Standard Zoning Enabling Act grants to local legislative bodies the power to regulate the height and size of buildings, yard sizes, population density, and the location and use of buildings.[79] An ordinance enacted under the authority of the Standard Act, however, need not regulate to achieve each objective permitted by the Act.[80] Thus, an ordinance would not be void if it did not provide density restrictions or contain minimum lot sizes. All that is required is that the ordinance relate to one or more purposes of the police power.[81] Likewise the Standard Act permits but does not require the local legislative bodies to divide the regulated land into districts.[82] However, if districts are established the regulations must be uniform throughout each district.

The recommended new community ordinance permits the local legislative body to rezone a tract under single ownership to a new community district. At the time of the rezoning the legislature will have before it a preliminary development plan drawn in compliance with the standards of the new community zone.[83] General relationships among the uses within the zone will appear in the preliminary development plan. However, when the legislative body grants approval of a preliminary plan and rezones the area for a new community, the location of specific uses is left to the final approval of the planning commission.

Although the Standard Enabling Act does not require zoning by districts, precedent suggests that zoning must involve zones. For ex-

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79 STANDARD ZONING ACT, Section 1; Section 3 of the Act states the purposes in view: "Such regulations shall be made . . . to secure safety from fire, panic, and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements."

80 *See* 1 RATHKOPF, ZONING AND PLANNING, 3-3 (3rd ed. 1962).

81 *See, e.g.*, Delawanna Iron and Metal Co. v. Albrecht, 9 N.J. 424, 83 A.2d 616 (1952).

82 STANDARD ZONING ACT, Section 2, provides in part: "For any or all of said purposes the local legislative body may divide the municipality into districts of such number, shape, and area as may be deemed best suited to carry out the purposes of this act . . . All such regulations shall be uniform for each class or kind of buildings throughout each district, but the regulations in one district may differ from those in other districts."

83 See section 7(b) in the proposed ordinance.

ample, in *Rockhill v. Chesterfield Township*,[84] residential, agricultural, and their accessory uses, and migrant housing facilities were permitted as of right in the rural township. Other development was permitted by special permit after investigation demonstrated that uses would be beneficial to the general development of the township.

The New Jersey Court stated that the basic concept of zoning involved a reasonable classification of uses, and allocation of uses by districts.

> The constitutional and statutory zoning principle is territorial division according to the character of the lands and structures and their peculiar suitability for particular uses, and uniformity of use within the division.[85]

The court also found that inadequate standards were established to guide administrative discretion in granting special permits.

The objections raised in *Rockhill* may be avoided by the procedures of the new community ordinance. Approval of a preliminary plan and rezoning to a new community does not permit further administrative discretionary development of the new community except within the relatively close tolerances for variation from the preliminary plan. Further, the development of a cohesive community under single ownership is significantly distinct from the development of a township stimulated by all the variations of initiative brought on by individual owners.

Thus one of the rationales for districting — to separate incompatible uses — is weakened when the development of a large tract is undertaken with single ownership and planning proceeds towards a coordinated series of objectives. However, a second objective of districting is to ensure that the owners of all similar property are treated equally. Within the tract designated for a new community this objective has no meaning. If the new community designation is available to all who are able to assemble an appropriate and qualified tract, the objective of equal treatment is satisfied.

The acceptance of the concept of a "floating zone" further weakens

84 Rockhill v. Chesterfield Township 23 N.J. 117, 128 A.2d 473 (1957); N.J. STAT. ANN. Section 40: 55-31 repeats the provisions of the Standard Zoning Act, Section 2, *supra* note 82. New Jersey is one of five states that have specific provisions concerning the power of the state to enact zoning ordinances in its Constitution. N.J. CONST., art. 4, § 6(2).

85 23 N.J. 117, 125, 128 A.2d 473, 478 (1957).

any suggestion that the exercise of the zoning power necessarily requires the establishment of mapped districts. In some cases the floating zone is finally located by a formal rezoning and legislative amendment to the zoning map.[86] In others, however, once the zone is created by the legislative body it may be located by procedures that do not conform to those prescribed for a formal zoning change. For example, the ordinance involved in *Rodgers v. Village of Tarrytown*[87] allowed final approval of the project by the planning commission or by the village board though there were no standards prescribed to guide the planning commission or legislature in the location of a project. The court upheld the discretion of either governmental unit to locate the project on the authority of *Green Point Savings Bank v. Zoning Appeals Board.*[88] *Green Point* had refused to invalidate an ordinance that permitted the location of filling stations in certain districts on approval of the Town Board. The objection to the ordinance in *Green Point* was that no standards guided the discretion of the legislature. The court held that:

> There is not presented a case for the canalization of standards to guide an administrative body, for here the power of approving the use was retained by the legislative body. Where the approval is thus lodged in the local legislative body, and where the matter is one which may endanger the safety of persons and property, there need not be formulated standards for the dispensing power, and the ordinance is constitutional.[89]

In the *Rodgers* case, the actual decision on the location of the project in question had been approved by the local legislative body. It is significant, however, that the procedure for locating the floating zone did not follow the procedure required for a rezoning. But even more significantly, the ordinance was drafted in a manner which permitted final decision on location of the zone by the planning board. This point was not discussed by the court, as it assumed that the original legislative amendment creating the zone was the significant event for testing the procedural requirements.

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86 Prince v. W. H. Cothrum & Co., 227 S.W.2d 863 (Tex. Civ. App. 1950).
87 302 N.Y. 115, 96 N.E.2d 731 (1951) ("residential B-B" garden district).
88 281 N.Y. 534, 24 N.E.2d 319 (1939) *app. dismissed*, 309 U.S. 633 (1939).
89 *Id.* at 538.

The floating zone in Tarrytown was not subject to challenge as spot zoning, because the court found it was in accordance with a comprehensive plan and for the benefit of the entire community, though this argument was raised by the dissent.[90] The Village's action was not an improper variance because, in the court's view, it was a rezoning followed by location of the zone in a separate decision and not a variance.[91] The court found that the zoning amendment took place when the zone was created. Only fixation of the actual boundaries remained until a later date.

However, the floating zone concept raises a fundamental problem that is not clearly considered by either the majority or the dissent. If the floating zone is located without the guidance of clear standards, the equal protection of the law, which is a fundamental test of zoning validity, is undermined. Equal protection is disrupted when some property owners are restricted by one level of zoning while others in the same circumstance, when motivated by their own welfare, are able to achieve a more advantageous use of their land.[92]

Yet this equal protection objection is not a valid one to the use of the *Rodgers* device in the new community context. Where the land is under single ownership, the planning commission's approval of floating relationships does not deny others in a similar situation the equal protection of the law, so long as the new community designation is available to anyone with land that meets the qualifying standard.

A line of cases in Maryland also has achieved the acceptance of the "floating zone" device with site plan approval within the framework of the existing enabling legislation by finding the powers exercised equivalent to those of special exception.[93] In *Huff v. Board of Zoning Appeals*[94] a county ordinance created a light industrial floating zone to be fixed only after the planning commission submitted its recommendation to the zoning commission which locates the zone. Appeal may be taken to the board of zoning appeals. The Court, in

90 302 N.Y. 115, 124, 130; 96 N.E.2d 731, 734-736 (1951).

91 *Id.* at 125.

92 For discussion of this argument, see Haar & Hering, *The Lower Gwynedd Township Case: Too Flexible Zoning or an Inflexible Judiciary*, 74 HAR. L. REV. 1552 (1961).

93 The Maryland cases are considered, in Reno, *Non-Euclidean Zoning: The Use of the Floating Zone*, 23 MD. L. REV. 105 (1963) and Goldman, *Zoning Change: Flexibility v. Stability*, 26 MD. L. REV. 48 (1966).

94 214 Md. 48, 133 A.2d 83 (1957).

approving the procedure, held that the classification is analogous to a special exception, and the rules which are applicable to a special exception would apply, not the general rules of original error or change in conditions of the character of the neighborhood, that control the propriety of rezoning. It stated that there had been a prior legislative determination, as part of a comprehensive plan, that the use which the administrative body permitted upon application to the particular case of the specified standards, was prima facie proper in the environment in which it was permitted.[95]

Costello v. Sieling[96] and *Beall v. Montgomery County Council*[97] both upheld "floating zone" ordinances on the authority of *Huff* and the analogy to the special exception. However, in *Beall* the procedure required legislative approval of the zone's locations.

The device utilized in *Huff*, authorizing the board of appeals to grant a special exception is not useful in the new community context because the board is not normally equipped to handle planning decisions on a large scale. Rather, final project approval power for the planning commission itself is desired for the new community ordinance as the planning commission is the logical agency to make large scale design and planning decisions.

The discussion thus far illustrates two legislative efforts which avoided the requirements of pre-established use districts. The concept suggested by the *Rodgers* case, in particular, is useful for application to the new community. In essence, a number of "floating zones" will be created by the legislature when it first approves a preliminary plan, leaving the finalization of the use areas to the limited discretion of the planning commission.[98]

Not all legislative attempts to achieve greater flexibility with the use of the floating zone concept have met with success in the courts. *Eves v. Zoning Board of Adjustment of Lower Gwynedd Township*[99] rejected a procedure that created a floating Limited Industrial District. In *Eves*, the floating district could not be located except by legislative rezoning of an applicant's land after a public hearing.

95 *Id.* at 62.
96 223 Md. 24, 161 A.2d 824 (1960).
97 240 Md. 77, 212 A.2d 751 (1965).
98 The argument will be made that the planning commission is the body in fact accomplishing the zoning. See discussion of this point at the text accompanying notes 156-158 *infra*.
99 401 Pa. 211, 164 A.2d 7 (1960).

Nevertheless, the court voided the ordinance, finding that the procedure was not authorized by enabling legislation, and further that case by case zoning failed to satisfy the requirement of zoning in accordance with a comprehensive plan.[100]

The Court in *Eves* was particularly concerned with the fact that property owners would not have notice of the possibilities of developments near them so long as land-use was not preplanned. More significantly, the court suggested that its ability to review the legislative zoning actions was reduced by the floating zone procedure.[101]

The thrust of the court's opinion rejecting the floating zone suggests that the requirement for pre-regulation of land use is partially a response to a demand for standards that will permit traditional judicial review. Professor Krasnowiecki has said that

> . . . courts feel threatened when asked to review any zoning change which seeks to blend apparently different uses sensitively to each other . . . Where the limitations would have the most success in controlling the impact of the industrial use on its surroundings, the court would have the greatest difficulty in ferreting out the case of favoritism and discrimination.[102]

The judicial reaction in *Eves* suggests one rationale for the perpetuation of pre-established closely detailed land-use control requirements. However, the objection raised by *Eves* may not be made with regard to the proposed procedure for *locating* the new community district. The rezoning for a new community will be made in accordance with standards that are established to guide the legislative body. Thus, review of the decision will be possible in a manner similar to judicial review of any decision to rezone. Preliminary plan approval would be granted by the legislature only after reviewing the considerations that would enter into the rezoning of any area, including coordination with the comprehensive plan requirements of the region in which the new community is located.[103]

In the event a dispute arises between the developer and the planning commission or legislative body over internal relationships in the new

100 *Id.* at 217.
101 *Id.* at 221.
102 Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 47, 69-70 (1965).
103 *See* Section 7 (d) (2) in the proposed ordinance.

community, the validity of court review is a more troubling question. Traditional tests of "arbitrary, discriminatory or unreasonable" government action have less meaning than they may have in the usual review of zoning decisions. The standards to guide the planning commission in approval of the final plan are not precise and there is no body of precedent to guide the court, (if that would be of any value). Further, there is some question whether the courts are inappropriate bodies to render judgment on land-use decisions that affect a single lot or small area.[104]

The problem of court review of legislative action on a petition for a new community district is recognized in the Howard County, Maryland, ordinance, but no answer is suggested.[105] A sound alternative would be the creation of an expert review body, perhaps a state agency, for the first appeal of decisions rendered by the local governmental authority on land-use control measures.[106] A more realistic alternative is an increased judicial reliance upon the presumption in favor of local government action. Such an attiude would be particularly warranted when the legislative action follows upon the completion of a planning commission review in accordance with the established standards.[107]

The recommended new community ordinance includes rigid procedural requirements for adoption of the new community district and for planning commission approval of the final development plan. The procedural rigidity will insure that the local government acts on the basis of a complete and formal presentation and that the findings and conclusions reached in the legislative decision are recorded. These requirements will establish a record for review that is usually not available in zoning decisions now returned by local legislatures.

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104 *See* the discussion in AMERICAN SOCIETY OF PLANNING OFFICIALS, NEW DIRECTIONS IN CONNECTICUT PLANNING LEGISLATION 143-147, 174-177 (1967) concerning the desirability of establishing an administrative agency for the first review of planning decision.

105 HOWARD COUNTY, MD., ZONING REGULATIONS, § 17.023B, provides: "The action of the County Commissioners in the approval or disapproval of a petition for New Town District Zoning, being legislative in nature, shall not be subject to appeal."

106 *See* American Society of Planning Officials, *supra* note 104.

107 In the recommended ordinance, should the planning commission refuse to approve the developer's final development plan, the developer may submit the plan to the legislative body; thus, a legislative decision would be reached before an appeal to the courts may be considered. *See* § 8(f).

Public hearings must be held by the legislative body before rezoning to the new comunity district is granted.[108] The procedure at the hearing is formalized and a record is created.[109] The legislative body is required to make findings of fact in support of the decision on the preliminary development plan and rezoning.[110] The procedure of the planning commission for approval of the final development plan is detailed,[111] and a report of findings is required in the case of disapproval.[112] More stringent procedural requirements are established to obviate the objection that judicial review is rendered ineffective by attempts to blend apparently different uses.

The objection to the proposed new community control procedure under consideration has been that legislative action to zone necessarily requires the creation of pre-established districts. The Standard Zoning Enabling Act explicitly does not require zoning by districts. The "floating zone" cases, and in particular, *Rodgers v. Tarrytown,* illustrate judicial acceptance of land use control without pre-regulation by fixed districting. *Eves* suggests a judicial attitude of hesitancy to accept land-use control except by clear, pre-established regulations. However, the *Eves* objection may be met if the procedures for adoption of legislative land-use control determinations are more carefully controlled thus permitting judicial scrutiny.

B. Planning Commission Site Review Authority

A second problem raised by the proposed procedure is that final approval of a new community plan is left for the planning commission. This procedure appears to be authorized by the subdivision control given to the planning commission under the Standard Planning Enabling Act.[113] The Act defines "subdivision" as follows: " 'Subdivi-

108 *See* § 7 (d) (1) (a).
109 *See* § 7 (d) (1).
110 *See* § (d) (2) (c).
111 *See* § 8 (c) (1).
112 *See* § 8 (d) (3).
113 STANDARD PLANNING ACT, §§ 14 and 15, quoted in text *infra,* elaborate the powers of subdivision control. Thirty-five states authorize counties to plan and control the subdivision of land. ANDERSON, PLANNING, ZONING AND SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE 50 STATES (1966). However, Section 14 of the *Standard Planning Act* has been adopted by only twenty states, and Section 14 and 15 of the *Standard Planning Act* by only six states. Krasnowiecki, *supra* note 102, at 84. In many cases different but similar powers are established for the county governments.

sion' means the division of a . . . parcel of land into two or more . . . sites, or other divisions of land for the purpose, whether immediate or future, of sale *or of building development.*"[114] The statute indicates that the exercise of the subdivision control power need not be restricted to situations involving division of title, but may be applied to control division of land caused by building development.

Under Section 15 of the Standard Act the planning commission has the power

> to agree with the applicant upon use, height, area, or bulk requirements or restrictions governing buildings and premises within the subdivision, provided such requirements or restrictions do not authorize the violation of the then effective zoning ordinance of the municipality.[115]

Section 14 of the Standard Act provides that the planning commission in order to govern the subdivision may provide:

> . . . for the proper arangement of streets . . . for adequate and convenient open spaces, for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots.[116]

Thus, if the subdivision enabling act for the county adopting the new community ordinance is as broad in scope as Section 15 of the Standard Act, there is authority for implementation of the plan approval process.[117]

However, a recent case illustrates the pitfalls that may arise. In *Hiscox v. Levine*,[118] the Supreme Court of Suffolk County, New York, voided a flexible zoning power granted to the planning board of Smithtown by the Town Board under the authority of an earlier version of New York Town Law Section 281, which authorized planning boards to "make any reasonable change in the zoning regulation" of

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114 STANDARD PLANNING ACT, § 1 (emphasis added.)

115 *Id.* Section 15.

116 *Id.* Section 14.

117 The Pittsburgh RP (Planned Residential Unit District) is based on provisions similar to Sections 1 and 14 of the Standard Act. See PA. STAT. ANN. tit. 53, Sections 22769 and 22770 (Supp. 1964). The Planning Commission approves internal relationships of the district in accordance with regulations which the Planning Commission is empowered to adopt under express terms of the statute. For a description of the planning commission's powers, see Craig, *Planned Unit Development as Seen From City Hall*, 114 U. PA. L. REV. 127, 130-132 (1965).

118 31 Misc. 2d 151, 153, 216 N.Y.S. 2d 801, 804 (1961).

plotted land.[119] The Town Board's resolution directed the Planning Board to "maintain the average density of population" and in all respects to proceed in "strict conformity with Section 281 of the Town Law."[120]

The developer submitted a plan proposing to dedicate 37.4 acres of a 100.8 acre tract as a public park; the remaining 63.4 acres were divided into 79 one-half-acre lots. The tract covered by the plan was partly in a one-acre residential zone and partly in a half-acre residential zone. The Planning Board approved the proposal and passed a resolution which applied the one-half-acre zone restriction to the 63 acre portion.

The court held that the Planning Board's change of the zoning regulations for the 63 acre area "encroaches on the legislative authority to make zoning changes (Town Law Section 265) [and] . . . cannot be upheld."[121] This position is untenable, given the legislative history of Section 281.[122]

However, New York Town Law Section 265 has its origins in Section 5 of the Standard State Zoning Enabling Act. Section 5 requires a three-quarters majority of the legislative body for any zoning amendment that is protested by twenty per cent or more of the neighboring landowners. A similar protection is not offered under New York Town Law Section 281. This observation is "tempting of the conclusion that [Section 265] offers an exclusive approach to substantial deviations from the established zoning pattern."[123]

The recommended new community ordinance is drafted to escape this problem by requiring legislative approval of the rezoning to new community district. The planning commission is not granted authority to vary the use designated on the preliminary development plan

119 New York Town Law Section 281 was amended in 1963. (N.Y. Laws 1963, c. 968). Prior to that time Section 281 was identical to Section 12 of Bassett's Model Planning Enabling Act found in Committee on Regional Plan of New and Its Environs, *Neighborhood and Community Planning*, VII REGIONAL SURVEY 272-273 (1929). Professor Krasnowiecki, in LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT (Technical Bulletin 52, Urban Land Institute 1965) Section 1.1, carefully traces the history and impact of Section 12 of Bassett's proposed planning enabling law. Other than in New York, the section was adopted only by New Jersey and Indiana. (Ind. Laws 1951, ch. 297, Section 1, p. 983, IND. STAT. ANN. (Burns) 534756(7)). New Jersey in 1953 dropped Section 12.

120 31 Misc. 2d 151, 153, 216 N.Y.S. 2d 801, 804 (1961).

121 *Id.* at 154.

122 KRASNOWIECKI, *supra* note 26, at 18, 36.

123 *Id.* at 18.

within 300 feet of the boundary of the new community without an additional hearing before the legislative body.[124] The procedural requirements of the new community ordinance are such that, were a planning commission to act under the authority of Section 15 of the Standard City Planning Enabling Act to give final plan approval, the objection raised in *Hiscox*, based on Section 5 of the Standard Zoning Enabling Act, should be countered.

Maryland is one of the six states that have adopted both Sections 14 and 15 of the Standard City Planning Enabling Act.[125] Howard County has added a NT (New Town) district[126] to the zoning regulations which permits the county legislative authority to rezone an area by generalized preliminary plan designated for a new community. Presumably under the authority of the subdivision statutes, final project approval power is granted to the planning commission.[127]

Similarly, Montgomery County, Maryland, has adopted a "Town Sector Zone" for a new community. After designation of an area as a Town Sector Zone by the legislative body, the planning commission has the authority to approve final development plans.[128]

In each of these examples, a developer is required to submit a preliminary plan to the legislative authority at the time of application for rezoning to the new community. The preliminary plans must contain such items as: layout of major roadways, description of proposed drainage, water supply, sewage and other utilities, the areas for residential use, commercial use and the location and nature of the commercial uses included in the residential areas as well as a statement of the various residential densities. In the Howard County ordinance, the authority delegated to the planning commission is to approve the final development plan, unless it is "not in conformity" with the preliminary plans. The ordinance permits the planning commission to allow a deviation from the preliminary plan by 10% in commercial uses and to decrease open space by 10%.[129] The Montgomery County ordinance allows the planning commission to grant final plan approval

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124 See Section 8(c) and (d) of the proposed ordinance.
125 MD. ANN. CODE, art. 66B, §§ 26 and 27.
126 HOWARD COUNTY, MD., ZONING REGULATIONS, § 17.
127 *Id.* § 17.034.
128 MONTGOMERY COUNTY, MD., CODE, § 104-19A(g)(2).
129 HOWARD COUNTY, MD. ZONING REGULATIONS, § 17.036.

if the plans are "consistent" with the preliminary plans. No specific deviation tolerances are permitted.[130]

Aside from the authority that may be found under a subdivision control act, a planning commission may exercise final site review under the authority of other planning enabling legislation. A limited number of cases consider this issue. A review of the cases provides a basis for evaluating judicial reaction to the extension of the planning commission's power of site review and further illustrates the rigid limitations of the existing statutory framework and case law interpretation which prevents an elaboration of administrative power without change of enabling authority.

Certain limitations on planning commission review power might be considered first. Generally, the cases hold that it is a violation of the legislative authority for an administrative agency to make changes in use affecting large tracts of land.[131] In *Saddle River County Day School v. Saddle River*,[132] the location and extent of any school proposed for residence districts was made subject to review and recommendation by the planning board, with the recommendation subject to legislative oversight. This power in the planning board was voided, because it was deemed by the court to be the exercise of a "special exception". The power to pass on special exceptions was vested in the board of adjustment.

The court refused to find authority for the planning board's delegated power in the applicable section of the planning act.[133] The court concluded that, although the school use was permitted as of right by the zoning act, the statute did by "intent and effect refer to the planning board for recommendation and the governing board for final

130 MONTGOMERY COUNTY, MD. CODE, § 104-19A (g) (2).

131 *See, e.g.*, People v. Perez, 214 Cal. App. 2d 798, 29 Cal. Rpt. 781 (1963) (Planning Commission has no power to zone); Adams v. Zoning Bd. of Review, 86 R.I. 397, 135 A.2d 357 (1957) (Bd. of Adjustment has no power to authorize use change).

132 51 N.J. Super. 589, 144 A.2d 425 (1958) *aff'd per curiam*, 29 N.J. 468, 150 A.2d 34 (1959).

133 N.J. STAT. ANN., § 40:55-1.13, provides in its second paragraph: "The governing body may by ordinance provide for the reference of any other matter or class of matters to the planning board before final action thereon by any municipal public body or municipal official having final authority thereon, with or without the provision that final action thereon shall not be taken until the planning board has submitted its report . . . Whenever the planning board, pursuant to this act shall have made a recommendation to another body, such recommendation may be overridden only by a majority of the full membership of the other body."

decision"[134] whether the school use would, in fact, be permitted at any given location. Thus, the court found that the planning board was granting the equivalent of a special exception, a power reserved to the board of adjustment.

Professor Krasnowiecki suggests that Justice Hall's opinion in *Saddle River* "is surely an unduly restrictive view of the powers of the planning board."[135] However, it might be noted that the opinion considers carefully the purpose of the state planning act and the effect, in fact, of the local ordinance upon the school's ability to locate in a district where it was permitted as of right.[136] The *Saddle River* opinion suggests the dangers of attempting to create more flexible land-use control measures without following the format of the rigidly developed structures of land-use control law. If the borough of Saddle River had granted the power to the Board of Adjustment to approve the location of the school, the objective of review would have been attained, and the enabling authority would have been satisfied.

But this is precisely the point that Professor Krasnowiecki makes, "the strict distinction between site planning function and the special exemption function is surely untenable" and the board of adjustment "is the least likely body to exercise planning functions."[137] The more fundamental point, however, is that adherence to the enabling authority is vital for assurance of the valid exercises of the land-use control function.[138]

A similar holding was evoked in *Swimming River Golf and Country Club v. New Shrewsbury*[139] where the ordinance permitted the plan-

134 51 N.J. Super. 589, 603, 144 A.2d 425, 432 (1958).

135 KRASNOWIECKI, *supra* note 26, at 36.

136 The local zoning ordinance in question had provisions for the location of certain uses in the districts by special exception. The *Saddle River* case arose when the plaintiff proposed to convert a mansion into a private school, the local legislature then amended the zoning ordinance to provide that the "location and extent" of any school proposed for the district was subject to planning board review and recommendation.

137 Krasnowiecki, *supra* note 26 at 36, 38.

138 It is useful to recall that, although the courts recognize a presumption in favor of the validity of a legislative act, there is the countering widely accepted presumption that a zoning ordinance is in derogation of the owner's common law rights and must be strictly construed. See 1, A. H. AND C. A. RATHKOPF, ZONING AND PLANNING 8-1 (3d Ed. 1962); Also see Williams, "Planning Law and the Supreme Court: 1," ZONING DIGEST 57, 64 (1961), for a discussion of the use of presumptions in the land-use control cases in the state courts.

139 30 N.J. 132, 152 A.2d 135 (1959).

ning board to vary minimum lot size and frontage requirements in accordance with a fixed schedule. Again the court found that the planning board was exercising a power of special exception which could be exercised only by the board of adjustment.

However, *Chrinko v. South Brunswick Township Planning Board*[140] may be contrasted with the *Swimming River* decision. In *Chrinko* the planning board was given the authority to permit reduction in lot sizes and frontage requirements so long as the net lot density of the area to be subdivided was not increased. The only authority the court relied upon was the power granted by the zoning enabling act which contains language essentially the same as that of the Standard Zoning Enabling Act, Section 1.[141]

The Swimming River holding was not mentioned in *Chrinko*. A notable distinction is that the reductions were available on a lot by lot basis in Swimming River,[142] whereas in *Chrinko* the provision applied apparently to reductions for entire developments. The latter case involves a more apparent site plan function for the planning board.[143] Nevertheless, the opinion in *Chrinko* does not deal specifically with the issue of the planning commission's powers. The thrust of the opinion is directed to the validity of the local legislative enactment of density zoning without more specific enabling authorization than that granted by the state act.

Two other New Jersey cases have considered more explicitly the powers of a planning board in a function of site plan approval. In *Kozesnick v. Montgomery Township*[144] the ordinances in question created a limited industrial district in two adjoining townships to permit quarrying in one and a coloring plant in the other. The boundaries of the districts were located by legislative action but the planning board in Montgomery township was given authority to approve the plans and specifications of the operations in accordance with detailed regulations written into the ordinance.

The court determined that the planning board was the proper agency for consideration of the action because the matters referred

140 77 N.J. Super. 594, 187 A.2d 221 (1963).

141 *Id.* at 601.

142 In *Swimming River*, the planning board could allow reductions for any "subdivision;" N.J. STAT. ANN., § 40:55-1.2, defines subdivision as any division of a lot or tract into two or more lots.

143 See discussion of this point in Krasnowiecki, *supra* note 26, at 37.

144 24 N.J. 154, 131 A.2d 1 (1957).

were cognate to the purposes of municipal planning as detailed in the applicable statute.[145] The statute is a general statement of the purposes for the creation of a master plan, which include the promotion of harmonious development, convenience, prosperity, efficiency, economy, traffic control, recreation, safety, light and air and civic design and arrangement. The court also relied on the express authority of *N.J. Stat. Ann.* Section 44: 55-1-13.[146]

In *Newark Milk and Cream Co. v. Township of Parsippany-Troy Hills*,[147] a New Jersey Superior Court opinion following *Kozesnick*, the Court elaborated on the planning commission's power of site approval. In *Newark Milk* the legislature established three classes of special economic development districts with specifically detailed requirements as to minimum lot size, street frontage, yard dimensions, and maximum building coverage. Various specified uses were allowed in the districts. They included offices, research laboratories and fabrication and processing plants.

Before a building permit could be issued the site plan for development was to be submitted to the planning commission for review. The planning commission was to consider the layout with respect to 1) streets, 2) parking and access, loading and unloading, 3) water lines, sewers, drainage, 4) signs, and 5) "the appropriateness of the site plan and the design of buildings in relation to the physical characteristics of the neighborhood, and the most beneficial prospective use of the land."[148]

The Court upheld the review as to items 1-4, but voided the planning commission's consideration of the standards of item 5. Justice Hall for the Court stated,

> . . . [t]he Planning Board may only consider those [standards] having a relation to the public interest . . . with . . . effect upon only adjoining property owners, adjoining areas outside the district or the community and public interest at large.[149]

Justice Hall continued on, however, to point out that the consideration of item 5 would cause an intereference with private land use and private business in the absence of public necessity and would "permit

145 N.J. STAT. ANN. § 40:55-1.12.
146 Quoted in note 133 *supra*.
147 47 N.J. Super. 306, 135 A.2d 682 (1957).
148 *Id.* at 313.
149 *Id.* at 333.

the intrusion of aesthetic considerations on a basis beyond that of conserving the value of property."[150] It is probable that Justice Hall's objection was to what he feared was an apparent attempt to attain an excessive aesthetic review power over a plan.[151]

The court met the objection that there was no authority for such site review by relying upon *Kozesnick*, "where it was pointed out that the local planning board is peculiarly the appropriate body to determine such matters."[152] Justice Hall found authority for the referral to the planning board for site review in *N.J. Stat. Ann.* Section 40:55-1.13.

> The delegation to the planning board here is preliminary to final action by the building inspector in issuing or denying the permit. Even though the Planning Board action may be binding on the building inspector and not merely recommendatory, I feel that it is within the letter and spirit granted by the [statute].[153]

Judicial authority on the planning commission's power in the function of site review is slight. The New Jersey opinions split into two groups. If a use is permitted in a district only after review by the planning board, which sounds of special exception, or an individual release from minimum lot size is permitted, which sounds of a variance, the power in the planning board is void because it appears to be the exercise of a power reserved by the enabling legislation for the board of adjustment. On the other hand, where a use in question is permitted as of right, the courts have allowed the planning board discretion to approve the plans of a developer in accordance with statu-

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150 *Id.*

151 It is interesting to note that implicit in Justice Hall's opinion is the view that aesthetic considerations are a valid basis for the exercise of the police power if property values are conserved. This view is a usual statement of the doctrine which is "that the police power cannot be used to accomplish purely aesthetic objectives, but that aesthetic objectives may be taken into consideration where for reasons of public health, safety, or morals, the zoning regulations may be sustained as a proper exercise of the police power. Dukeminier, *Zoning For Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROBS. 218, 219 (1955). Justice Halls' view, more recently, is that aesthetic considerations should be explicitly recognized as an appropriate basis in some circumstances for the exercise of the police power. See Hall, J., dissenting in United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447 (1964).

152 47 N.J. Super. 306, 332, 135 A.2d 682, (1957).

153 *Id.*

tory standards.[154] This distinction appears to be exactly the opposite of that necessary to provide power to a functioning planning board.

Recognition of authority in the planning commission for final plan approval raises an additional problem, namely, that the administrative agency is in fact exercising a legislative power to zone. The authority is extensive that the doctrine of separation of powers does not extend to the local government level.[155] In *Baltimore County v. Missouri Realty*[156] the Court followed this rule in considering the question whether the zoning function could be delegated to an administrative agency, the zoning commission.[157]

The review of the enabling legislation and precedent suggests certain conclusions on the question whether final plan approval of the new community might be assigned to the planning commission. Section 15 of the Standard City Planning Enabling Act is sufficiently broad to permit the planning commission to exercise plan approval of use relationships particularly when the zoning ordinance does not establish rigid limitations. Even where the Standard Planning Act is not in force, the approach of the court in *Kozesnick* is particularly helpful in suggesting that the details of area and bulk regulation might be controlled by the planning commission acting on the basis of preestablished principles and standards rather than by detailed legislative pre-regulation.

However, the New Jersey cases reveal the difficulties that are to be encountered if efforts are made to assign to the planning commission functions that are not permitted by the enabling legislation. Precedent does not allow the legislature to assign authority to the planning commission which might be said to fall into one of the well estab-

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154 A site plan review function was upheld in a recent Wisconsin opinion that is not excessively explicit. St. *ex. rel.* American Oil Company v. Bessent, 27 Wis. 2d 537, 135 N.W.2d 367 (1965). The ordinance upheld required planning commission approval of the "location and plan of operation" of any use "'similar" to those permitted as of right in local business districts. Without other elaboration the court held: "The purposes and objectives expressed in the [local zoning] ordinance, and in the [zoning enabling] statute applicable thereto, are sufficient standards for the exercise of the [site review] power." *Id.* at 550.

155 See Mandelker, *Delegation of Power and Function in Zoning Administration*, 1963 WASH. U. LAW. Q. 60.

156 219 Md. 155, 148 A.2d 424 (1939).

157 *Id.* at 162.

lished categories assigned by the enabling legislation to other administrative bodies.

If the enabling authority is not as broad as Section 15 of the Standard Planning Act, delegation of final plan approval to the planning commission must be preceded by enactment of enabling legislation that will authorize the planning commission's function.

C. Final Approval of the Plan

It is proposed that the developer may submit final plans for the new community by stages. Not only would it be economically unrealistic for the developer to require final plan approval at one time, but such a procedure would defeat the planner's ability to utilize the feedback process. Additionally, the recordation of a final plan will have significant legal effects. An implied dedication of streets and other areas to be used by the public will occur on final plan approval unless the legends on the plan indicate a contrary intent.[158] Purchasers who buy in reliance on a plan will obtain an implied easement of passage over the streets shown on the plan or an equitable servitude to require that items indicated on the plan be maintained for their mutual benefit.[159] Thus, to avoid these additional rigidities, it is imperative that there be staged approval of the final development plan.

Final approval also raises a question as to the standards that will be established to control the use of land in the new community in the years following its construction. The Howard County, Maryland, ordinance permits the developer to designate in his proposed final development plan for each building a "general use" or a "specific use."[160] The proposed ordinance adopts this device and makes the future regulations dependent upon the "general use" designated in the final development plan.[161]

In addition to use designation, it is necessary to establish the other

158 URBAN LAND INSTITUTE, HOMES ASSOCIATION HANDBOOK (1964) 304-308. *See e.g.*, Versailles Twp. Authority v. McKeesport, 171 Pa. Super. 377, 90 A.2d 281 (1952).

159 *See e.g.*, Morrow v. Highland Grove Traction Co. 219 Pa. 619, 69 Atl. 61 (1908).

160 A "general use" for a building is equivalent to establishing a requested zoning classification for each building, and thus permitting a variety of approved uses. A "specific use" designation would permit only the single requested use in the building. HOWARD COUNTY, MD., ZONING RESOLUTIONS, § 17.031D.

161 See Section 8 (b) (4) in the proposed ordinance.

specific regulations that will go into effect upon completion of the new community. This problem can be avoided by leaving all future construction subject to planning commission approval under the procedures of final plan approval. If detailed development standards, such as setback, yard and area restrictions are required to bind future development, the present cycle of rigidity would be re-established. Once ownership of the new community is divided, many of the rationales for permitting greater planning commission discretion are removed. But, because the plan for the new community will be more comprehensive than that for any existing city, the range for discretionary decision is narrowed. The new community provides an opportunity to shift land-use controls away from the rigidities of pre-established detailed regulation, not only for the original planning phase, but for the future control of its land-use.

IV. Conclusion

Present zoning and subdivision control law does not provide the flexibility of land-use control necessary for the large scale development of new towns. This article has recommended an alternative method of control in which the planning commission is given discretion in granting approval for final plan details. Such a process removes the rigidities imposed by use districts and bulk regulations. Though most states do not presently have enabling legislation to accomplish this alternative it would appear to fit within the framework of the Standard Planning and Zoning Enabling Acts. Certainly, such a plan is a great step forward from the imprisoning embrace of archaic property law.

APPENDIX
PROPOSED ORDINANCE FOR LAND USE DURING NEW TOWN DEVELOPMENT

Introduction

The proposed ordinance is drafted for adoption under enabling legislation, such as the *Standard Zoning Enabling Act* and Section 15 of the *Standard Planning Enabling Act* (see text at note 115, *supra*) or Section 12 of the *Model Planning Enabling Act* (see note 119, *supra*). It reflects the procedural considerations advanced in "Suggested Legislation" prepared by Babcock, McBride, and Krasnowiecki, published in Urban Land Institute, Technical Bulletin 52, *Legal Aspects of Planned Unit Residential Development.* Certain of the procedural portions of the ordinance are excerpted from that study's "Illustrative Ordinance." Certain other portions of the ordinance are inspired by or derived from the new community ordinances of Orange and Ventura Counties, California; Montgomery and Howard Counties, Maryland; and Fairfax County, Virginia. The Howard County (Columbia), Maryland, ordinance is exceptionally useful. However, in no case do the examples mentioned duplicate the allocation of powers recommended in the proposed ordinance.

SECTION 1: *Purpose and Intent*

The New Community (NC) District is intended to permit the development of planned communities in accordance with the County and Regional Master Plans, to the extent such plan or plans exist. The location of all residential, commercial, industrial and governmental uses, school sites, parks, playgrounds, recreation areas, parking areas and other open spaces shall be controlled in such a manner as to permit a variety of housing accommodations and land uses in orderly relationship to one another. The NC District is intended to provide an environment which will maximize the choice of housing accommodations for citizens of all income levels and to provide adequate public facilities, including those needed for education, health and social serv-

ices, transportation, and recreation. The District shall contain in so far as possible the residential, commercial, civic, and industrial facilities needed to make possible a community that is reasonably self-sufficient.

It is further intended that the NC District provide a means whereby land may be designed and developed as a unit by taking advantage of modern site planning methods which will maximize the use of new and improved technology and design. Thus, it is the further purpose of this Chapter to eliminate the specific restrictions, which regulate the height, bulk, and arrangement of buildings and the location of the various land uses in other zoning categories, to provide for greater flexibility in subdivision requirements. The requirement that all development be in accordance with a plan meeting the provisions of this Chapter, which are designed to ensure that developments meet adequate standards regarding open space, light and air, pedestrian and vehicular circulation, density of dwelling units, and separation of incompatible uses, will be substituted for these requirements.

SECTION 2: *Definitions*

For purposes of this Chapter:

a. "Preliminary Development Plan" means a set of drawings and texts, submitted as part of an application for the designation of an area as a NC District, providing information and descriptions of the development proposed to be undertaken within such District, as required by Section 7(b).

b. "Final Development Plan" means a set of drawings and texts, submitted for final approval of the development proposed to be undertaken within a designated NC District, providing information and descriptions of such development, as required by Section 8(b).

c. "Open Space Land" means predominantly undeveloped land which has value for (1) park and recreational purposes; (2) conservation of land and other natural resources; or (3) historic or scenic purposes.

d. "New Community District", "NC District" or "the District" means the land zoned for the development of a new community under the provisions of this Chapter.

e. "Landowner" shall mean the legal or beneficial owner or owners of all of the land proposed to be included in the New Community. The tenant under a lease having a term of not less

than seventy-five years shall be deemed to be the holder of the beneficial title to the land covered by the lease for the purpose of this Chapter.

SECTION 3: *Uses Permitted*

a. All uses permitted by right or by special permit in any district shall be permitted within NC Districts, except that no use shall be permitted which does not conform to the "Final Development Plan."

b. Except for accessory uses as provided for in the zoning ordinance, no structure within a NC District shall be erected except at the general location shown, or used for any purpose other than the use designated for such structure on the Final Development Plan.

SECTION 4: *Land Use Standards*

a. Each New Community shall contain a total area of at least 1000 contiguous acres. Lands which are divided by streets, roads, ways, highways, transmissions pipes, lines or conduits, or rights of way (in fee or by easement) not owned by the landowner shall be deemed to be contiguous for the purposes of this Chapter.

b. Each NC District must provide each of the following uses in the following proportions:

	Minimum % of the Total Area of the District	Maximum % of the Total Area of the District
(1) Open Space	——%	——%
(2) Commercial	——%	——%
(3) Industrial and Major Employment	——%	——%

The definition of commercial and industrial use shall be that found in the zoning ordinance.

c. Each NC District must provide adequate public transportation facilities and public water and sewer systems.

d. Access shall be provided from every use site to a public street or to a system of common streets and ways connecting with the public street system.

e. Nothing herein shall render inapplicable any ordinance or regulation of the County relating to construction requirements and/or subdivision approval to the extent that any of the same are not inconsistent with the provisions of this Chapter.

f. For all industrial uses, performance standards shall be applicable, as set forth in regulations under this ordinance.

g. The accessory use provisions of the zoning ordinance shall be applicable to residential uses within the NC Districts.

SECTION 5: *Height, Area, and Bulk Restrictions*

There shall be no minimum lot size, minimum lot width, setback, maximum percentage lot coverage, maximum height or number of stories of structures, or any other height, area, or bulk restrictions, imposed within a NC District except as contained in the Final Development Plan. However, the Planning Commission may limit the height or number of stories of any structure if it finds that existing or proposed development would be adversely affected unless such limitation were imposed.

SECTION 6: *Density*

a. The overall population shown on the Preliminary Development Plan for a NC District, including the associated industrial and commercial areas, shall not exceed an average density of 145 persons per acre. In computing the population density a factor of four and eight-tenths persons shall be used for one family dwellings, three and five-tenths persons per garden type apartment unit or town house and two and eight-tenths persons per high rise apartment unit.

b. Three residential density areas shall be permitted in a NC District in the locations shown on the Preliminary Development Plan. Such density areas shall be designated low, medium, and high.

(1) The population density within a low density area shall not exceed sixty persons per acre of gross residential area.

(2) The population density within a medium density area shall not exceed 150 persons per acre of gross residential area.

(3) The population density within a high density area shall not exceed 270 persons per acre of gross residential area.

SECTION 7: *Procedure For Designation of New Community Districts*

a. Application for NC District Classification.

(1) The landowner of any tract of land in this County meeting the requirements of Section 4 may petition the County Com-

missioners to designate the property described in the petition as a NC District.

(2) The petition shall contain:

(a) The name and address of the petitioner and a reference to the Land Records of the County in which the deed conveying the property in question to the petitioner is recorded. If the petitioner is not the legal, as well as beneficial, owner of the property, the petition shall also contain a statement to that effect and a written assent signed by the legal title holder.

(b) A metes and bounds description of the property covered by the petition and a survey thereof demonstrating that the same meets the requirements of Section 4(a).

(c) A Preliminary Development Plan for the property sought to be reclassified.

(3) The petitioner shall file [5 copies] of the above described petition and all schedules annexed thereto with the Planning Commissioner, who shall, in turn, transmit copies to other relevant state and local agencies for recommendation. Each agency, shall within [30] days after receipt of the petition issue a written report and recommendation thereon to the County Council.

b. Submission Requirements for Preliminary Development Plans.

A "Preliminary Development Plan" as used in this Chapter shall consist of a generalized drawing or series of drawings of the proposed NC District, with appropriate text materials, setting forth:

(1) The major planning assumptions and objectives;

(2) A statement of the intended overall maximum density of population of the proposed NC District, expressed in terms of the average number of people per acre, calculated in accordance with the provisions of Section 6 hereof;

(3) A statement of the number of acres within the proposed NC District intended to be devoted to:

(a) Open Space Uses

(b) Commercial Uses

(c) Industrial Uses.

(4) The general location of the residential uses specifying the type of units. and the estimated cost and retail sales price or rental of such units, and maximum population proposed for each designated residential area broken down into the number of acres to be used for each of the following specific residential uses:

(a) low density
(b) medium density
(c) high density

(5) The general location of the proposed sites for:

(a) Schools, colleges, recreational uses, parks and other public or community uses;
(b) retail commercial areas within the residential areas;
(c) commercial uses other than neighborhood retail;
(d) industrial uses.

(6) A description of the proposed drainage, water supply, sewage and other utility facilities.

(7) The proposed layout of roads and highways of arterial standards or greater.

(8) A description of the public transit system routes and method of operation and the proposed layout of right-of-way if required.

(9) A map showing the location of the NC District within the general area.

(10) A statement of the method of assuring that all open spaces uses will be permanently maintained for that specific purpose.

(11) The substance of the covenants, grants of easements, or other restrictions to be imposed upon the use of the land, buildings and structures, including proposed easements for public utilities.

(12) A schedule showing the time within which applications for final approval of all parts of the New Community are intended to be filed, where plans call for development over a period of years.

c. Review and Report by the Planning Commission.

Within [90] days after receipt of the petition for creation of a NC District, the Planning Commission shall issue a written report and recommendation thereon to the County Council. The Commission shall consider the matters set forth in the various sections of this Chapter and the policies and maps embodied in the County and Regional Master Plans, to the extent that such Plan or Plans exist. As part of its review, the staff of the Planning Commission shall consult with the other departments of the County and State concerning the application. If the Planning Commission finds that the application meets the requirements of this Chapter, and that the proposed development is in accordance

with the County and Regional Master Plans, it shall recommend approval of the NC District.

d. Review of Proposed NC District by County Council

(1) Procedure for hearing before the County Council

(a) Within [120] days after the filing of an application pursuant to Section 7(a) hereof, a public hearing shall be held by the County Council. Public notice of said hearing shall be given in the manner prescribed in regulations promulgated under this ordinance.

(b) All testimony by witnesses at any hearing shall be given under oath and every party of record at a hearing shall have the right to cross-examine adverse witnesses.

(c) A transcript of the hearing shall be made by the Council, copies of which shall be available at cost to any party to the proceedings. All exhibits accepted in evidence shall be identified and duly preserved, or, if not accepted in evidence, shall be properly identified and the reason for the exclusion clearly noted in the record.

(d) The Council may continue the hearing from time to time, and the Council may refer the matter back to the Planning Commission for a further report, a copy of which shall be made available without delay to the Landowner or his representative. However, in any event the public hearing or hearings shall be concluded within [60] days after the date of the first public hearing.

(2) Findings of the County Council.

(a) After the public hearing and consideration of the reports and recommendations of the Planning Commission, the County Council shall examine the Preliminary Development Plan in detail. In making its examination, the County Council shall consider the following factors in passing on the petition:

(i.) the appropriateness of the location of the NC District as evidenced by the County and Regional Master Plans, to the extent such Plan or Plans exist;

(ii.) the effect of such District on the County and on properties in the surrounding vicinity;

(iii.) traffic problems and their relation to the public safety and welfare;

(iv.) the most appropriate use of the land;

(v.) the need for adequate open spaces and for light and air;

(vi.) the preservation of the scenic beauty of the County;

(vii.) the provision of adequate community utilities and facilities, such as public transportation, fire fighting equipment, water, sewerage, schools, parks and other public requirements;

(viii.) the proximity of large urban centers to the proposed NC District:

(b) The County Council shall, within [30] days following the conclusion of the public hearing provided for in Subsection d(1)(d) hereof, either (1) grant approval of the Preliminary Development Plan as submitted, (2) grant approval subject to specified conditions not included in the Preliminary Plan as submitted, or (3) deny approval to the Preliminary Plan. In the event that approval is granted subject to conditions, the Landowner may, within [15] days after receiving a copy of the resolution of the Council, notify the Council of his refusal to accept all said conditions, in which case the Council shall be deemed to have denied approval of the Preliminary Development Plan. In the event the Landowner does not notify the Council within said period of his refusal to accept all said conditions, approval of the Preliminary Development Plan, with condtions, shall stand as granted.

(c) The County Council's grant or denial of approval shall be in the form of a written resolution which shall include findings of fact and shall set forth the reasons for the grant or denial, specifying with particularity in what respects the Preliminary Development Plan would or would not be in the public interest including, but not limited to, findings of fact and conclusions on the following:

whether the petition complies with the provisions of 7(a)(2);

whether the proposed development constitutes a New Community within the requirements of Section 4;

whether the New Community District should be located at the proposed site;

whether the Preliminary Development Plan makes adequate provision for public services, provides adequate control over vehicular traffic, and further, the amenities of light and air, recreation and visual enjoyment.

(d) If the petition is approved, the zoning map of the County shall be amended so as to designate the area of the NC District.

SECTION 8: *Procedure For Approval of Final Development Plan*

a. Application

In any area which is classified as a NC District and in which a Preliminary Development Plan has been approved, a proposed Final Development Plan may be filed for any portion thereof with the Planning Commission of the County.

b. Submission Requirements for Final Development Plan.

A "Final Development Plan" as used in this Chapter shall consist of a drawing or series of drawings at the scale of one inch equals 100 feet with appropriate text material, setting forth with respect to the entire NC district or section thereof:

(1) The topography of the land;

(2) The information normally required in the submission of preliminary subdivision plans, plus specific notations as to all deviations;

(3) The permitted location of

(a) public schools, parks and playgrounds and other community or public use,

(b) public streets and roads,

(c) major lines and conduits supplying water, sewage, electrical and other utility services, and

(d) drainage facilities.

(4) The proposed general locations of all buildings and structures and the permitted "uses" of each such building and structure. Where the Final Development Plan designates the use or uses of a particular building or structure or particular portions thereof as "uses permitted in a (C-1) District", then the building or structure or particular portions thereof may be used for all uses permitted in the particular District.

(5) The height limitation, parking requirements, front side and rear yard areas, set back provisions, minimum lot sizes and acreage requirements stated generally and/or specifically with respect to particular improvements or types of inmprovements.

c. Review of the Final Development Plan by the Planning Commission

(1) In acting upon a proposed Final Development Plan, the Planning Commission shall be guided by the provisions of this Chapter and in particular shall consider:

(a) the location and adequacy of all streets and ways, in relation to the highway plans of the County and State.

(b) the location and adequacy of public utility and community facilities, including transportation facilities and recreational uses and school properties, in relation to the density of population.

(c) the location, extent and potential use of open space in the form of greenbelts, walkways, parkways, park land as it affects the general amenity of the community.

(d) the impact of the proposed commercial and industrial uses on the residential areas of the NC District.

(2) The Planning Commission shall not unreasonably disapprove or change a proposed Final Development Plan. The failure of the proposed Final Development Plan shall be sufficient ground for disapproval or change. The Planning Commission shall not approve any Final Development Plan which:

(a) varies the areas of uses below the minimum or above the maximum percentages for particular uses specified in Section 4(b);

(b) reduces the area set aside for open space land;

(c) increases the overall maximum density of population within the NC District approved in the Preliminary Development Plan;

(d) increases by more than 10% the number of acres proposed for nonresidential use; or

(e) changes a use of land in the NC District within 300 feet of any outside boundary thereof from that shown on the Preliminary Development Plan unless the owners of all land abutting the NC District within 300 feet of the land the use of which is proposed to be changed shall sign a written waiver of the right to be heard in connection with such change in use.

(3) In applying the provisions of this section, where the proposed Final Development Plan is submitted in phases, the overall density and the acres devoted to particular uses shall be recomputed upon the consideration of each successive phase so as to include all prior phases. In making these computations, the gross area of the entire NC District covered in the Preliminary

Development Plan shall be considered and not merely the area of the segments covered by prior phases and the current phase being submitted for approval.

d. After review of the material submitted, and after giving the petitioner an opportunity to be heard, the Planning Commission shall:

(1) Approve the proposed Final Development Plan, or phase thereof, as submitted by the Petitioner;

(2) Approve the Plan subject to conditions not included in the Final Development Plan as submitted. In the event that approval is granted subject to conditions, the Landowner may within [15] days after receiving notification of said approval, notify the Planning Commission of his refusal to accept all said conditions, in which case the Planning Commission shall be deemed to have denied approval of the Plan. In the event that the Landowner does not notify the Planning Commission of his refusal to accept all said conditions, approval of the Plan with conditions shall stand as granted.

(3) Refuse to grant approval to the proposed Final Development Plan. The Planning Commission may not deny approval if the Final Development Plan is in substantial compliance with the Preliminary Development Plan. The Commission shall advise the Landowner in writing of said refusal, setting forth the reasons why one or more of said variations are not in the public interest.

e. A public hearing on a proposed Final Development Plan shall not be required provided the Plan is in substantial compliance with the Preliminary Development Plan before holding public hearings in the manner prescribed by section [ ] of these regulations.

f. In the event the Landowner refuses to accept the conditions imposed upon the Final Development Plan (or particular phase thereof) by the Planning Commission or in the event the Planning Commission shall refuse to approve the Final Development Plan, then the petitioner, at his election, may submit the proposed Final Development Plan directly to the County Council. The County Council shall hold a public hearing on the proposed Final Development Plan and request recommendations from the Planning Commission, which shall be forthcoming within [15] days

after such request. The Council may approve, with or without changes, or disapprove the proposed Final Development Plan in the manner prescribed by Section 7(d) of this Chapter.

g. An amendment may be requested by any interested party. The proposed amendment shall be governed by all of the foregoing provisions relating to the approval of the Final Development Plan.

h. Upon approval of the Final Development Plan the same shall be recorded among the Land Records of the County, and the provisions thereof as to land use shall bind the property covered thereby as provided in this Chapter with the full force and effect of specific zoning regulations. In addition to the Final Development Plan there shall also be recorded a plat which shall include in addition to the requirements of the subdivision regulations, specific notations for lot width, areas, side yards, rear yards, setback coverage, grouping of buildings, placement of standards for street lighting, and other similar requirements.

SECTION 9: *Judicial Review*

Any person or persons aggrieved by any decision of the County Council under this Chapter may appeal such decision to the [ ] Court in the manner prescribed by Section [ ] of these Regulations.

A MODEL PUBLIC EMPLOYEES COLLECTIVE BARGAINING ACT*

Introduction

The Public Employees Negotiation Statute was drafted for the State of Florida in response to a request by a member of the Florida Legislature. The problems to which the statute is directed exist throughout the country; and, therefore, the statute could be enacted in virtually any state without significant change.

Strikes by public employees are becoming more frequent and more serious every year. The purpose of this statute is to provide procedures and mechanisms to facilitate settlement of disputes between public employers and public employees, and to provide sanctions for the prevention of strikes by such employees.

*Prepared by Neil H. Koslowe, member of the Class of 1969, James H. Breay, and Howard A. Kenley, members of the Class of 1970, in the Harvard Law School.

PUBLIC EMPLOYEES NEGOTIATION ACT

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SECTION 1: *Short Title*

This Act may be cited as the Public Employees Negotiation Act of ————.

SECTION 2: *Statement of Policy*

The legislature of the state of ———— declares that it is the public policy of the state and the purpose of this act to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government.

SECTION 3: *Definitions*

(1) "Public employee" means any person employed by a public employer but does not include those persons appointed by the governor or elected by the people, department heads, agency heads, and members of boards and commissions.

(2) "Public employer" means the state, any county, any municipality, or any subdivision of them, including school districts, special districts and authorities, as well as those individuals who represent these entities.

(3) "Membership dues checkoff" means the practice of an employer to deduct from the salary of an employee with his consent an amount for the payment of his membership dues in an employee organization.

(4) "Budget submission date" means the date by which, under law or practice, a government's proposed budget, or a budget containing proposed expenditures applicable to such government, is submitted to the legislative or other similar body of the government for final action.

(5) "Deadlock" means a condition which exists when the public employer and the certified public employee representative fail to achieve agreement at least ninety (90) days prior to the budget submission date of that public employer.

(6) "Strike" means any strike or other concerted stoppage of work or slowdown by public employees.

(7) "Total amount of annual membership dues of the employee organization" shall include initiation fees, periodic dues, and all assessments collected by such employee organization in the twelve-month period preceding the violation of section 11 attributable to the members of such employee organization in that part of the collective negotiating unit actually on strike; provided, however, that if such strike effectively prevents the functioning of the entire collective negotiating unit or units represented by such employee organization, it shall mean such fees, dues and assessments attributable to the total number of members of the employee organization in such unit or units.

SECTION 4: *Right of Organization and Representation*

(1) It shall be lawful for public employees to organize together, to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, and to negotiate or bargain collectively with their public employers through representatives of their own free choice.

(2) Representatives designated or selected for purposes of collective bargaining by the majority of the public employees in a unit appropriate for such purposes, shall have the right to be the exclusive representatives of all the public employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment, and shall be so recognized by the public employer.

(3) Certified employee representatives shall also have the right of membership dues checkoff.

(4) Any individual employee at any time may present grievances to his employer and have the grievances adjusted on an individual basis so long as the adjustment is not inconsistent with the terms of a collective bargaining contract or agreement then in effect, and so long as the bargaining representative has been given opportunity to be present at such adjustment.

COMMENT: The drafters believe that the employee bargaining units will be effectively represented only if their elected representatives are the exclusive representatives of the unit. However, given the possibility that an individual employee may have special circumstances

involved in his employment, the act provides qualified means for permitting the public employer and the individual employee to reach agreement on his special claims.

SECTION 5: *Procedure for Determination of Representation Status*

(1) Employees and the appropriate department or agency heads may, by mutual agreement, decide appropriate collective bargaining units. In establishing, modifying, or combining the bargaining unit they shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives; the extent of organization among the employees; and the desire of the public employees. The Public Employees Relations Board shall certify the bargaining unit in accordance with these standards.

If no such agreement on an appropriate bargaining unit is reached between the employees and the department or agency head within a reasonable time, but in any event not longer than sixty (60) days after the initial request for such discussions unless the parties agree otherwise, this shall be held to constiute an impasse. When the failure to reach such an agreement qualifies as an impasse, the parties involved shall use the services of the Public Employees Relations Board to resolve such dispute.

(2) Where an appropriate bargaining unit exists, the Board shall, upon written petition of ten percent (10%) of the public employees within the unit, hold an election by secret ballot to determine the representation for collective bargaining purposes. The ballot shall contain the name of any candidate showing written proof of ten percent (10%) representation of the public employees within the unit and, in every instance, a provision for a marking of no representation. The candidate receiving a majority of all votes cast by the public employees shall be certified by the Board as the exclusive representative of the unit for collective bargaining purposes, and no election to determine representation within the unit shall be held within one (1) year thereof. In the event that none of the choices on the ballot receives a majority of the votes cast, a runoff election shall be conducted, the ballot providing for a selection between the two choices receiving the largest number of valid votes cast in the election.

COMMENT: In determining the bargaining unit, Subsection (1) encourages the employees and governmental agencies involved to attempt to define the appropriate unit themselves. This procedure hopes to utilize their familiarity with the needs of the employees. Also, this freedom of choice will give the employees more autonomy in the selection of their unit than has generally been allowed in other states. It is felt that this freedom is of practical value to public employees, since their activities are restricted in other ways, due to the necessary deferences to the public interest. Subsection (1) also provides for procedures to be utilized in case of failure to reach an agreement over the appropriate bargaining unit.

Subsection (2) provides the procedure for election of officers once the appropriate unit has been established. The elected representatives are the exclusive bargaining agents, as provided for in Section 4, subsections (2) and (3).

SECTION 6: *Scope of Representation*

The scope of representation shall include all matters relating to employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other terms and conditions of employment.

COMMENT: It is the belief of the drafters that there is no reason nor justification for limiting the scope of representation for some groups — such as teachers or policemen — and not others. The rights of all public employees should be the same.

SECTION 7: *Public Employment Relations Board*

(1) There is hereby created in the state department of civil service a board, to be known as the Public Employment Relations Board [herinafter, the "Board"], which shall consist of three members appointed by the governor, from persons broadly representative of the public, with the advice and consent of the senate. Not more than two members of the Board shall be members of the same political party. Each member shall be appointed for a term of six years, except that of the members first appointed, one shall be appointed for a term to expire on [designate here two years from date of apopintment], one for a term to expire on [designate here four years from date of appointment], and one for a term to expire on [designate here six years from date of

appointment]. The governor shall designate one member as chairman of the Board. A member appointed to fill a vacancy shall be appointed for the unexpired term of the member to whom he is to succeed.

(2) Members of the Board shall hold no other public office or public employment in the state. The chairman shall give his whole time to his duties.

(3) Members of the Board other than the chairman shall, when performing the work of the Board, be compensated at the rate of $ per day, together with an allowance for actual and necessary expenses incurred in the discharge of their duties. The chairman shall receive an annual salary to be fixed within the amount available therefore by appropriation, in addition to an allowance for expenses actually and necessarily incurred by him in the performance of his duties.

(4) The Board may appoint such persons, including but not limited to mediators, members of fact-finding committees, and representatives of employee organizations and public employers to serve as technical advisers to such fact-finding committees, as it may from time to time deem necessary for the performance of its functions. The Board shall prescribe their duties, fix their expenses within the amounts made available therefor by appropriation.

COMMENT: Collective bargaining between public employers and public employees is a very sensitive and a very new phenomenon. Since any existing state mediation service might be linked to the state-employer by public employees, it is felt that a new, independent, full-time board should be created to supervise and to assist such negotiation. The hope is to foster confidence in the negotiation process and to assure public employees the maximum degree of unfettered bargaining feasible.

SECTION 8: *Functions of the Public Employment Relations Board*

The functions of the Board shall be:

(1) to certify the representation status of public employee bargaining units and resolve disputes through procedures of its own

concerning such status when requested to do so by any public employer or public employee organization;

(2) to conduct studies, collect and publish statistical data and other information, and recommend legislation on the conditions of employment of public employees and the problems involved in collective bargaining between public employers and public employees;

(3) to participate in the resolution of disputes between public employers and certified public employee representatives as provided in section 9;

(4) to draw up, after consulting public employers and certified public employee representatives, lists of qualified persons broadly representative of the public, to be available for service as mediators or members of fact-finding committees;

(5) to hold hearings and make inquiries as it deems necessary, and to administer oaths, examine witnesses and documents, take testimony and receive evidence, compel the attendance of witnesses and the production of documents by the issuance of subpoenas, and delegate powers to the members of the Board;

(6) to make, amend, and rescind such rules and regulations as it deem appropriate to carry out the purposes of this Act.

SECTION 9: *Resolution of Disputes*

(1) Public employers and certified public employee representatives are hereby empowered to enter into written agreements establishing procedures for the resolution of disputes which may reach a deadlock in the course of collective bargaining. In the absence or failure of such procedures resulting in a deadlock as defined in section 3, either disputing party may request the assistance of the Board to break the deadlock and resolve the dispute, and the Board may render such assistance on his own motion as well.

(2) If the Board is called upon or decides to render assistance in breaking a deadlock, the Board shall:

(A) require the chairman of the Board to meet with the disputants in order to learn their respective positions on the disputed issues and to suggest ways of breaking the deadlock;

(B) if the deadlock continues, establish a fact-finding committee of not more than three (3) members drawn from a list maintained by the Board pursuant to section 8(4), which committee shall investigate and report back to the disputants within ten (10) days of its establishment distributing to them findings of fact and recommendations for the resolution of the dispute and the breaking of the deadlock;

(C) if the deadlock continues, order the fact-finding committee to make public its findings of fact and recommendations for the resolution of the dispute, and appoint a mediator or mediators, drawn from a list maintained by the Board pursuant to section 8(4), who shall mediate the dispute with the parties;

(D) if the deadlock continues, take whatever steps it deems necessary and appropriate to resolve the dispute and break the deadlock, including the making of recommendations, although a second fact-finding committee shall not be appointed;

(E) if the deadlock continues and is not broken at least forty-five (45) days prior to the budget submission date, transmit to the chief executive officer of the government involved a copy of the findings of fact, recommendations of the fact-finding committee, and the recommendations of the Board. Within ten (10) days thereafter, the chief executive officer shall submit to the legislative body of the government involved his recommendations for resolving the dispute and breaking the deadlock. The chief executive officer may meet with the disputants to assist in resolving the dispute at any time prior to submitting his recommendations to such legislative body.

(3) If the deadlock is not broken at least thirty-five (35) days prior to the budget submission date, there shall be a thirty (30) day "cooling-off" period during which the disputants may meet with any outside parties.

(4) If the deadlock continues when the "cooling-off" period comes to a close, the legislative body of the government involved shall resolve the dispute.

COMMENT: This section recognizes that any initial procedures for resolving disputes should be worked out in written agreements between the parties concerned. However, it may well happen that written

procedures will not be devised or, even if devised, may fail. In such a situation, it is felt that a well-defined and orderly procedure should be followed, and that it should begin far enough in advance of the budget submission date to allow for unhurried negotiations.

The first step of the statutory procedure calls for the chairman of the Board to step in and, through direct talks with the parties, attempt to achieve a solution.

If the dispute continues, it is assumed that there may be some contested facts or some temporarily hardened positions which could be overcome perhaps by an outside, impartial committee that could concretely establish the facts and recommend solutions.

Should this fail, it is felt that time pressure would begin to be a factor and that public concern would be aroused. In addition, a professional mediator, familiar with similar types of disputes, should be introduced into the dispute. If that too should fail, the Board itself could attempt a resolution.

The last elements of the procedure call for the direct involvement of the chief executive officer of the government involved. It is hoped that he will meet with the parties and use the prestige of his office to resolve the dispute. Should his efforts fail, he should recommend a solution to the legislature of the government involved and a final "cooling-off" period, during which last-effort attempts at resolution should be made, could begin. The legislature of the government involved has final authority to settle the matter. The drafters recognize that this raises the problem of unfairness, since it is the employer who finally decides the issues. However, it is not as unfair as would be a parallel arrangement in the private sector, since the union has the opportunity, through the political process, to get its views heard and adopted by the legislature; and the employer will realize that if it treats the employees unfairly, there will be a strike.

An alternative would have been to provide for compulsory arbitration. However, compulsory arbitration is felt to be undesirable since it tends to undermine bargaining by decreasing the incentive to make concessions, resulting in less bargaining and more arbitration. Moreover, an increase in wages for public employees requires either cutting back on other public programs or increasing taxes, and an arbitrator has no special ability to make such political decisions.

SECTION 10: *Prohibited Practices: Public Employers*

It shall be a prohibited practice for a public employer, its desig-

nated representative or agent, or a department or agency head, wilfully:

(1) to interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this act;

(2) to encourage or discourage membership in any labor organization, employee agency, committee, association or representation plan by discrimination in hiring, tenure or other terms or conditions of employment;

(3) to discharge or discriminate against an employee because he has filed any affidavit, petition or complaint or given any information or testimony under this act, or because he has formed, joined or chosen to be represented by any labor organization or employee organization;

(4) to dominate or interfere with the formation, existence, or administration of any labor or employee organization or to contribute financial support to it;

(5) to refuse to bargain collectively in good faith or to refuse to discuss grievances with an employee organization which has been certified as the exclusive representative of employees in an appropriate unit;

(6) to violate the provisions of any written agreement already entered into.

SECTION 11: *Prohibited Practices: Public Employees*

No public employee or employee organization shall engage in a strike, and no employee organization shall cause, instigate, encourage, or condone a strike.

COMMENT: It is urged by some that public employees should be given the right to strike. It is argued that this would involve the least amount of supervision and the greatest amount of freedom. Moreover, it would put public employees on the same level as private employees and would recognize that most public jobs are not especially sensitive. In addition, it is said that since public employees are striking and will continue to strike, their right to do so might as well be recognized.

However, there are significant differences between strikes in the public sector and strikes in the private sector. Public employees are not subject to the same market restraints that push toward settlements

in the private area. The pressure of competition is a strong stimulus to settlements in the private sector, and the absence of this pressure in the public area increases the likelihood of strikes by public employees. Furthermore, in the private sector damage to the public is only an incidental by-product of a strike, while in the public sector it is the central aim. The very object of the strike is to bring pressure to bear by hurting the public. In addition, the present status and attitude of public employees' unions is to some extent similar to that of private employees' unions in the 1930's. The right of public employees to organize and to bargain collectively has begun to be recognized only in recent years, and the unions are eager to exercise their new power and to test its limits. Hence there is likely to be a relatively larger number of strikes in the public sector in the next few years, until the employee organizations become accustomed to their new rights. For these reasons, the drafters concluded that it would be undesirable to give public employees the right to strike, at least at the present time.

SECTION 12: *Procedures to Determine Whether Prohibited Practices Have Taken Place*

(1) Any controversy concerning prohibited practices may be submitted to the Board. Proceedings against the party alleged to have committed a prohibited practice shall be commenced by service upon it and the Board of a written notice, together with a copy of the charges. The accused party shall have eight (8) days within which to serve a written answer to such charges. The Board's hearing will be held promptly thereafter and at such hearing, the parties shall be permitted to be represented by counsel and to summon witnesses in their behalf. Compliance with the technical rules of evidence shall not be required. The Board may use its rule-making power, as provided in Section 8(6), to make any other procedural rules it deems necessary to carry on this function.

(2) The Board shall state its findings of facts upon all the testimony and shall either dismiss the complaint or determine that a prohibited practice has been or is being committed. If the Board finds that the party accused has committed or is committing a prohibited practice, the Board shall petition the Court of Appeals to punish such violation, and shall file in the court the record in the proceedings. Any person aggrieved by a final order of the

Board granting or denying in whole or in part the relief sought may obtain a review of such order in the Court of Appeals by filing in the court a complaint praying that the order of the Board be modified or set aside, with copy of the complaint filed on the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board. Findings of the Board as to the facts shall be conclusive unless it is made to appear to the court's satisfaction that the findings of fact were not supported by substantial evidence.

COMMENT: This section is intended to provide procedures for the determination of whether prohibited practices have taken place. The Board's powers in these inquiries are to be analogous to those of the federal indedpendent regulatory agencies. Procedure is to be informal, with emphasis on eliciting the facts.

The Board's remedial powers are to be flexible within the standards laid down by the Penalties and Sanctions section, (sec. 13). Review may be taken by aggrieved parties, and the Board may enforce its orders, by appeal to the Court of Appeals. Review by the court is to be limited as to the findings of facts by the Board so as to emphasize the Board's expertise in the area of public employment practices, and the Board's opportunity for better witness credibility judgments. The contemplated standard of review is comparable to that of sec. 10(e) of the Federal Administrative Procedure Act.

SECTION 13: *Penalties and Sanctions*

(1) If the Board determines, pursuant to section 12 that an employee organzation has violated or is violating the provisions of section 11, the Board shall order forfeiture of the rights granted pursuant to the provisions of section 4(3) for a specified period of time, as the Board shall determine, but in no event to exceed twelve (12) months; provided, however, that where a fine imposed on an employee organization pursuant to paragraph 2 of this section remains wholly or partly unpaid, after the exhaustion of the cash and securities of the employee organization, the Board shall direct that, notwithstanding such forfeiture, membership dues deduction shall be continued to the extent necessary to pay such fine and such public employer shall transmit such moneys to the court.

(2) Upon application of the Board to the court of appeals, pursuant to section 12, the court shall punish violators as follows:

(A) In the case of a violation of section 10 by a public employer, or its designated representative or agent, or a department or agency head, the court shall (i) issue an order restraining and enjoining such violation, and/or (ii) impose on any individual violator a fine of not more than five hundred dollars ($500) nor less than one hundred dollars ($100), or shall do both.

(B) In the case of a violation of section 11 by an employee organization, the court shall impose upon such employee organization, for each day of such violation a fine fixed in an amount equal to one twenty-sixth (1/26) of the total amount of annual membership dues of such employee organization or twenty thousand (20,000) dollars, whichever is the lesser; provided, however, that where an amount equal to one twenty-sixth (1/26) of the total amount of annual membership dues of such employee organization is less than two thousand and five hundred (2,500) dollars, such fine shall be fixed in the amount of two thousand and five hundred (2,500) dollars. If, however, the employee organization alleges, and the court finds, that the appropriate public employer or its representatives engaged in such acts of extreme provocation as to detract substantially from the responsibility of the employee organization for the strike, the court may in its discretion reduce the amount of the fine imposed pursuant to the preceding sentence.

(3) If an employee organization appeals a fine imposed pursuant to the preceding paragraph, (i) the court to which such an appeal is taken shall, on motion of any party thereto, grant a preference in the hearing thereof, and (ii) such employee organization shall not be required to pay such fine until such appeal is finally determined.

COMMENT: The drafters concluded that economic sanctions, especially in the form of heavy fines, would be the most effective deterrent to strikes by public employees. Other sanctions were considered but rejected because they would be likely to have undesirable results. For example, removing recognition of the union would only cut off communication and thereby impede progress toward a settlement. Firing or jailing the strike leaders would probably result in transforming them into martyrs, which would only stimulate further intransigence.

It will be noted that despite the fact that New York's Taylor Act

(N.Y. JUDICIARY LAW, § 751) provides for the imposition of fines of up to $10,000 per day, New York has experienced a series of damaging strikes by public employees. However, it appears that the New York courts have been reluctant to impose the maximum possible fines. Moreover, some of the unions involved are sufficiently large that the fines actually amount to only a few cents per day for each member. The drafters have attempted to insure the effectiveness of this sanction by providing for twice the amount of fine imposed by the Taylor Act and by making that amount mandatory. The court has discretion to reduce the fine only where "the public employer or its representatives engaged in such acts of extreme provocation as to detract substantially from the responsibility of the employee organization for the strike."

SECTION 14: *Severability Clause and Effective Date*

(1) It is declared to be the legislative intent that, if any section, subsection, sentence, clause, or provision of this act is held invalid, the remainder of the act shall not be affected.

(2) This act shall take effect ————————.

LEGISLATIVE DEVELOPMENTS

THE MICHIGAN TENANTS' RIGHTS STATUTE

In 1968, as part of a package of tenants-rights and housing-code enforcement legislation, Michigan adopted a law providing for participation by tenants in public housing affairs in cities with populations greater than one million. This statute[1] appears to be aimed at two goals: first, to give a fair hearing to tenants aggrieved at the housing commission, and second, to give tenants a voice in managing their own homes. It establishes a board of tenant affairs, one half of whose members are to be elected by tenants in local housing projects on a proportional basis, with the rest to be selected by the mayor with the approval of the municipal legislature. A separate board may be formed for each housing project or on an areawide basis.[2] Meetings of the board are to be held at least twice a month, with a majority of the members constituting a quorum.[3]

I. Powers and Representation

The board's functions are: to advise the local housing commission on matters concerning tenants; to review rules promulgated by the housing commission; to act as a board of review on appeals from adverse determinations on an applicant's request for admission to public housing; and to review appeals from housing authority evictions and changes in rent.[4]

The board's power to review authority decisions and to veto authority rules can be exercised only by a two-thirds vote of the members of the board. Since the city executive appoints one half the members of the board, and since a two-thirds vote is required to veto commission rules, it would seem that any action the city administration is determined to take will be put into effect. Nevertheless, if the tenants put up a solid front on the board of tenant affairs, the publicity from that stand, and the support of rank and file tenants, may well put enough

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1 P.A. 344 (1968), Mich. C.L.A. §§ 125.699-125.705. Presently, its provisions apply only to the city of Detroit. To a great extent the law was drafted by CAP/Legal Services Program at the University of Detroit Law School.

2 Mich. C.L.A. § 125.705.

3 *Id.*, § 125.701.

4 *Id.*, § 125.702.

pressure on the municipal administration to grant the tenants' demands. In fact, a situation of fair bargaining may develop, with the political power of the tenants now buttressed by a new capacity for mobilizing their own constituency and a new opportunity for seeking ad hoc allies among the members of the board.

A number of obstacles, however, will remain. The fact that board members serve without compensation will probably prevent the tenant members from spending a great amount of time on tenant affairs. If it becomes general practice, moreover, for all tenants who have received unfavorable decisions from the commission to appeal to the board, the amount of time the board may be able to give each case will be limited. In addition, the election procedure will probably not produce a true representation of the tenant population among the tenant members of the board. The law provides for as few as four members; thus each housing project cannot have its own representative. The tenant board member will not have much time to visit the various housing projects and to seek the views and grievances of his constituency. It is also possible that the elected tenant members will not represent fairly the three main tenant groups, the blacks, the whites, and the elderly.[5]

II. Fair Hearing

The objective of a fair hearing for persons aggrieved by housing authority action is made harder to achieve by the short period allowed for filing an appeal. A tenant has only seven days in which to appeal the authority's decision to the tenant board.[6] Although the aggrieved party must be given notice of his right to appeal by the housing authority, this abrupt deadline may weaken the effectiveness of this right; lower-income citizens tend to be relatively non-litigious.

However, even this limited right is an improvement over existing law. Absent such a statute, there seems to be no legal requirement that a housing agency give aggrieved tenants a hearing of any sort. Thus, the housing authority generally need not tell the tenant its reasons for evicting him,[7] although if the authority does inform the tenants of the reasons for his eviction, these reasons must not be capricious.

5 Interview with Chester W. Hartman, Assistant Professor in the Department of City and Regional Planning, Harvard University, in Cambridge, Massachusetts, Mar. 14, 1969.

6 Mich. C.L.A. § 125.703 (2).

7 68 Colum. L. Rev. 561, 585 (1968).

Such a rule encourages the local authority not to state any reasons. Only recently has the Department of Housing and Urban Development in an official circular required all federally-supported housing projects to inform tenants of the reasons for their eviction.[8] The existence of a tenant's right to notification and hearing can be supported by federal court decisions requiring the government to give a fair hearing to persons deprived of certain other governmental privileges. In *Dixon v. Alabama*[9] the Fifth Circuit required the state to grant student plaintiffs a fair hearing before expelling them from a state college.

Though it found fair hearing to have different meanings in different contexts, the court in *Dixon* stated that, in the context of a student's expulsion from a university, the state must provide the names of the witnesses against him, and an opportunity for him to present evidence.[10] The new Michigan tenants' rights law states that tenants must be given a fair hearing, and the right to counsel. But no definition of fair hearing is found in the statute, and it is not even clear whether the tenant has a right to cross-examine witnesses. The right to counsel may be meaningless to impoverished tenants, unless counsel is provided by the city or the state. It is unfortunate that the Michigan statute neglected to provide counsel.[11]

The law also gives to persons whose applications for admission to the projects have been denied the right to appeal to the tenant board. This procedure is not entirely suitable. A board composed of tenants may be better qualified for handling eviction disputes than admission disputes. Tenants do have special knowledge of the facts of tenancy, e.g., which rules are insignificant and should not be considered in determining the appropriateness of eviction, or what the financial pressures are in meeting rent payments. But, in a dispute over admission, the tenants are not in the aggrieved person's shoes, and do not have

8 Department of Housing and Urban Development Circular, Feb. 2, 1967. In *Thorpe v. Housing Authority of Durham*, 89 S. Ct. 518 (1969), the Court held the circular mandatory and valid under the department's rule-making power.

9 294 F. 2d 150, 159 (5th Cir.) *cert. denied*, 368 U.S. 930 (1961).

10 Other areas in which deprivation of a governmental benefit without fair hearing may be constitutionally forbidden are public employment, Weiman v. Updegraff 344 U.S. 183 (1952) and occupational license, Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Syrek v. California Unemployment Ins. App. Bd., 2 Cal. Rptr. 40 *aff'd* 54 Cal. 2d 519, 7 Cal. Rptr. 97, 354 P. 2d 625 (1960) (adopting the opinion below).

11 *Contra*, Note: *Public Landlords and Private Tenants: The Eviction of Undesirables from Public Housing Projects*, 77 YALE L. J. 988, 1005 (1968).

the same special appreciation of the facts. A tenant is dealing with an aggrieved applicant may be more likely to ask himself whether he would like the applicant as a neighbor rather than whether his application has been unfairly cleared, especially if the tenant is himself a long-time resident of the project.

III. Tenant Participation

The second goal of the law is to meet the problem of tenant participation in the administration of housing projects. The possible benefits of community control in areas other than housing have been recognized: for example greater cooperation from local people in implementing the socal program, better administration of local programs, and greater flexibility in meeting community needs.[12] The Department of Housing and Urban Development has accordingly issued a circular[13] requiring housing projects to set up procedures for tenant participation, as a prerequisite for receipt of certain funds. In the context of a housing project, community control can mean better care of the project by the tenants, better tenant-management relations, and greater benefits to the tenant from the housing.

However, the veto power given to the tenant board by the new Michigan law is rather limited; it extends only to rules defining tenant obligations, rules on eligibility for entrance, rules on what constitutes just cause for eviction, and "other rules of administration."[14] Moreover, no decision of the tenant board may be inconsistent with federal or state law or regulation. Michigan law prescribes certain meanings of "just cause for eviction": for example, non-payment of rent, or violation of a rule of the housing commission. The housing commission must by law set its rents so as to be financially self-supporting.[15] Michigan law also provides that apartments be rented only to persons of "low income."[16] And federal law prescribes some limitations on the income of tenants allowed in federally-supported public housing.[17]

The power tenants are given over the setting of rents will be merely advisory since the rents will probably be set by such factors as bud-

12 F. Michelman and R. Sandalow, The Organization of Government in Urban Areas. II 313 a-d (1968) (Unpublished text).
13 Department of Housing and Urban Development Circular, Nov. 14, 1967.
14 Mich. C.L.A. § 125.694(b).
15 *Id.*, § 125.677.
16 *Id.*, § 125.694.
17 42 U.S.C.A. § 1410(g) (1964).

getary needs. But tenants may nevertheless play a significant role in infusing new ideas on methods of setting rents. For example, tenants may propose a range of rents, with the percentage of tenant's income allocated to rent decreasing as income increases.[18] The income of children may be excluded in determining changes in the tenant's rent. Tenants, members of a different class and thus having a different set of mores from the housing authority member,[19] may be more willing to eliminate such grounds for eviction as arrest of a family members.[20] The tenant board might also choose to veto such rules as those dealing with keeping pets, refurbishing rooms, and putting television antennae on window sills, and rules giving management the right to enter an apartment at any reasonable hour.[21] Some of these rules seem relatively minor, but this is an area in which tenant-management relations can be improved if management is not put in the position of enforcing petty rules.[22] It will allow for flexibility and shared responsibility in an area where housing rules interfere too greatly with the personal life of the tenant.

It should be noted that important areas of possible tenant control are not reached by the Michigan statute. Many tenant complaints are related not to rules but to services. Tenants seem to be most concerned about such matters as security (for themselves, their property, and their mail), space for recreation, better maintenance service (such as a live-in custodian) and more garbage pick-ups.[23] Tenants could be hired to perform many of these tasks in the projects, including repair and security patrol. In addition, tenants have no direct power in the determination of how money is spent. This area is probably more important to the individual tenant than rule-making authority.

Another area not covered by the law is control of the management and personnel operating the projects. Selection of personnel has often

18 M. HIPSHMAN, PUBLIC HOUSING AT THE CROSSROADS: *The Boston Housing Authority* 34 (1967) [hereinafter cited as Hipshman]; REPORT OF THE COMMITTEE ON RENTAL AND OCCUPANCY OF THE BOSTON MODERNIZATION PROGRAM 3 (Mar. 23, 1968).

19 Hartman and Carr, *Housing Authorities Reconsidered*, 35 J. AMER. INST. PLAN. 10, 13 (1969) [hereinafter cited at Hartman and Carr].

20 *See* New York City Housing Auth. v. Watson 27 Misc. 2d 618, 207 N.Y.S. 2d 920 (Sup. Ct. 1960).

21 Hipshman, *supra* note 18, at 40.

22 "[M]ost of recent tenant protests about public housing and most surveys of public housing tenants indicate a strong resentment against the excessive picayune, and arbitrary regulations that characterize public housing operations." Hartman and Carr, *supra* note 19, at 17.

23 Hipshman, *supra* note 18, at 42.

been on the basis of patronage. Management is often of a different class and ethnic group than tenants with perhaps inadequate understanding of the problems of poor people. A contemptuous attitude toward tenants and poor service are the symptoms.[24] This problem will be difficult to solve, although taking management out of certain private areas of the tenants' lives and better tenant-management communications can help.

An alternative solution to the question of tenant control might be to give tenants the authority to manage the project.[25] With some limitation as to the budget and the standards to be maintained, each project could be operated as a condominium, with tenants meeting to set rules and general policies, to allocate the budget, and to choose a manager. The central authority can set certain minimum standards and provide professional help for the tenants' administration. Thus, tenant-management relationships in public housing would be placed on the same basis as in private housing.

Another alternative to the Michigan law is to place tenants on the housing authority itself. The proportion of tenants on the authority could be adjusted to the amount of power the legislature may want to grant tenants. The authority, with tenant representation, could be given the powers of review [of lower echelon decisions] granted to the tenant board by the new Michigan law.

How much control should tenants have? The answer depends to some extent upon where the emphasis is place in evaluating the goals of housing. If the emphasis is put on self-reliance and community control and the benefits accruing from a localization policy, then the model for a public housing project is the condominion, with a greater amount of social services than would be found in private housing. But such a policy may run counter to another goal of public housing, namely providing shelter for all those who need it and cannot afford it. Problem families, families whose children vandalize and terrorize the proj-

24 *Id.* at 44; D. Muchnick, *Report on the Department of Tenant and Community Relations of the Boston Housing Authority* 39 (unpublished report for the Massachusetts Committee on Discrimination in Housing, 1968).

25 Hipshman, *supra* note 18, at 53. For a proposal to establish tenant management of the Bromley-Heath housing project in Boston, *see* Harvard University, Urban Field Service, Graduate School of Design, *Modernization Program for Bromley-Heath . . . A Report to the Residents* (1968). The general question of tenant management of public housing projects is discussed in Organization for Social and Technical Innovation, Inc., *Interim Report on the Feasability of Creating Tenant Management or Ownership Corporations*, 1968.

ect, probably cannot find housing in the private market. But these are precisely the families whom public housing tenants will find intolerable and whom they will set up rules of eviction and acceptance to keep out. Special housing with extra social services for problem families[26] may be beset by such problems as stigmatization of families assigned to this housing and interference with "liberty of the individual."[27] The housing authority, whose concern should encompass the housing problem in the entire locality, should be able to feel and react to the necessity of finding shelter for the problem family. However, in a recent survey of housing authority members, 38% would keep out problem families altogether, 37% believed they should be assigned to the same housing as other tenants, while 24% would put them in separate housing.[28] Thus, whether authority members can be relied upon to protect the problem family is not clear.

However, authority members, if they cannot be educated, can be replaced. Tenants' representatives will continue, presumably, to represent the constituency which elects them, and the tenants' interests will probably continue to conflict with that of the problem family. The Michigan law does not reach this problem, perhaps because the amount of power given the tenants is not great. The law does not find it necessary to distinguish areas in which tenants have a clear and unrivalled concern from areas in which the interests of tenants and society may conflict. If the movement towards more community control in housing continues, this conflict will have to be resolved.

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26 A. Silverman, SELECTED ASPECTS OF ADMINISTRATION OF PUBLICLY OWNED HOUSING, 154 *et. seq.* (1961).

27 *Id.*, at 173.

28 Hartman and Carr, *supra* note 19, at 15.

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