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The State of Wisconsin

A PRIMER ON  
ZONING

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T A B L E O F C O N T E N T S

	<u>Page</u>
I. INTRODUCTION .....	1
The Varied Problems of Zoning .....	1
What Is Zoning? .....	1
II. WISCONSIN'S LAND USE CONTROL LAWS .....	2
Who Is Empowered to Zone? .....	2
Who Exercises Subdivision Control? .....	7
III. ZONING: THE QUESTION OF JURISDICTION .....	7
Existing Alternatives .....	8
Proposed Alternatives .....	11
Recommendations of the Fragmentation Study .....	12
Wisconsin's Problems .....	12
Wisconsin's Solutions .....	16
IV. ZONING: THE QUESTION OF FISCAL EFFECTS .....	18
How Zoning Affects the Property Tax .....	18
How the Property Tax Affects Zoning .....	18
V. ZONING: THE QUESTION OF ECONOMIC INTEGRATION .....	22
The Problem .....	22
The President's Guidelines .....	23
Court Decisions on Economic Integration .....	25
Various Studies and Recommendations .....	29
Pioneering Legislation in Other Jurisdictions .....	35
The Wisconsin Situation .....	39
VI. ZONING: THE QUESTION OF TECHNIQUES .....	44
Planned Unit Developments .....	44
Density Zoning .....	48
Agricultural Zoning .....	50
Miscellaneous Techniques .....	51
VII. WISCONSIN 1971 ASSEMBLY BILL 162 .....	52
VIII. CONCLUSION .....	55
Jurisdiction .....	56
Fiscal Effects .....	57
Techniques .....	57
Economic Integration .....	58
IX. APPENDIX: BIBLIOGRAPHY OF SOURCE MATERIAL .....	59

## A PRIMER ON ZONING

### I. INTRODUCTION

#### The Varied Problems of Zoning

In any overall consideration of housing problems in Wisconsin, one aspect that should not be ignored is the role that zoning plays as a help or hindrance to the development of satisfactory housing and a desirable housing environment. In a recent study, "State Steps to Better Housing" (LRB-IB-71-7), we explored the role of building codes in improving the quantity and quality of housing; in this study we will pursue the subject further with a look at zoning and subdivision control ordinances in this state and how they measure up to current thinking on land use controls.

One aspect of zoning — so-called economic integration — has been receiving considerable attention both in this state and nationally. Not only was it the subject of an extensive statement on federal policy by President Nixon (June 11, 1971), but it was discussed by Governor Patrick Lucey in his special message on housing (May 21, 1971) and in the "Final Report on Mission 70," the report of former Governor Knowles' Mission 70 Steering Group (December 1970). It is also the subject of a bill before the 1971 Wisconsin Legislature (Assembly Bill 509).

There are other major facets of the zoning problem, however. Wisconsin's 1971 Assembly Bill 162, would revise the entire Wisconsin zoning law, although this bill is as much a recodification of the law for the sake of clarity as it is a substantive change.

In general, the problems presented by current zoning laws, both in Wisconsin and throughout the nation, tend to group themselves into 4 categories: 1) the problem of jurisdiction — which level or levels of government should be responsible for zoning; 2) the problem of fiscal zoning — zoning not necessarily for the best use and development of the land but for the tax relief it will provide; 3) the problem of economic integration — whether it is desirable to zone for one type of housing or to allow mixed types and prices in a single zone; and 4) the problem of updating techniques or methods of zoning. Each of these problems will be discussed in this study.

#### What Is Zoning?

A zoning ordinance is a law which regulates and restricts the use of private property in the public interest. It divides a community into districts, that is, zones, in order to regulate the use of land and water and the height, size, shape and placement of structures; and to regulate the density of population. It confines certain land uses to areas suited to them. Traditionally, zoning regulations have had to be uniform within a district but could vary from district to district. A

zoning ordinance consists of the text of the law and a map showing the district boundaries.

Zoning is an exercise of governmental police power, that is, the power to legislate for the health, safety, welfare and morals of a community. It developed primarily during the 1920's as increasing urbanization brought with it a realization that municipalities could not continue to grow in haphazard fashion without detriment to the area and to the value and enjoyment of the property within it.

Closely connected to zoning is subdivision control, which may be the subject of a separate ordinance or part of the zoning ordinance. Under the Wisconsin statutes, land subdivision is the division of a lot, parcel or tract of land by the owner for sale or development where the division creates 5 or more parcels or building sites of 1.5 acres each or less, either at the time of division or within 5 years. Controls are applied by government through decisions on street location, water supply, sewerage, drainage and lot size.

Zoning, subdivision control and the official map showing street alignments substantially comprise what are referred to as land use controls. Although this study is primarily devoted to zoning, subdivision controls and zoning are so closely connected that, of necessity, the former will be given some consideration in any discussion of the latter.

## II. WISCONSIN'S LAND USE CONTROL LAWS

### Who is Empowered to Zone?

The State of Wisconsin itself does not zone. State law, however, authorizes certain governmental jurisdictions, namely, cities, villages, towns and counties, to do so if they wish. Not only do the statutes specify which jurisdictions may zone, but they also state the purposes for which they may zone, the general administrative methods to be followed, and what may be zoned. The details of how an area is to be zoned are left to the discretion of the local units of government.

With so many jurisdictions involved in zoning, the picture may appear confusing, especially the rather tangled relationships presented by county and town zoning powers. In brief, however, the pattern is: A city may zone within its own jurisdiction and also has extraterritorial jurisdiction up to 3 miles (1.5 miles for fourth-class cities) in adjacent towns (with limitations). A village has the same zoning power as a city and up to 1.5 miles of extraterritorial jurisdiction. A county may pass a zoning ordinance to apply to the unincorporated areas of the county, but it is not effective within a town unless approved by the town board. If a county has not adopted a zoning ordinance after being petitioned by a town to do so, the town can adopt its own ordinance. If a town has been granted village powers under Sec. 60.18

(12), it can adopt an ordinance in the same manner as does a village; but if the county has an ordinance, the exercise of the power to adopt a town ordinance must be approved by the town electors and the ordinance subsequently approved by the county board. If a town is within a regional planning program, its ordinance must conform to the regional plan, be approved by the town electors and by the county board if the county has an ordinance.

Counties are also required to enact shoreland zoning ordinances, and these are mandatory, not optional, throughout the unincorporated areas. This special type of zoning ordinance will not be reviewed in this study.

Following is a more detailed summary of selected sections of the Wisconsin statutes which seem most pertinent to an understanding of the state zoning laws.

### Cities

Sec. 62.23 of the Wisconsin statutes authorizes any city to create a city plan commission. The commission must adopt a master plan incorporating its recommendations for the physical development of the municipality. Such master plan may include such items as the location and character of roads, sidewalks, parking areas, public places, parks, public buildings, airports, railroad routes, sewers and other public utilities; the general character, extent and layout of the replanning of blighted districts; and a comprehensive zoning plan. The master plan may be amended. When adopted, it is certified to the common council to aid it in performing its duties.

The commission is also required to consider and report on such matters as the location and architectural design of public buildings, the location of statues, all plats of land in the city, and the location, character and extent of public housing and slum clearance.

The city council may establish an official map showing the streets, parks and playgrounds.

Sec. 62.23 (7) authorizes a city council to adopt a zoning ordinance to promote the health, safety, morals or general welfare of the community. It may regulate the height and size of buildings, the percentage of lot area that may be occupied, the size of yards, courts and other open spaces, density of population and the location and use of buildings, structures and land for trade, industry and residence.

In order to do this, the council may divide the city into districts (that is, zones) of any number, shape and size and may regulate the construction and use of buildings, structures or land therein. Regulations must be uniform for each class of building and for the use of land throughout each district, but regulations may differ from district to district.

With the consent of the owners, the city council may also establish special districts called planned development districts in order to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses. Recreation and open space shall be provided. In such districts the regulations need not be uniform. Such regulations shall be made in accordance with a comprehensive plan and shall be made with a reasonable consideration "of the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout such city."

The city council may repeal or change all or any part of the zoning regulations.

The council shall provide for a board of appeals, which can, under certain conditions, make exceptions to the terms of the ordinance. Further appeal may be made to a court of record.

Sec. 62.23 (7a) authorizes a city, which has created a city plan commission and adopted a zoning ordinance, to exercise extraterritorial zoning power over an unincorporated area within 3 miles of the city limits of a first, second or third class city, or 1.5 miles if a fourth class city or a village. The council may enact an interim zoning ordinance to preserve existing zoning or uses in all or part of the extraterritorial zoning jurisdiction while the comprehensive zoning plan is being prepared. Such interim ordinance shall be effective for only 2 years, but may be extended under certain circumstances. Plans and regulations for the extraterritorial area shall not be adopted by the city council until approved by a joint extraterritorial zoning committee after hearings.

Sec. 66.40 (12) subjects all housing projects of a city housing authority to the zoning, planning, sanitary and building laws applicable to the locality in which it is situated.

Sec. 66.052 authorizes a city council or village board to regulate or prohibit any industry, thing or place where any nauseous, offensive or unwholesome business is carried on within the city or village or 4 miles from its boundaries. Town boards may do the same for areas within the town not regulated by any city or village.

A city or village may, with town approval, regulate areas where solid waste is dumped in any town within one mile of the corporate limits of such city or village.

Sec. 66.058 (2) (b) authorizes cities, villages and towns to set license fees and standards and regulations for every trailer and trailer camp and mobile home and mobile home park, and limit the number of units of trailers or mobile homes therein.

Sec. 114.136 authorizes a county, city, village or town to protect the aerial approaches to an airport by enacting an ordinance regulating the use, location, height and size of buildings in the vicinity.

### Villages

Sec. 61.35 confers upon villages the powers and duties regarding zoning conferred upon cities by Sec. 62.23 (see above).

### Towns

Sec. 60.74 (1) authorizes a town in a county which has not adopted a county zoning ordinance, after it petitions the county to do so, to regulate by ordinance the areas within which agriculture, forestry and recreation may be conducted, the location of roads, schools, trades and industries, the location, size and height of buildings, the percentage of lot which may be occupied, size of yards, courts and open spaces, the density and distribution of population; to establish districts and set-back building lines; to regulate the areas along natural watercourses; and to adopt an official map.

Sec. 60.74 (2) provides that the town park commission or zoning committee, after hearings, shall recommend to the town board the district boundaries and appropriate regulations. The board may adopt an ordinance and make subsequent changes therein.

Sec. 60.74 (7) authorizes a town board which has been granted village powers by its town meeting to adopt a town zoning ordinance in the same manner as villages do, provided that if a county has adopted a zoning ordinance, the exercise of the power to adopt a town zoning ordinance shall be subject to referendum approval of the town electors. A town zoning ordinance adopted under this subsection shall be subject to the approval of the county board in counties having zoning ordinances.

Sec. 60.74 (8) authorizes towns participating in a regional planning program to adopt town zoning ordinances in the same manner as villages, provided that such ordinance conforms to the regional plan, is approved by the county board in a county having a county ordinance, and the town electors approve it.

Sec. 60.75 authorizes the town board to appoint a board of adjustment, which may make exceptions to the ordinance.

Sec. 66.058 (2) (c) provides that in a town in which the town board has adopted an ordinance regulating trailers and has also adopted the county zoning ordinance, the more restrictive of the 2 ordinances shall apply to any trailer camp in the town.

### Counties

Sec. 59.97 (1) authorizes a county, except those in a regional planning area under a regional planning program, to plan for the physical development and zoning of territory within the county and to adopt a master plan. Its purpose shall be "to promote the public health, safety, convenience and general welfare; to encourage planned and orderly land use development; to protect property values and the property tax base; to permit the careful planning and efficient maintenance of highway systems; to insure adequate highway, utility, health, educational and recreational facilities; to recognize the needs of agriculture, forestry, industry and business in future growth; to encourage uses of land and other natural resources which are in accordance with their character and adaptability; to preserve wetlands; to conserve soil, water and forest resources; to protect the beauties and amenities of landscape and man-made developments; to provide healthy surroundings for family life; and to promote the efficient and economical use of public funds."

Sec. 59.97 (2) authorizes the county board to create a county planning and zoning committee.

Sec. 59.97 (3) authorizes the committee to prepare a county development plan for the physical development of the unincorporated territory within the county and areas within incorporated jurisdictions whose governing bodies by resolution agree to having their areas included in the county development plan. Such plan may be adopted or amended by the county board.

Sec. 59.97 (4) authorizes the county board to establish within the county but outside villages and cities districts and regulations to carry out the purposes of this section.

Sec. 59.97 (5) authorizes the county zoning agency to draft an ordinance to submit to the county board. When adopted, it shall not be effective in any town until approved by the town board.

Sec. 59.971 authorizes county boards to enact, separately from ordinances under Sec. 59.97 above, ordinances zoning shorelands in their unincorporated areas. Existing town ordinances which are more restrictive may continue in effect to the extent of the greater restrictions, but not otherwise. If a county had not adopted such ordinances by January 1, 1968, the state Department of Natural Resources was directed to do so.

Sec. 59.99 authorizes a county board to appoint a board of adjustment to hear appeals in zoning cases.

### Regions

Sec. 66.945 provides for the creation of regional planning commissions. Sec. 66.945 (9) and (10) provide for the preparation and adoption by the commission of a master plan for the region. It shall

show the recommendations of the commission for the physical development of the region.

Sec. 66.945 (11). The reports and recommendations of the commission are solely advisory. Local units or state agencies may authorize a commission to act for it in reviewing plats.

Sec. 66.945 (12) authorizes a local government unit within a region to adopt all or part of the plans and other programs prepared by the regional plan commission. By contract with a local unit, a commission may make studies and offer advice on land use and other matters.

#### Who Exercises Subdivision Control?

Chapter 236. "Platting Lands and Recording and Vacating Plats," of the Wisconsin statutes regulates the subdivision of land, giving detailed provisions on how it is to be done.

Sec. 236.16 provides that each lot in a residential area in counties having a population of 40,000 or more shall have a minimum average width of 50 feet and a minimum area of 6,000 square feet; in counties of less than 40,000, 60 feet and 7,200 square feet. In municipalities, towns and counties adopting subdivision control ordinances under Sec. 236.45, minimum lot width and area may be reduced to dimensions authorized under such ordinances if the lots are served by public sewers.

Sec. 236.45 authorizes any municipality, town or county which has established a planning agency to adopt ordinances governing the subdivision of land which are more restrictive than the provisions of this chapter. Such ordinances may include provisions regulating divisions of land into parcels larger than 1-1/2 acres or divisions of land into less than 5 parcels.

Sec. 236.46 authorizes a county planning agency to prepare regional plans for the future platting of lands within the county outside the limits of any municipality or for the future location of streets. The county board, with the approval of the town boards, may adopt by ordinance the proposed regional plans.

### III. ZONING: THE QUESTION OF JURISDICTION

In the extensive literature that has been written about zoning, considerable criticism has been directed toward the level at which the zoning function is performed as well as the multiplicity of governing units performing it. Traditionally, of course, zoning has been a function of local government. Beginning with cities, it gradually spread to villages, towns and counties as urban populations increased.

Metropolitan growth then led to the granting of extraterritorial jurisdiction to municipalities over the adjacent unincorporated territory. A later development was the review of certain zoning actions by an agency with broader jurisdiction, but such review has been primarily advisory in nature.

This is generally the status of zoning at the present time. Writers in this area, however, point to problems that have arisen under this system throughout the nation. Conflicts may arise between neighboring jurisdictions. The horrible example always given is the possibility of one community's residential zone being immediately adjacent to another's heavy industry zone. Conflicts may arise over extraterritorial jurisdiction and annexation of parts of a town by a city. A town may not want to be annexed, and a city may want to annex only part of a town, leaving the remainder in a crippled condition. A municipality may not zone according to what is considered the best interests of the metropolitan area, although how to determine "best interests" may be an elusive matter. The zoners may not even be the decisive influence in the location of public facilities, such as schools, highways or pollution control facilities — all of which affect zoning. The school boards, highway administrators and sewage districts may all exercise more control over these factors than the zoning authority. Fiscal zoning and exclusionary zoning (considered in more detail in later parts of this study) may be important factors in the zoning process.

Another criticism of fragmented zoning has been directed toward the lay composition of zoning commissions, which may lack the expertise to do a professional job. Small communities, of course, frequently have part-time staffing; or a local official may handle zoning matters along with a variety of other tasks.

A report prepared for the National Commission on Urban Problems, "Fragmentation In Land-Use Planning and Control", by James G. Coke and John J. Gargon, particularly addresses itself to these problems and the solutions that have been suggested to deal with land-use planning and controls.

#### Existing Alternatives

Several arrangements are already being used in various jurisdictions to combat "metropolitan fragmentation." Some apply only to planning and zoning; others are multifunctional. These include:

Councils of government (COG) — A council of government is "a voluntary association of governments designed to provide an area-wide mechanism for key officials to study, discuss, and determine the means — cooperative, if possible — of solving common problems." It is multifunctional and has a governing board composed at least 50% of elected officials. Most are involved in regional planning, a few coordinate certain regional activities, some are involved in operating programs and capital construction, and others provide cooperative

services.

The Metropolitan Council of Minneapolis-St. Paul is considered a good example of a COG. According to the above-cited study, it has shaped regional development through participation in region-shaping decisions rather than through the exercise of land-use controls. The Metropolitan Council was created by the Minnesota Legislature to plan for and develop a 7-county area. Appointed by the governor with Senate consent, it is engaged in regional planning, data collection, research, review and coordination. Furthermore, all municipalities must submit their comprehensive plans to the council for review, and the council, indeed, may review the plans of each independent agency in the Twin-Cities area. If a plan affects other municipalities, the council notifies them that it contains matters of regional concern, and an affected municipality may request a hearing. Any plan inconsistent with the orderly growth of the area may be suspended. The council may also have one of its members serve as a nonvoting member of any metropolitan area commission.

Metropolitan government — Metro government may take diverse forms, such as city-county consolidation or a new county government and may differ not only in overall structure, but within various formats.

One example is the Metropolitan Government of Nashville and Davidson County, Tennessee, which is responsible for functions formerly handled by the city and county. Land-use planning and control became a function of the Metropolitan Government, although the zoning ordinance for the area was not prepared until 1968. A Metropolitan Planning Commission was created to develop a master plan for the area, to control platting and subdividing of land, to adopt a zoning ordinance and to compile a yearly list of proposed capital improvements. Any street, park or public building must be approved by it. A single Metropolitan Board of Zoning Appeals was also established. Six suburban cities, representing, however, only 4% of the area's population, did not choose to come under the Metro and hence retained control of their own zoning. Changes in the zoning ordinance are submitted to the commission before going to the Metropolitan County Council, and a two-thirds vote of the council is necessary to override a Planning Commission adverse vote. The Planning Commission also participates in urban renewal projects in cooperation with the Nashville Housing Authority.

Another metropolitan government is UNIGOV, the unified government of Indianapolis-Marion County. UNIGOV's Department of Metropolitan Development contains Divisions of Housing, Urban Renewal, Code Enforcement, Building, and Planning and Zoning. The Division of Planning and Zoning is responsible for area-wide and long-range planning and for administration of the zoning ordinance. According to HUD CHALLENGE, May 1971 ("UNIGOV"), the division has been "working closely with community-level groups and neighborhood associations, a mutually beneficial relationship which has resulted in such innovations as incorporation into the City's master plan of subarea plans drawn up by neighborhood groups with the technical assistance of Planning and Zoning personnel." The division will explore seven areas of planning activity:

"management and programming; economic considerations; special needs, including improvements in the area of human resources; land use and environmental conditions; transportation; management of utilities and programming of support systems; and public facilities."

It is interesting to note that a bill was introduced in the 1971 Indiana Legislature — called the "Mini-Gov Bill" — to counteract the unifying trend. It would divide Indianapolis-Marion County into communities, each with an elected community council. With regard to zoning, a community council would have the power to propose amendments to the Metropolitan Development Commission's master plan for its community, propose amendments to any zoning ordinance regulating property within its area, hold hearings on rezoning petitions and make recommendations thereon to the commission, and act as a board of zoning appeals.

Local planning assistance by metropolitan planning agencies — Another method of counteracting fragmentation in zoning is through local planning assistance by a metropolitan planning agency, such as county planning agencies or regional planning commissions. Assistance may range from the provision of research data and general planning advice (said to be the most frequent form of assistance) to the preparation of comprehensive plans (called the least frequent form of assistance). The Fragmentation study cites as an example of this method the county planning commission which was created in each of four suburban Pennsylvania counties. It carries on an extensive program of local planning assistance, including the reviewing of plats before their recording and the preparation of comprehensive municipal plans by the county planning staff.

County involvement in regulatory activities — A stronger county government with regard to land-use planning and controls is another proposed solution. Control over land use would be granted to the county. Since the counties already exist as a unit of government, they could serve as a convenient vehicle for developing such controls and furnishing a broader perspective. In the absence of this, it is recommended that the county exercise control in unincorporated areas.

State action — The Fragmentation study authors believe that the state itself has many advantages as a metropolitan regional government. It is the superior of the local governments, has better revenue-raising ability and is the ultimate repository of the police power. Direct state involvement to date, however, has been minimal. Colorado law contains an interesting provision that requires proposed county zoning ordinances to be submitted to the state planning director for advice and recommendation, while in Michigan they are referred to the Department of Economic Expansion. The most active role in land-use controls has been played by Hawaii, which divides the state into four land-use categories — urban, agricultural, conservation and rural — through a State Land Use Commission. Counties adopt the detailed zoning regulations within each district except conservation districts, which fall under the jurisdiction of the State Department of Land and Natural Resources.

Vermont, however, now has a law requiring any development of over 10 acres to be approved by the state.

### Proposed Alternatives

In addition to proposals that are already used to some extent in various jurisdictions, the Fragmentation study also describes several miscellaneous proposals that have been advocated from time to time to modify local control of land-use planning and controls.

Gearing metropolitan area planning to development decisions — One theory is that framework to guide urban growth is necessary, but planning must also be more related to regional land-use development. A comprehensive plan should be more closely related to the goals of a community. To integrate the planning process with the development process, it is suggested that a Metropolitan Area General Plan be developed together with an Urban Development Policies Instrument, which would serve as a framework for policy decisions. In addition, a Metropolitan Area Public Works Program and Urban Development Code would combine zoning, subdivision and housing regulations; and a program of civic education on planning would be undertaken.

Strengthening area-wide review — Another suggestion is that area-wide review could be imposed either at the metropolitan or at the state level. One aspect of area-wide review in use in some states is the requirement that boundary decisions or highway decisions be submitted to a county or regional agency. Another type of area-wide review is provided in Section 204 of the federal Demonstration Cities and Metropolitan Development Act of 1966, which provides that application for certain federal grants be accompanied by the comments of an area-wide planning agency. Use of a state administrative tribunal to settle appeals relating to land-use controls has been suggested.

Creating new agencies short of metropolitan government — It has been suggested that special districts, called suburban development districts, be created to acquire all lands within the district in order to plan and provide for the development of the land by private developers. Under another proposal, metropolitan development commissions would nationalize development rights. A third proposal is for a development control agency on a metropolitan or submetropolitan basis to replace the zoning administrator and board of appeals. It would administer a zoning ordinance combining zoning and subdivision controls. Yet another is for a state-chartered public development corporation to promote the development of new towns. A fifth type of organization is a metropolitan special district to plan and install certain key capital facilities like transportation, open space and utilities.

Generating private development incentives — Although public policies are important in stimulating regional growth, the extent of growth depends largely on private development. To guide development it is suggested that 1) land banks could be used, that is, holding land

until an appropriate time for development; 2) mortgage guarantees could be used; and 3) creation of new communities could be stimulated.

Decentralization in large municipalities — Although the large administrative unit is highly recommended for providing urban services in the most efficient way, a counterbalancing idea of decentralization of land-use planning and controls within core cities of large metropolitan areas is advanced. It is contended, however, that, in fact, the present system is decentralized, but that formal decentralization could be achieved through a series of community planning boards in sub-areas of 30,000-50,000 population. They could grant variances and comment on any proposed zoning ordinance change.

#### Recommendation of the "Fragmentation" Study

In the light of various innovations now in use and proposals not now used, Coke and Gargan in their Fragmentation study recommend: 1) removing fiscal constraints that affect land-use policies by use of unconditional block grants, state-collected, locally-shared sales and income taxes returned at least partially according to need, and state or regional taxation of commercial and industrial property either to finance major functions or returned to localities at least partially on a need basis; 2) recasting the framework for regulatory controls in order to integrate zoning, subdivision controls and housing codes into one set of regulations, to prepare a general plan "that expresses development policies as well as mapped land-use areas", and to create a state review agency to hear appeals; 3) organizing planning at the regional scale through regional development agencies; 4) strengthening the administration of traditional controls at the county and large municipality levels and prohibiting land-use control by small municipalities; 5) involving the state in regional development by coordinating state-wide planning, policies and technical assistance for local governments, placing urban affairs and state planning in a single agency which would have a metropolitan coordinator in each regional development agency; and 6) expanding professional capacities through increased federal support of professional training and developing continuing educational programs for practicing professionals.

#### Wisconsin's Problems

Since Wisconsin's zoning structure is similar to that of the other states, it shares the common question of jurisdiction or the fragmentation problem.

County-town problem — A prime example of the fragmentation problem in Wisconsin can be seen in the jurisdictional question between counties and towns. As we noted in the preceding section, county zoning need not be adopted by the towns within the county (later in this report, we shall discuss 1971 Assembly Bill 162 which would remove the town veto power over county zoning). In preparation for this study we submitted questionnaires to each county in the state on various aspects

of zoning. Some of the county respondents spoke to this issue. One county which does not now have a zoning ordinance is planning on compiling one in the near future. Its respondent wrote that they are hoping the bill passes, as "It hardly seems right to go through all the work of zoning rules if only a few townships accept it." Another county official thinks the need is for a metropolitan planning and zoning ordinance for the whole county; there are too many overlapping jurisdictions now. Still another respondent stated: "Elimination of town board veto is imperative if any uniform control is to be exercised." Again, from another: "The main problems re zoning are the fragmented systems — Some towns have comprehensive — some that have adopted it haven't implemented it. The issuance of permits may be by the wife of the farmer who has the job because he is gone. The issuance then, of the permit will only have the beneficial effect equal to the person's knowledge of why the permit is issued." Related to this, another reply said: "We are looking forward to State standards for zoning, building, plumbing, sanitation, electrical, and building codes." Finally, one county respondent described the fact that a town must elect to become zoned as "the number one fault of the State Statutes regarding zoning."

How many towns have accepted their county zoning ordinances? Data recieved from corresponding counties indicate the following:

Table 1: Wisconsin Towns Which Have Adopted County Zoning

Counties	Towns Approving County Ordinance		Counties	Towns Approving County Ordinance	
	No. of Towns	No. of Towns		No. of Towns	No. of Towns
Ashland	17	17	Langlade	6	17
Barron	6	25	Lincoln	14	16
Bayfield	all		Manitowoc	9	18
Buffalo	all		Marquette	10	14
Calumet	5	9	Menominee	all (one town only)	
Chippewa	9	23	Oneida	15	21
Columbia	17	21	Outagamie	17	20
Dane	all		Pepin	3	8
Dodge	4	24	Pierce	11	17 (2 in process)
Door	3	14	Polk	0	24 (co. just adopted ord.)
Douglas	15	16	Racine	all	
Dunn	8	22	Rusk	all	
Eau Claire	7	13	St. Croix	20	21
Florence	7	8	Sauk	17	22
Forest	8	14	Shawano	19	25
Grant	2	33	Trempealeau	14	15
Green	all		Vilas	all	
Green Lake	6	10	Walworth	all	
Iowa	8	14	Washington	13	13
Iron	all		Waukesha	5	13
Jefferson	all		Waushara	9	18
Juneau	3	19	Winnebago	15	16
La Crosse	all				

Several counties, of course, have only shoreland zoning ordinances; they do not have a general zoning ordinance. Out of our 56 replies, some 10 fell into this category. Brown County, one of those with no general county zoning ordinance, indicated that 15 of its 17 towns have their own ordinances, while Ozaukee County's 6 towns each have their own ordinances and in Rock County 12 towns out of 20 have their own ordinances.

City-town problems — Two zoning officials — one county and one city — expressed the view that extraterritorial zoning has not worked out too well. The problem seems to be the interim development that occurs during the period while the comprehensive zoning plan is being prepared.

Staffing problems — Concerning the problem of professional staffing, we sought information on this point in our questionnaires. The size of the staff varied from one part-time employe to 14 full-time employes. Data for those counties with zoning ordinances that replied to this question is tabulated as follows:

Table 2: Zoning Staff Size by Responding Counties

<u>County</u>	<u>Full-Time</u>	<u>Incl. Professionals</u>	<u>Part-Time</u>
Ashland	1	-	1
Barron	5	-	-
Bayfield	5	1	-
Buffalo	-	-	1
Calumet	2	1	-
Chippewa	-	-	4
Clark	5	-	-
Columbia	3	-	-
Dane	3	-	-
Dodge	6	4	7
Door	1	1	-
Douglas	1	-	-
Dunn	2	1	-
Eau Claire	3	-	-
Florence	1	-	-
Forest	1	1	2
Grant	-	-	1
Green	1	-	2
Green Lake	1	-	1
Iowa	1	-	-
Iron			X
Jefferson	2	-	-
Juneau			X
La Crosse	1	-	1
Langlade	-	-	5
Lincoln	2	2	-
Manitowoc	6	-	-
Marquette	1	-	-
Menominee	1	-	-
Oneida	3	-	20
Outagamie	1	1	-
Ozaukee	1	1	-
Pepin	-	-	X
Polk	-	-	3
Racine	14	4	10
Rock	4	3	-
Rusk	1	-	1
Sauk	3	2	1
St. Croix	1	1	-
Shawano	2	1	-
Taylor	-	-	-
Trempealeau	1	-	-
Vernon	1	-	-
Vilas	X	X	-
Walworth	7	5	-
Washington	2	-	-
Waukesha	X	X	-
Waushara	2	1	-
Winnebago	-	-	3

Our questionnaires were also sent to the cities and villages of Dane and Milwaukee Counties. Among the cities and villages of Dane County, 2 cities have a planning director, plus a third that hires one on a consulting basis. One village has a planning director. The professional staff varied from zero in most villages and one city, to 10 in Madison.

In Milwaukee County 6 municipalities have planning directors, while this office is filled by an associate planner in one jurisdiction and a city engineer in another. Some had none. Professional staff varied from none to 38 in the City of Milwaukee.

### Wisconsin's Solutions

Planning assistance to municipalities in the state may come from several sources -- from the regional planning commissions, from the counties wherein a municipality is located, or from the State Department of Local Affairs and Development. All of these sources have been used to provide comprehensive plans or proposed ordinances on zoning and subdivision control for assorted municipalities.

So far, the primary method which has been used in Wisconsin to counteract the fragmentation process in zoning has been through regional planning commissions. At the present time there is one council of government in the state and 7 regional planning commissions.

The Fox Valley Council of Governments is "a voluntary association of 14 local political units which seeks to use intergovernmental cooperation as a tool to solve area-wide problems." It changed from a regional planning commission into a council of governments in 1967 in order to give greater representation to elected officials than is provided for in the RPC laws and to be able to address itself to area-wide problems which are outside the scope of regional planning. It provides planning and study services for its members. It has used land-use planning to coordinate local plans and to structure land uses. It completed a comprehensive land-use development plan in 1963 (recently updated). Local units implemented it with their local ordinances. In addition to its land-use planning, FVCOG has assisted municipalities "through recommendations on specific requests," such as zoning, subdivision design, park planning and so forth.

The regional plan commissions are engaged in various forms of advice and assistance to local governmental units. The Brown County Regional Planning Commission, for example, was authorized by the county board in 1970 to review all survey maps and subdivision plats in the towns within the county. Also in 1970 it initiated a local assistance planning program to provide technical planning services to local units upon their request. When this is done, it negotiates a contract with the local unit. Land use for the entire county was updated in 1970.

The Dane County Regional Planning Commission is engaged — in mid-1971 — in compiling a set of land-use standards which it hopes the municipalities in the county will use as guidelines in their zoning activities.

As we noted in the preceding section of this study, the regional planning commissions in this state function in a purely advisory capacity. To what extent do local jurisdictions turn to them for help in their zoning activities? In response to our questionnaire, 13 counties said their ordinances are based on RPC models, while 2 said theirs are partially based on them. Clark County, which does not yet have a zoning ordinance (except shoreland zoning), intends to draw up a comprehensive zoning ordinance this winter with the assistance of regional planning personnel. Pierce County is working with the Mississippi River Planning Commission to remodel its ordinance, while Vernon County is working on an ordinance with the help of the same commission. Walworth County is presently developing a new comprehensive zoning ordinance "to upgrade existing ordinance and to fully implement regional plan. All recent programs have been developed in cooperation with S.E. Wis. Regional Planning Commission."

On the other hand, another county wrote: "Zoning and land use planning are not coordinated in our county and therefore are limited in effect. Cities and villages are independent of town and county planning. Conflicting purposes and situations exist. Regional planning is advisory only and is not heeded when critical land use decisions must be made. What is needed is an area-wide planning authority with administrative responsibility."

A MILWAUKEE JOURNAL news article of September 14, 1971, described the difficulties experienced by the Southeastern Wisconsin Regional Planning Commission in its efforts to control urban sprawl. Since its plans are advisory, it must rely on some 153 local units of government for implementation. The commission's plan to contain urban sprawl, which involves restricting new developments to sewerred areas, has not been followed. SEWRPC Chairman George Berteau, however (MILWAUKEE JOURNAL, September 24, 1971), stated that regional planning could work in southeastern Wisconsin if it were strengthened. Still keeping its advisory nature, the Legislature should grant it power to review plats of proposed subdivisions and advise developers and local governments as to their conformity with regional plans. He advocated a stronger legal and financial base for SEWRPC and a closer relationship between state agencies, such as the Department of Natural Resources, and the regional planners. Editorializing on September 25, the Journal recommended that the state "provide SEWRPC with stable funding, removing the need to beg locally. The agency should also be empowered to defend rational land use. It should be able to veto, subject to state review, major breaches in regional planning by local governments."

On the other hand, Milwaukee County Executive John Doyne recommended to the County Board on October 5 that the county withdraw from SEWRPC because of the county's financial problems.

#### IV. ZONING: THE QUESTION OF FISCAL EFFECTS

##### How Zoning Affects the Property Tax

Zoning affects the local property tax, and the local property tax affects zoning. The result has been so-called "fiscal zoning," that is, using zoning to increase the tax-producing elements and decrease the tax-consuming elements of a community. This results in planning land use for fiscal ends rather than for an orderly and improved pattern of urban growth.

In general, fiscal zoning is practiced on the theory that certain types of economic, commercial or low-density residential developments pay their way; that is, their taxes are sufficient to offset the cost of services needed by them. On the other hand, high density areas, such as high rise apartments or apartments with 2 or more bedrooms, and low-cost housing imply a greater need for services, particularly schools, than are compensated for by taxation. Thus, one of the reasons economic segregation or exclusionary zoning is practiced is to prevent a rise in property taxes (see next section of this study for details on exclusionary zoning).

Fiscal zoning may have other effects, of course, than economic segregation. If numerous exceptions (spot zoning) are made to the zoning ordinance to permit enterprises in an area not otherwise zoned for then in order to improve the property tax base, the result may be a hodge-podge development out of harmony with the general zoning scheme.

##### How the Property Tax Affects Zoning

What are the features of the property tax that have an effect on zoning decisions? One such feature is the amount of revenue derived from the tax. In spite of state aids and shared taxes, local governments in Wisconsin, like those throughout the nation, are heavily dependent on the property tax for financing local government services, including schools. Since the 3 major forms of taxation — income, sales and property — are, however, already heavily utilized in this state, it does not seem likely that the property tax will either be abandoned or substantially lowered. This results in the zeal to zone for the improvement of the tax situation. Ideally, zoning would be for the purposes of promoting an orderly growth of an area, a wise use of land, and an aesthetically attractive, healthy and convenient environment. In order for these goals not to be thwarted or warped by the local property tax, it would be necessary to change the property tax itself and the dependence on it by local governing units.

Various methods have been advocated to provide tax relief to municipalities. These include such proposals as the following:

- (1) Changing the formula for distribution of state shared taxes and aids to reflect population and need and to prevent windfall revenues

in some communities. This procedure was recommended by the Tarr Task Force in 1969 and the Governor in his 1971 budget and incorporated in the budget act.

(2) Increasing the tax base by adding property that is now tax-exempt and providing in-lieu tax payments by governmental property. Tax-exempt property includes governmental property, educational and religious institutions, property of benevolent associations, labor temples, farmer temples, and fraternal societies and other miscellaneous categories. Some writers advocate service payments by these groups in lieu of taxes. Florida revised its property tax laws in 1971, effective December 31, 1971, to extend the tax to hitherto exempt commercial enterprises connected with churches and other nonprofit organizations and private enterprises that use public land or facilities. Also included are enterprises previously granted tax exempt status as an inducement to establishment of business and industry. Currently in the courts in Florida is a case involving an earlier attempt — based on a 1968 constitutional amendment — to tax the airport facilities of several airlines at the Miami airport, which property is owned by the Dade County Port Authority. The constitutional change — as implemented by the new law — allows local taxation of privately leased property created by public revenue bond financing.

(3) Assumption of the cost of a particular service, such as education, by the state instead of the partnership arrangement now existing between the state and local units. Education or welfare are the 2 major items that have been variously recommended for take-over at a higher governmental level, state or federal.

(4) Providing municipalities with more tax options alternative to the property tax, such as county or municipal income taxes. Municipal income taxes are expressly forbidden by Wisconsin statute, but counties are allowed to enact a 0.5% piggyback sales tax (no county has yet done so). Municipalities were also authorized to enact a municipal vehicle registration fee — the so-called wheel tax — but no local government has yet enacted it.

(5) Reorganization of local government to provide for a better distribution of taxes and, hopefully, more efficient use of the tax. This was discussed in some detail in the preceding section of this study. If the tax were levied on a metropolitan-wide basis, for example, it would not matter in which precise spot in the metropolitan area industry, commerce, or low-cost housing were located because the benefit or the cost would accrue equally over the whole area. A new law was enacted in Minnesota in 1971 somewhat along these lines. This so-called fiscal disparities law represents an innovative approach to the problems of fiscal zoning. Under the law (Chapter 24, 1971 Extra Session Laws of Minnesota), the 300 taxing units in the Twin Cities 7-county area will continue to make their own policy decisions on levying the property tax, but beginning in 1972 a unit's valuation will consist of 2 parts — one local and not shared, the other an assigned share of the region's growth over the previous year. According to HUD CHALLENGE, October 1971 issue, "The shared portion will be 40% of the

net growth of commercial-industrial valuation after 1971. All communities will receive back an assigned share of the growth, determined basically by population."

The CITIZENS LEAGUE NEWS, July 1971, states: "In perhaps the most dramatic way possible it breaks down the barriers which have been created between central cities and their suburbs and between the suburbs and the surrounding rural areas and reduces the incentives for 'fiscal zoning' which have presented such an obstacle to orderly planning and development in urban areas." Explaining that the law does not change the autonomy of the independent taxing units, the News says it "works entirely within the present framework of local government." No additional taxes are imposed. The assigned share which each unit receives back will be based on population adjusted upward to reflect a property valuation below the area average per capita and downward to reflect an above average property valuation.

The detailed steps involved in administering the tax are as follows, taken from the CITIZENS LEAGUE NEWS.

Just how does the new law on sharing 40% of the growth of commercial-industrial tax base in the metropolitan area affect an individual school district, municipality or other unit of government in the Twin Cities area?

First, it is important to stress that — although a local government's tax base will be different — nothing else changes for that local government. Now each year it is informed by the county auditor the dollar total of its tax base. The same will be true under the new law.

In the fall of the year, as has been the case in the past, each unit of government will certify to the county auditor its dollar tax levy — the dollars to be spread on its tax base in the coming year. Then during the coming year each unit of government, as in the past, will receive the receipts from the levy from the county treasurer.

The changes required by the new law will take place in the administrative activities which are carried out by county auditors in calculating the tax base for each unit of government and in calculating the tax rate on each piece of property necessary to raise the dollars certified by the various units of local government.

These steps can be summarized as follows:

1. Calculation of the tax base — Each municipality will have an official taxable value: that is, its tax base. Until the new law was passed, taxable value represented only the value of taxable property which was physically located within the borders of a unit of government. Under the new law, its taxable value will be the sum of the following:

- All residential property values, including apartments, physically located within its borders. Also, all other property value physically located within its borders, which is not defined as commercial-industrial property. For example, farm property.
- All commercial-industrial property physically-located within its borders except 40% of the total net growth of commercial-industrial property in the municipality over the 1971 values. (The 40% from this municipality and all others in the metropolitan area are added together to make up the areawide tax base, which then is redistributed back to each municipality.)
- The municipality's assigned share of the areawide tax base. If the municipality's market value of all real property per capita is the same as the metropolitan value per capita, its share will be equal to its population as a per cent of the entire area's population. If its market value per capita is below average, its share will be larger, and if its market value per capita is above average, its share will be smaller.

Once this tax base is determined, it constitutes the municipality's official taxable value for all purposes, including debt and levy limits which are related to its taxable value. This official taxable value is also used by overlapping taxing units, such as school districts. If such a unit covers only a part of the municipality, it will receive a proportionate amount of the municipality's assigned share of the areawide tax base, according to its relative amount of residential valuation.

2. Calculation of the tax rate — Each municipality certifies a dollar amount to be levied on its taxable value to the county auditor. The auditor then proceeds to calculate the tax rate, or as it is commonly called, the mill rate. A municipality has been able to estimate fairly closely what the mill rate will be when it certifies its dollar levy. Under the new law this will continue to be the case. Thus the governing board of a municipality, when it sets its levy, can know what tax rate will be imposed on its residents.

The governing board will not be able to know what tax rate will be imposed on the shared tax base. That rate, which will be calculated by one of the seven county auditors, will be, in effect, a weighted average of the tax rates of all units of government in the Twin Cities area.

A piece of commercial-industrial property will have two tax rates. The local tax rate will apply to the part of its value which remains local, and the areawide tax rate will apply to the part of its value which is made a part of the areawide tax base. All commercial-industrial properties will be treated equally. The law

sets up no distinctions between buildings built before or after 1971.

Another feature of the property tax which has an effect on zoning is the requirement in the Wisconsin statutes (Sec. 70.32) that real property shall be valued "at the full value which could ordinarily be obtained therefore at private sale." This particularly affects agricultural property, which may be assessed at rates it would bring in a sale for higher-income use, such as a suburban or commercial development, rather than for its use for agricultural purposes. This could increase a farmer's taxes to the point that he would be encouraged or even forced to sell his farm for nonagricultural purposes.

The Southeastern Wisconsin Regional Planning Commission has recommended overcoming this problem by removing the development potential. It cites 3 ways of doing this (see Planning Report No. 12: "A Comprehensive Plan for the Fox River Watershed"): 1) The property owner could grant an easement to a governmental unit which would prohibit development for 20 years; or 2) he could place restrictive covenants on the land; or 3) a governmental unit could purchase the development rights. These methods, according to SEWRPC, would permit the local assessor to assess agricultural lands at their fair market value for agricultural, conservancy and floodland uses rather than for potential urban uses. It is noted that these are "largely untried" techniques. This subject is further discussed in Section VI of this study.

## V. ZONING: THE QUESTION OF ECONOMIC INTEGRATION

### The Problem

A problem which is being discussed today with increasing frequency — and intensity — involves the question of exclusionary zoning or economic segregation. This involves the practice of zoning municipalities to exclude lower or middle-income housing. Those who would abolish this type of zoning call for "open communities" — opening up the communities to lower-income housing; those who oppose such attempts label them "forced economic integration." As noted in the Introduction to this study, a bill providing for open communities is pending in the Wisconsin Legislature and has the endorsement of Governor Lucey.

The problem has noticeably developed in the last 2 decades as industry and commerce have followed homeowners to the suburbs. When suburban communities are zoned for higher priced homes, principally through lot sizes and the type of housing that can be built, it is difficult for workers to find housing near the industrial or commercial establishments where they work. This type of zoning also serves to concentrate the lower-income groups in the central city without the counterbalancing influence of other segments of the population, thus

accentuating the city's problems with welfare, crime, slums and minority concentration, and creating an imbalance in the tax sources. In addition, urban renewal often displaces the residents of an area, leaving them with no alternative housing.

On the other hand, suburbs do not want to bring the slums to their areas, are fearful of the effect of low-cost housing on their property values, doubt their ability to cope with the rising school costs — and, hence, increased property taxes — that would result from an influx of lower-income groups into their communities, and are desirous of living in an aesthetically pleasing environment with others of similar economic and social backgrounds. When a family buys a home, it buys a particular lot in a particular neighborhood; that is, it buys an environment as well as a house. Thus, the critics of the "open communities" approach pose the question: are families to be denied buying whatever priced environment they can afford, and are they to be reduced to a common denominator environment?

#### The President's Guidelines

On June 11, 1971 President Nixon issued a major policy statement concerning economic integration. The federal government has developed programs aimed at creating equal housing opportunity, which he defined as "the achievement of a condition in which individuals of similar income levels in the same housing market area have a like range of housing choices available to them regardless of their race, color, religion or national origin."

While pledging to uphold prohibitions on racial discrimination, the President stated that he would not seek to impose economic integration upon an existing local jurisdiction. Economic measures, however, cannot be used as a subterfuge for racial discrimination. He pointed to the twin problems of, on the one hand, building federally-assisted housing units together in one location, thus exacerbating the social and racial divisions of our people, and, on the other hand, of impacting an established community with a flood of low-income families.

President Nixon stated that he interpreted the 1968 Civil Rights Act to require, as one of the criteria for judging applications for housing assistance, consideration of the extent to which the plan will open up new, nonsegregated housing opportunities. "This does not mean that no federally assisted low- and moderate-income housing may be built within areas of minority concentration. It does not mean that housing officials in Federal agencies should dictate local land-use policies. It does mean that in choosing among the various applications for Federal aid, consideration should be given to their impact on patterns of racial concentration." Further, the programs will be administered so as to advance "equal housing opportunity for people of all income levels on a metropolitan areawide basis." While his administration "will not attempt to impose federally assisted housing upon any community", it "will encourage communities to discharge their responsibility for

helping to provide decent housing opportunities to the Americans of low — and moderate — income who live or work within their boundaries."

The President stated that such efforts should be helped by new-style construction of housing projects in which the emphasis has changed from high-rise projects to low-rise, scattered site projects of greater variety. "By approaching local questions of land-use planning in a creative and sophisticated manner, local authorities should in most cases be able to work out site-selection problems in ways that provide adequate housing opportunities for those who need them without disrupting the community."

Speaking of his goal of a free and open society, the President reiterated an earlier statement on desegregation and integration. "We cannot be free, and at the same time be required to fit our lives into prescribed places on a racial grid — whether segregated or integrated, and whether by some mathematical formula or by automatic assignment. Neither can we be free, and at the same time be denied — because of race — the right to associate with our fellow-citizens on a basis of human equality." "An open society does not have to be homogeneous, or even fully integrated...what matters is mobility: the right and the ability of each person to decide for himself where and how he wants to live, whether as part of the ethnic enclave or as part of the larger society — or, as many do, share the life of both." Finally, he pointed out the need for local action on land-use policies to prevent their being hammered out in the courts.

On June 14, 1971, Secretary of Housing and Urban Development George Romney, Attorney General John Mitchell, and Administrator Robert Kunzig of the General Services Administration made implementing statements.

Secretary Romney stated that project selection criteria have been developed which will enable the President's policies to be applied. Proposed projects will be rated according to such items as community need, improved environmental location for low-income families, effect of proposed housing upon neighborhood environment, and, especially, nondiscriminatory location (that is, outside an area of minority concentration). A superior or adequate rating will be given to a development inside an area of minority concentration only if it is part of a major new and racially inclusive development or the need cannot be met any other way — "...all other factors being equal, projects outside areas of minority concentration will be given preference."

With reference to HUD's water and sewer grant program, the Secretary also stated that HUD has a project selection system which takes into account the accessibility of low- and moderate-income housing in the area to be served by the project as well as such factors as public health and financial need.

Mr. Kunzig explained a Memorandum of Understanding between his agency and HUD, whereby HUD will advise GSA on the availability of low- and moderate-income housing on a nondiscriminatory basis in areas where

the GSA is contemplating federal construction or leasing. The 2 agencies will develop an action plan to assure Federal personnel access to low and moderate-income housing where such housing is inadequate.

Attorney General John Mitchell stated the Department of Justice would continue to use its powers to eliminate racial discrimination "which is brought about by community action in the field of zoning or land-use regulations." The department that day filed suit in the Black Jack case (see subsection on court cases below).

Three months later, on September 29, 1971, the Department of Housing and Urban Development announced its guidelines on this subject which were to be published as regulations in the FEDERAL REGISTER on October 2, 1971. The guidelines are designed to encourage dispersal of government subsidized housing by giving priority to those projects that are outside areas of minority concentration, are not overburdened with low-income families, and are near areas where jobs and services are located. Proposals for housing projects are to be rated "superior", "adequate", or "poor", depending upon whether they meet various objectives set forth to achieve the goals.

#### Court Decisions on Economic Integration

Since the whole idea of zoning was first given the stamp of approval by the U.S. Supreme Court in 1926 in the case of Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), there has been a constant stream of court cases affecting zoning throughout the nation. A few recent cases that are especially pertinent to exclusionary zoning are briefly noted at this point. It seems likely that in the years immediately ahead there will be considerable action on this subject. Although little that might be considered definitive has yet been settled — most of these cases have been at the state supreme court or lower federal court level — they do indicate some of the current thinking and possibly the trend.

Lionshead Lake v. Wayne Township, 10 N.J. 165 (1952) — As a point of reference, the Lionshead Lake case represents the prevailing standard that has been generally operational since that decision. The New Jersey Supreme Court upheld the right of a community to set minimum floor space requirements, stating it was "beyond controversy." Contending that the floor areas imposed were not inordinately large, the court stated that without such restrictions there is always the danger of a deterioration of land values (it should perhaps be noted that Wayne Township includes a lake area with summer cottages). Other decisions, around this period and since, have upheld such standards.

Minimum floor areas in housing, lot acreage, and type of housing are zoning methods, of course, that have been used to maintain a high standard of housing and preserve the permanent residential character of a community. Another method is the requirement that a referendum must be held in a community before low-cost housing can be erected. In

California this is a constitutional requirement. Two recent California cases, in particular, have received considerable attention.

SASSO v. City of Union City, Calif., 424 F. 2d 291, 295-96 (9th Cir. 1970 (dictum)) — The U.S. Circuit Court of Appeals upheld the right of Union City to turn down a rezoning for a low-income housing project by means of a referendum vote. A tract of land had been rezoned by city ordinance to permit the Southern Alameda Spanish Speaking Organization (SASSO) to construct a multifamily, federally-financed housing project for low and moderate-income families. The rezoning ordinance, however, was nullified by a city-wide referendum. The appellate challenged the constitutionality of referendum zoning, contending it violates due process requirements. The court held, however, that a referendum is the city itself legislating through its voters. Further, it was not an arbitrary use of the police power. Considering whether the vote violated the equal protection clause, the court said that in this case the motivation was not a proper one for judicial inquiry. There is no reason to think that the rejection of rezoning was done on racial grounds more than on legitimate environmental grounds. Although it is the responsibility of the city to see that the needs of its low-income families are met, this does not call for a federal court decision. A state law is not in question. The "appellants' challenge is directed not against the state grant of power but against the manner in which the city has exercised that power."

James v. Valtierra, U.S. Supreme Court (1971) — In a similar situation, the U.S. Supreme Court, on April 26, 1971, upheld the same California referendum requirements. In the Valtierra case the court reversed a federal district court and upheld the right of a municipality in California to vote by referendum to exclude a public housing project. A low-cost housing project proposal was defeated in a local referendum in San Jose, and the plaintiff claimed the California constitutional provision was contrary to the U.S. Constitution's supremacy clause, the privileges and immunities clause, and the equal protection clause. Reversing the district court's verdict, the high court held against all 3 claims, noting particularly that California had a long history of giving citizens a voice on questions of public policy by means of referenda. The provision of a mandatory referendum in the case of public housing (many referenda take place only on citizen initiative) is not the only mandatory referendum provision; there are several others. The referendum procedure "ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues. It gives them a voice in decisions that will affect the future development of their own community. This procedure for democratic decision-making does not violate the constitutional command that no State shall deny to any person 'the equal protection of the laws.'"

On the other hand, there have been a number of cases recently that have put restrictions on economic zoning.

Gautreaux v. the Chicago Housing Authority, 296 F. Supp. 907, 915 ND Ill. (1969), was a case in the Federal District Court in Chicago which resulted from the failure of the Chicago Housing Authority to build more public housing projects outside Negro neighborhoods because of vetoes by aldermen from white neighborhoods. Housing projects tended to be either all black, all white or token black. In his judgment order, Judge Austin declared that with regard to site selection, there should be no new public housing units built or leased in Chicago or Cook County unless 75% were outside the predominantly Negro area.

Further ramifications of this decision can be seen in recent decisions declaring the Secretary of HUD was racially discriminating in granting funds for housing projects to the Chicago Housing Authority. In Gautreaux v. Romney, CA 7, decided September 10, 1971, the federal Court of Appeals stated that the desperate need for public housing in Chicago did not justify the Secretary of HUD in acquiescing in Chicago's discriminatory housing program. Similar decisions were reached in Shannon v. HUD, 436 F. 2d 809 (1970), and Hicks v. Weaver, 302 F. Supp. 619 D La. (1969).

In the Shannon case, for example, the U.S. Court of Appeals in Philadelphia decided that the change of the Fairmount Manor urban renewal project for low and moderate-income single-family homes to an apartment project would increase the concentration of low-income blacks in this area. Under the Civil Rights Act the effects of such housing on accelerating concentration must be considered.

Appeal of Kit-Mar Builders, Inc., 466, 268 A. 2d 765 (1970) — In 1970 the Pennsylvania Supreme Court struck down a zoning provision that required a minimum lot size of 2 acres. Kit-Mar Builders wanted a tract of land rezoned from 2 and 3-acre lots to one acre. The request was denied and their appeal eventually reached the State Supreme Court. The court cited a previous case, National Land and Investment Company v. Eastown Township Board of Adjustment, 419 Pa. 504 (1965), which had decided that zoning which had an exclusionary purpose was not acceptable in Pennsylvania. The court did not say that minimum lot sizes could not be established; but, declaring the ordinance unconstitutional, it did say, "At some point along the spectrum, however, the size of lots ceases to be a concern requiring public regulation and becomes simply a matter of private preference...The two and three acre minimum imposed in this case are no more reasonable than the four acre requirements struck down in National Land." Furthermore, possible sewerage problems cannot be used as an excuse for exclusionary zoning. There are other methods of handling this problem. Thus, a township cannot keep people out rather than make community improvements. "The implication of our decision in National Land is that communities must deal with the problems of population growth. They may not refuse to confront the future by adopting zoning regulations that effectively restrict population to near present levels. It is not for any given township to say who may or may not live within its confines, while disregarding the interests of the entire area." Another decision, Village 2 at New Hope, Inc. Appeals, 429 Pa. 626 (1968), approved planned unit developments, which were noted as a method of helping communities to respond to the urban expansion

problem. The court further stated that "the overall solution to these problems lies with greater regional planning..."

Westwood Forest Estates v. Village of S. Nyack, 297 N.Y.S. 2d 129 (1969) — The New York Court of Appeals held that an amendment to the village zoning ordinance barring new construction of multiple dwellings throughout the village for the purpose of alleviating the burden on the village's sewer disposal plant and not because of any requirement of or change in the comprehensive plan for development of the village was invalid: It restricted the plaintiff's property to a use for which it was not adaptable and did not properly relate to zoning purposes. The village cannot single out one party to bear a heavy financial burden because of a general condition in the community. The result constituted taking property and is in violation of the zoning power. The court, however, suggested that the village could impose other restrictions or conditions on the granting of a building permit, such as a general assessment for reconstructing the sewer system, granting a permit for garden apartments to be built in stages, or even imposing a moratorium on construction.

Kennedy Park Homes v. City of Lackawanna, 318 F. Supp. N.Y. 669 (1971) — This decision concerned a proposed sale by the Catholic Diocese of Buffalo of 30 acres of vacant land located in Ward 3 of Lackawanna to a black nonprofit organization for low-cost housing. The sale was prevented by enactment of a zoning ordinance which placed the land in a park district. For some time the city had had a sewer problem, houses were flooded in certain areas, but the city had not followed the recommendations made for correction of the problem. It continued to approve subdivisions in Ward 3 in spite of the drainage problem. In zoning for parks, the 30 acres were included, but subdivisions in Ward 3 were exempt in which lots were available for sale. "There is ample evidence of racial discrimination in the case." The court stated, "The rezoning for parks and recreation was not justified. The action deprived all of the citizens of an effective sewer system and denied the petitioners an opportunity for low cost housing."

Girsh Appeal, 437 Pa. 237 (1970) — The Pennsylvania Supreme Court declared unconstitutional the failure of Nether Providence Township to provide for apartments in its zoning ordinance. Multiunit apartment buildings are neither explicitly prohibited nor provided for in the ordinance. Girsh had bought a tract of land in an R-1 Residential zoned area, intending to build apartments, but his application was refused. The court held that the township could not have a zoning scheme that makes no reasonable provision for apartment uses. As in National Land, the township is trying to stand in the way of natural forces which send our growing population into hitherto undeveloped areas. It cannot "choose to only take as many people as can live in single-family housing, in effect freezing the population at near present levels."

De Simone v. Greater Englewood Housing Corporation, No. 1267 Atl. 2d 31 (1970) — A nonprofit housing corporation developed plans for a housing project in a single-family district in Englewood. The project

would be bounded by a park and developed in a cluster-style arrangement. Its purpose was to provide housing outside the ghetto for black ghetto inhabitants. The city granted a use variance on the finding of special reasons. The New Jersey court held that the contract was not an illegal attempt to zone and that the project would promote the general welfare.

Blackjack — A few days after the President issued his guidelines in June 1971, the U.S. Department of Justice brought suit in a federal district court against Blackjack, Missouri, a suburb of St. Louis, asking an order to permit construction of a multifamily town house development and asking the court to forbid any racial discrimination in housing. The case arose when a nonprofit corporation wanted to build a development in Blackjack in 1969 for limited-income persons. Blackjack thereupon incorporated in order to acquire zoning power, using the power to block construction. The Federal Government is charging racial discrimination and, hence, violation of civil rights laws. Eight more suits were filed in the next 2 days.

In glancing over these miscellaneous cases, it is clear that economic zoning cannot be used as a cover-up for racial zoning. The President's guidelines, the Blackjack case, and the Kennedy Park case make this clear. Some dents are also beginning to be made in economic zoning as such. The Pennsylvania Supreme Court seems to have declared itself vigorously in this area with regard to lot sizes and the general exclusion of apartments.

The most recent case in this area comes from a superior court in New Jersey which, on October 29, 1971, struck down the entire zoning ordinance of Madison Township on the ground that it ignored "the desperate housing need." The township, which had heretofore consisted of moderately priced homes, has grown rapidly in the last 20 years. In 1970 it adopted a zoning ordinance restricting new houses to one and 2-acre lots and also set floor space requirements. Apartments were also restricted. In his decision, Judge David D. Furman declared that "a municipality must not ignore housing needs, that is, its fair proportion of the obligation to meet the housing needs of its own population and of the region." Further, "Housing needs are encompassed within the general welfare. The general welfare does not stop at each municipal boundary. Large areas of vacant and developable land should not be zoned, as Madison Township has, into such minimum lot sizes and with such other restrictions that regional as well as local housing needs are shunted aside."

### Various Studies and Recommendations

#### Harvard Law Review Notes

The Notes of the May 1971 Harvard Law Review, "Exclusionary Zoning and Equal Protection," extensively discussed the problem, court decisions and, particularly, exclusionary zoning in relation to the Equal Protection Clause of the United States Constitution (14th Amendment). Exclusionary zoning can be accomplished in several ways —

through minimum lot sizes, minimum floor space requirements, a prohibition on construction of multiple-family dwellings, strict building codes, floating or non-Euclidian zoning (that is, zones allotted for a particular use, but with no location set aside for it; "Euclidian" refers to the court case mentioned in Chapter VI), and private restrictive covenants. The author stated that so far, although some indication of judicial concern has begun to appear, the judiciary has done more to encourage exclusionary zoning than to discourage it.

The Equal Protection Clause places some restrictions on treating different classes of people unequally (notably in education, voting and criminal process). In zoning matters, however, the courts have used the clause only in invalidating ordinances which bar racial minorities from certain neighborhoods. The author of the Harvard Law Review note takes the position that a state or municipality may not enact zoning ordinances which generally operate to confine the poor to the deteriorating central city. He contends that laws which isolate the poor in a way that impairs their social mobility, even though based on de facto rather than de jure lines, "are as invidious as those which discriminate according to race." Wealth discrimination should receive judicial treatment similar to race discrimination.

Citizens may be classified and treated differently if the court is satisfied that there is a compelling justification for such classification or a fundamental interest involved. In Dandridge v. Williams, 397 U.S. 471 (1970), the U.S. Supreme Court "intimated" that fundamental interests would be limited to freedoms specifically contained in the Constitution, presumably excluding social welfare matters, and that suspect classification would be limited to racial classification. In short, the author states that racial discrimination and class discrimination (or wealth) receive different treatment from the courts. Yet the two are much alike. Poverty is looked upon as a stigma. It can be contrary to democratic concepts of equality if people are denied an opportunity for advancement. He believes that the poor are powerless.

He concedes, however, that to apply equal protection runs into problems of "trivialization." Where do you draw the line? Theoretically, poverty is remedial, while race is not. "Some governmental acts, however,...tend to frustrate efforts to lift people out of poverty, limiting their upward mobility...active equal protection review is in order when the state creates obstacles which strongly tend to frustrate people desiring to remove themselves from a disadvantaged and discriminated-against group." Employment and education are two critical factors necessary for social advancement.

Exclusionary zoning can operate as a serious restriction on the social mobility of the poor when industry and mercantile establishments migrate to the suburbs. They either have to commute or fail in their efforts to get jobs. Central city unemployment also results.

Exclusionary zoning, he contends, also contributes to inferior education for lower-income persons, because inner-city schools are

inferior to suburban schools. Physical isolation from wealthier pupils further impairs the education of poor children. To a considerable degree, each child's performance depends on the background of the other children. Exclusionary zoning thus denies the poor the chance to improve their situation.

The author further argues that exclusionary zoning would not necessarily affect property values, that with the greater competition for it, land values might rise instead of fall.

He suggests that the use of zoning to preserve the character and beauty of a community may come at too high a price. Possibly other means could be used, such as cluster zoning, without excluding the poor.

The author concedes that since less expensive housing generates less revenue, smaller suburbs might feel too great a strain on their finances. If no employment opportunities are available, this might justify exclusivity by a small suburb. The added cost to a larger suburb with considerable industrial and commercial development would be negligible.

He suggests that communities be permitted to set limits on the quantity of low-income housing which they would absorb, based on such factors as the number of jobs available, local unemployment rates, and the proximity and expense of public transportation. These limits would be subject to change if, for instance, more industry moved in.

Private restrictive covenants can achieve the same results as zoning for neighborhoods or entire developments. The Supreme Court has ruled that covenants directed against race come under the 14th Amendment. The author's thesis is that restrictive covenants "verge so closely on being zoning ordinances that courts should be willing to view them as state action, and apply the same standards of equal protection suggested here for zoning ordinances."

#### Wisconsin Law Review Article

In an article, "Segregation of Residential Areas Along Economic Lines: Lionshead Lake Revisited," in the Wisconsin Law Review, Vol. 1969, No. 3, Norman Williams, Jr. and Edward Wacks looked at Wayne Township, New Jersey, to see what the area had become since the 1952 State Supreme Court decision upholding minimum floor area requirements. One of their conclusions was that increasing the house size requirements has nothing to do with increasing the aesthetic appearance of a community. Topography, trees, lot size and the relationship of house size to lot size are more important. Their primary contention, however, was the desirability of overruling such opinions as Lionshead Lake. They called for "reinstating judicial review as a creative function" and "following the United States Supreme Court's policy in other matters by reversing the normal presumption of constitutionality in situations where major civil liberties issues are involved."

Further, they contend that suburban towns need the authority to control the "timing of development (including both the rate of growth and the sequence of development); control over continued access to open space; and some device to allocate to new residents a part of the cost of local services." They call for a grant to the suburbs of the necessary new powers in return for their acceptance of some responsibility for low-cost housing.

#### National Commission on Urban Problems

Problems of Zoning and Land-Use Regulation is a research report (No. 2) prepared by the American Society of Planning Officials in 1968 for the National Commission on Urban Problems. In discussing the propriety of exclusion on an economic basis, the report stated that the strongest argument against economic exclusion is that it does, in fact, produce segregation. Removal of restrictive land-use controls, however, will not by itself solve the problem. As long as man prefers to associate with others similar to himself, whether this similarity relates to economic status, hobbies or skin color, he will find other ways of achieving the same result. There is a difficult conflict here between two sets of values.

Another research report (No. 15), Alternatives to Urban Sprawl; Legal Guidelines for Governmental Action by Fred P. Bosselman, also prepared for the commission, stated that suburban housing for lower-income and minority groups "requires conscious planning. History has demonstrated that the existing sprawl-oriented system will continue to promote the existing pattern of affluent suburb and poor core unless positive steps are taken to assure a place in the newly developed areas for those who are not excluded." To prevent urban sprawl and provide for balanced development of the urban fringes, the Bosselman study particularly recommends 3 techniques: the planned development zone, compensative regulations, and public land assembly. The large-scale unified development associated with planned unit developments furnish an opportunity for careful site planning which permits "the compatible and efficient mixing of residential, commercial and industrial uses which would not be possible under traditional patterns of small-scale development." As a result of large-scale planning, there is an increased opportunity to provide a mixture of housing for different income levels. "Only in large developments can such housing be constructed in sufficient volume to be helpful to a substantial number of central city residents while still maintaining a varied racial and economic environment." (See next section for further information on planned unit developments.)

Fragmentation in Land-Use Planning and Control, Research Report 18, by James G. Coke and John J. Gargan, another report prepared for the commission, also spoke of the problem of large-lot zoning. On the one hand, economic segregation produces a high degree of racial segregation; on the other hand, suburbanites value highly the "amenity and neighborhood homogeneity" thus provided. Large lots produce an aesthetically pleasing environment. Other aspects of the political

system, however, in addition to land-use controls help to produce economic exclusion. The authors point to FHA mortgage policies, the emphasis on automobile transportation over mass transportation, and "strong constraints on local capabilities to raise tax money for public facilities that would support other forms of high-density housing." In order to change the present housing pattern, it would be necessary to change these policies. "Merely shifting the focus of responsibility for land-use planning and controls to the metropolitan level would not be enough."

### Mission 70

The "Final Report on Mission 70," issued in December 1970 by Governor Knowles' Mission 70 Steering Group, called for "more flexible zoning provisions in urban areas so [that] low and moderate income housing can be constructed at diverse locations." This was justified on the basis of bringing lower and moderate-income people closer to their employment and avoiding concentrations of poverty. The steering group recommended a law similar to Massachusetts "to prevent communities from excluding low and moderate income housing subsidized by the state and federal governments. This law also should cover housing constructed by private, profit-making enterprises for sale to a housing authority or nonprofit corporation. While zoning is the primary vehicle used to exclude low and moderate income housing, the new law should also prohibit local governments from using building, housing, subdivision, sanitation and other ordinances and regulations to achieve the same goal." Legitimate reasons for exclusion are if the community has a "fair share" of subsidized housing, the rejection is based on essential and equally applied regulatory objectives (such as that the land lies in a flood plain), and the project is not consistent with a legitimate regional plan for distribution of such housing.

### Governor Lucey's Special Message

In his special message to the Legislature on May 21, 1971, "Housing in Wisconsin," Governor Lucey spoke to all aspects of the housing problem in Wisconsin. With regard to zoning, he condemned the practice of using zoning to exclude from a community housing affordable by the average family. "Large-lot zoning in areas of high land costs, high minimum square foot requirements, exclusion of multi-family dwellings and hasty rezonings in the face of development rumors deprive the typical Wisconsin family of freedom of choice in their place of residence. Seven Milwaukee suburbs have minimum zoning requirements higher than those of any district in the City of Milwaukee. Other communities have successfully prevented the construction of moderate-income housing through manipulation of zoning laws, forgetting in some cases that the community was born from housing financed by the Federal Housing Administration and the Veterans Administration at the end of World War II." These practices limit housing choice to the relatively affluent. They remove land from the reservoir of building sites for the sort of housing needed by most of our citizens. "They

unfairly minimize local property taxes in these localities at the expense of the central cities which must provide the basic housing resource for virtually all low and moderate income families within the metropolitan areas." One of our goals should be "balanced-income communities." The Governor expressed his opinion that restricted housing means people are unable to live where they work, and that poor housing leads to poor learning ability, poor health and broken homes. Lack of housing leads to lack of industry. He supported Assembly Bill 509 to prevent exclusionary zoning.

#### 1971 Assembly Bill 509

Assembly Bill 509, introduced by Representative Czerwinski and 26 other Wisconsin legislators, would create a Housing Appeals Board attached to the State Department of Local Affairs and Development. A local governing board could reject an application for a permit to build low or moderate-income housing on a specified piece of land only if it finds that the municipality has a sufficient number of low or moderate-income housing units "to satisfy a fair and equitable share of the housing needs of low or moderate income persons and families within the regional market area" and that such housing would cause "serious harm to the health and safety of occupants of the proposed project." Appeals may be taken to the Housing Appeals Board if an applicant's permit has not been acted upon by the local governing body within 60 days, if such body has rejected his application or has attached conditions which make the project uneconomic. If the board approves an application, it would issue a comprehensive permit; and all local regulations would be superseded. The bill defines "low or moderate-income housing as "any housing sponsored by, assisted or subsidized by the federal or state government under a program to assist construction or rehabilitation or low or moderate-income housing as defined in applicable federal or state statutes, including housing built, rehabilitated or operated by any public agency or any nonprofit or limited dividend organization and housing built or rehabilitated by profit-making organizations when such housing will be occupied by persons receiving housing assistance or subsidy."

Assembly Substitute Amendment 1 clarifies the purpose of the comprehensive permit to specify that it should not overrule building codes or the land-use section of the local zoning codes.

#### 1971 Senate Bill 596

This bill is not specifically tied-in with the zoning authority, but is so closely related to it that it should be brought up, perhaps, at this point. In the wake of the Valtierra case (see court cases above), it was introduced by Senator James Swan and cosponsored by five Representatives to allow voters to petition for a referendum on a low-rent proposed public housing project before a housing authority could go ahead with the project. A 45-day period for filing the petition is allowed.

### Pioneering Legislation in Other Jurisdictions

Seeking a solution to the problem of exclusionary zoning, 3 interesting and novel approaches have come to public attention. The Dayton plan, involving primarily the suburbs of Dayton, Ohio, represents a regional approach by way of the Miami Valley Regional Planning Commission. Fairfax County, Virginia has used the county as the basis for its approach, while Massachusetts has enacted a state law on the subject.

#### State Level: The Massachusetts Law

Chapter 774, Massachusetts Laws of 1969, provides that if a permit to build low or moderate-income housing is denied by a board of zoning appeals, the applicant can appeal to the Housing Appeals Committee of the Massachusetts Department of Community Affairs for review. The hearing shall be limited to the issue of whether the denial was consistent with local needs or whether conditions were imposed which would make such housing uneconomic. The committee can vacate a denial if it considers it unreasonable and can direct the board to issue a comprehensive permit. If the requirements imposed are uneconomic and not consistent with local needs, it can order the board to remove such conditions. "Uneconomic" involves the imposition of factors which would make it impossible to build or operate low or moderate priced housing without economic loss. "Consistent with local needs" are requirements that are "reasonable in view of the regional need for low and moderate income housing considered with the number of low income persons in the city or town affected and the need to protect the health or safety of the occupants of the proposed housing or of the residents of the city or town," to preserve open spaces, to promote better site and building design, and if such requirements are applied equally to both subsidized and unsubsidized housing. Requirements are consistent with local needs when imposed by a board of zoning appeals after hearings where 1) low or moderate-income housing exists which is in excess of 10% of the city or town's housing units or on sites comprising 1.5% or more of the total land area zoned for residential, commercial or industrial use; or 2) the application would result in construction of such housing on sites comprising more than 0.3% of such land area or 10 acres, whichever is larger, in any one year.

The main difference between the Massachusetts law and 1971 Wisconsin Assembly Bill 509 is that the former has specific provisions concerning the grounds on which the local zoning board can reject low or moderate-income housing; that is, if 10% of the housing units or 1.5% of the land area in the municipality are already in such housing. The Wisconsin bill is more general, simply saying that the municipality has a sufficient number of low or moderate-income housing "to satisfy a fair and equitable share of the housing needs of low or moderate income persons and families within the regional market area."

### State Level: The New York Urban Development Corporation Act

Chapter 174, New York Laws of 1968, the Urban Development Corporation Act, provides another approach to the economic zoning problem. The New York corporation was given broad powers to work with federal, local and private programs to rehabilitate substandard areas of cities and to provide capital for construction of industrial and housing facilities. Most specifically and significantly for our study, however, is its authority to waive local zoning and construction ordinances and substitute compliance with the state's own building construction code when compliance is not feasible. It can go into a community and condemn land for low-income housing or other purposes in disregard of local zoning and building codes. The innovative character of the corporation is its power to initiate and carry out its own enterprises. It is "a multi-purpose public authority empowered to act out any or all of the roles associated with urban development from acquisition to management...This initiative power cast UDC in the role of promoter, financier, consultant and developer." ("The State Urban Development Corporation: New York's Innovation," by William K Reilly and S. J. Schulman, THE URBAN LAWYER, Summer 1969). The president of UDC, Edward Logue, has proposed that low-income houses be built in suburban communities to constitute about 5% of the total local housing supply. He believes these houses could be built by private enterprise. The primary objections to UDC have come from municipalities which fear it will encroach upon their home rule powers.

### Regional Level: The Dayton Plan

In studying the housing needs of the area, the Miami Valley Regional Planning Commission, which covers a 5-county region in southwestern Ohio centered in Dayton, found that the greatest concentration of low- and moderate-income housing was in Dayton. (Low and moderate income was defined as below \$10,000 in the 2 most urbanized counties and below \$7,000 in the other 3 counties.) It worked out a plan, which was approved in the fall of 1971, to distribute lower-cost housing throughout the area. Within the next 4 years, 14,125 subsidized housing units are scheduled to be built, with quotas being assigned to each suburb. The Planning Commission states that its quotas are not strict allocations, but "flexible guidelines." Although the plan was not set up without considerable opposition, it represents the first effort in the country of a racially-mixed city and its white suburbs to join in tackling the problem of providing low-cost housing.

In order to determine the logical allocation of such housing, the housing need of each county was first established, followed by a subdivision of the area into 53 planning units to which the housing units could be assigned. The planning unit might comprise a single township, several townships, or — as in the case of Dayton itself — 21 planning units consisting of groups of census tracts. Their size was largely based on the intensity of their development. Planning unit profiles were compiled, providing demographic, economic and physical characteristics of the unit.

A proposed mathematical formula was to determine how the dwelling units were to be distributed. In its report, "A Housing Plan for the Miami Valley Region," the commission listed several ways that could be used to arrive at such a determination: 1) Housing units could be divided between the planning units on an equal basis. 2) They could be assigned in proportion to the population. 3) Assignments could be made on the basis of the number of low and moderate-income households each contains, that is, the greater the number of such units the more would be assigned to it. 4) The opposite assignment could be made, the more such housing a planning unit contains, the less it would have assigned to it. 5) Assignment could be made so that the greater number of units would go to planning units whose school districts had the highest assessed valuation per pupil. 6) Assignment could be made so that the most overcrowded school district would receive the fewest dwelling units.

In making its decision, the commission used a composite of the above 6 methods. The number of housing units for each planning unit under each method was figured, totaled and divided by 6. When the number of dwelling units was then assigned to each county, it was divided by 4 to arrive at a yearly-rate-of-production goal.

The low and moderate-income housing needs include both FHA-assisted housing and public housing units. Each planning unit with a public housing authority must now accept a certain number of these units. Areas without a housing authority are advised to establish one.

There are various problems that have to be dealt with in this plan. The City of Dayton, for example, was found already to have its entire quota of public housing units. Its units, therefore, would probably be FHA units. Some suburbs lacked space on which to build. Some school systems have low assessed valuation and are overcrowded. Rural planning units pose a problem in finding suitable areas for such housing.

#### County Level: Fairfax County, Virginia

Effective July 1, 1971, Fairfax County, Virginia amended its zoning law to establish minimum quotas for low and moderate-income housing. Fairfax County, a bedroom suburb of Washington, D.C., has grown rapidly in recent years and now contains apartments, shopping centers, single-family suburban developments and country estates.

Under its new ordinance, low-income housing is defined as dwelling units subsidized by government under any program of housing for low-income families, that is, families who meet eligibility standards under the Federal Low-Rent Public Housing Program of the U.S. Housing Act; while moderate-income housing is housing subsidized for moderate-income families under eligibility standards established by federal programs for homeownership and rental and cooperative housing authorized in Sections 221, 235 and 236 of the National Housing Act. "Low income" is earnings under \$6,000 with housing costing less than

\$20,000, while moderate income is earnings of \$6,000 to \$12,000 with housing in the \$20,000 to \$28,000 bracket.

Planned development housing district (PDH) — The ordinance requires every planned development of the PDH (planned development housing) district to provide dwelling units for families of low and moderate-income. An applicant for PDH zoning shall provide not less than 6% of the total dwelling units in the project in low-income housing and provide moderate-income dwelling units which, when added to the low-income units, shall be not less than 15% of the total.

To provide low-income housing, the developer shall propose to sell land or dwelling units or lease dwelling units to the Fairfax County Redevelopment and Housing Authority or arrange a rent supplement plan with the U.S. Department of Housing and Urban Development. To provide moderate-income dwelling units, the developer shall propose applications to the Federal Housing Administration under programs for homeownership, rental or cooperative housing.

Before the applicant's development plan and application for rezoning are submitted to the Planning Commission, he must submit to the Director of County Development his agreement with the Housing Authority; the Authority's evaluation of the site, availability of the requisite subsidies and other pertinent information; his proposals providing low-income housing through rent supplements; his moderate-income housing proposals and various supporting documents. The Planning Commission's recommendation goes to the county board, which holds a hearing before approving the proposal.

If government subsidies do not become available for development of the proposed low and moderate-income housing which has been approved, the applicant is excused from developing such housing to the extent that they are unavailable.

An applicant may propose to locate some or all of the low and moderate-income dwelling units in a suitable area other than the area which is the subject of the application, and the county board may approve if it finds the substitution will further the purposes of low and moderate-income dwelling unit requirements and will not result in undue concentration of low and moderate-income families in a particular geographical area.

An applicant may propose to satisfy the requirement without utilizing a government subsidy program if he can demonstrate that his proposal will benefit the same number of families at the same income levels and for the same rentals or prices which the requirements are intended to assure.

The ordinance also contains a provision that low and moderate-income dwelling units should be designed to harmonize with other residential structures in the development. The applicant shall also make an effort to avoid concentration of low and moderate-income dwelling units in one part of the proposed district. In deciding

whether to approve a project, the county board shall consider whether the plan effectively avoids such concentration.

R-GC District, Residential Garden Court — Every site plan of this district must provide low and moderate-income dwelling units in the same percentages as for planned development housing districts. Site plans with fewer than 50 dwelling units are exempt from this provision, but a density bonus is provided for an applicant who voluntarily provides low and moderate-income dwelling units. The provisions for this type of district are similar to those for the PDH district. An applicant is entitled to an additional density of one dwelling unit for each 2 low or moderate-income dwelling units he builds.

Thus, if a developer has a 200 unit project, 15% or 30 units would have to be built in low and moderate-income housing. This would then allow him to build an extra 15 units of any kind in the same project.

The other zoning districts to which the provisions on low and moderate-income housing apply are: RT-5 (residential townhouse 5 units/acre), RTC-5 (residential townhouse cluster 5 units/acre), RT-10 (residential townhouse 10 units/acre), RTC-10 (residential townhouse cluster 10 units/acre), RM-2 (multifamily residential), RM-2G (multifamily garden type), and RM-2M (multifamily medium).

The Fairfax County ordinance, of course, has been in effect only a few months. Since the county's population is 97% white and it is so close to heavily black Washington, D.C., it will be an interesting test of the results of this new type of zoning. A WALL STREET JOURNAL article of September 29, 1971, however, said that the plan's "principal motivation was to provide shelter for the county's own people; people who are white and who work as teachers, policemen, firemen and nurses; people who provide essential public services to the county but cannot afford to live in it." Thus, it is thought that it will benefit the people who hold jobs in the county but cannot afford to live there. County officials appear to believe that the new plan will not attract large numbers of blacks for some time. Although Fairfax County wants to attract industry and the shortage of workers and housing for them is an inhibiting factor, new industry will probably not have unskilled jobs to offer. Thus, one official believes it will be 25 years before a substantial number of blacks reside in the county. On the other hand, one of the leaders who have been active in promoting more subsidized housing believes that zoning is an important first step, and the blacks will come as industry develops.

#### The Wisconsin Situation

What is the situation in Wisconsin with reference to economic segregation? After studying the 1970 Census data on housing in the state, the Bureau of Planning and Budget of the State Department of Administration ("Wisconsin Profile Series — Housing," June 1971) concluded that certain practices in the use of land-use controls are restricting the mobility of low-income groups, notably in the Milwaukee

area. Examining the vacancy rate data, it noted that most of the Milwaukee suburbs have a low vacancy rate. Of 4,037 vacant lots in the suburbs, 3,363 were zoned single-family, 109 two-family and 132 multifamily. This restriction on multifamily dwellings severely restricts housing availability to low and moderate-income persons in these areas.

Mayor Henry Maier of Milwaukee pointed to exclusionary zoning as being a major contributory factor in making the Milwaukee metropolitan area one of the two most segregated metropolitan areas in the nation (the other being the Minneapolis-St. Paul area). These 2 areas have the lowest ratios of blacks in the surrounding suburbs of the 66 largest metropolitan areas in the country. Although the figures have been a subject of dispute, the Chicago Regional Hospital Study has stated that the City of Milwaukee ranks tenth among 20 cities in segregation (MILWAUKEE JOURNAL, July 9, 1971).

Testifying before the U.S. Civil Rights Commission, Percy Julian, chairman of the Wisconsin Advisory Committee to the Civil Rights Commission, claimed that the county (Milwaukee County) has authority to seek locations for low-income housing, but had made only 4 houses available, all in the city. The County Executive, John Doyne, said many other sites are being considered. Julian advocates establishment of a metropolitan development corporation with authority to provide low-income housing (MILWAUKEE SENTINEL, June 15, 1971).

On September 21, 1971, the Milwaukee Housing Authority voted to divide the city into 5 major areas and distribute public housing equally among the areas. The first 400 of 1,200 units planned to be built in the city in the next 2 years would be divided about 80 per area. The new units would not be built within a half mile of any substantial concentration of low-cost housing, but a minimum of 24 units will be built at a specific site. Housing units requiring 5 or 6 bedrooms will be constructed as family homes on scattered sites rather than as apartment housing. This proposal is part of an agreement with the Federal Government that must be approved by the Milwaukee Common Council in order to restore the city's eligibility for various federal grants.

Another current dispute involves the efforts of the Village of River Hills to zone out low-cost housing. A Nike missile site in River Hills will be up for sale in the near future. The Milwaukee Tenants Union wants the land used for low and moderate-cost housing; the village would like to buy it and has opposed the idea of using it for low-income housing. Governor Lucey has assigned the deputy secretary of the State Department of Local Affairs and Development to assist the Tenants Union in its efforts.

In Madison the City Plan Commission recommended against a proposed ordinance to require a minimum of 15% of the units in a planned residential development or planned development district to be allocated to government subsidized housing. Under the plan, not more than 25% of the total lots and not more than 33-1/3% of the lots in any block face in any existing single-family or duplex subdivision or addition thereto

shall be used for low or moderate-income housing. Further, not more than 2 abutting lots shall be used for low or moderate-income housing and not less than 2 abutting lots for other housing.

On October 12 the Madison City Council held a hearing on the proposal and then referred it to the City-County Liaison Committee, the Dane County Regional Planning Commission, and the County Zoning Committee. The opinion seemed to be that any such ordinance should be county-wide in application, not limited to the city. At the hearing several representatives of Madison builders spoke against the measure, saying it would be a financial hardship on local builders who have not had much experience with federal subsidy programs. It was also stated that inquiry concerning the Fairfax County, Virginia ordinance, upon which this proposal is based, indicates that the ordinance is expected to be revised to meet some of the problems that have developed in its application.

#### Questionnaires

At this point it might be well to look at the information obtained from questionnaires which we submitted to municipalities in Milwaukee and Dane Counties, as well as to each county in the state, inquiring about various aspects of their zoning ordinances.

Milwaukee metropolitan area — Of the 19 municipalities in Milwaukee County, 15 replied to our questionnaire. The number of residential districts in these communities varied from 2 to 14 (a proposed revision would change the latter to 6). All except Bayside and River Hills have at least one district zoned for multifamily dwellings. Two said their ordinances regulated factory-built homes, while at least 6 regulated mobile homes in some manner.

More apropos, perhaps, are lot sizes and building size minimums imposed by various communities. In the City of Franklin, for example, which has 8 residential zones, one is for 2-family dwellings and one for multifamily dwellings. R-6 Residential, which has the lowest requirements for single-family dwellings, has a minimum of 10,000 square feet (less than one-quarter acre) for the lot and 1,250 square feet for the building. R-1 zone requires 2-acre lots, and 2,000 square feet for buildings; for the other zones the sizes vary downwards between the 2 perimeters.

The city of Greenfield has 5 residential zones, ranging in area from 9,000 square feet with a 75-foot frontage to 15,000 square feet with 100-foot frontage. The former, R-5, is the only one zoned for multifamily dwellings.

The City of Milwaukee has 10 residential zones, of which 4 are zoned for multifamily dwellings. Districts zoned only for single families require lot sizes varying from 6,000 square feet to 5 acres.

The City of Oak Creek has 5 residential zones ranging from the R1 district requiring lots of 18,000 square feet and which is almost entirely in unsewered areas, to R2 of 10,000 square feet and R3 of 8,000 square feet. R4 is zoned for multifamily dwellings and R5 for mobile homes.

Of St. Francis's 5 residential zones, one is for single-family housing, one for 2-family units, one for multiple family units not to exceed 4 families, one for multiple-family units over 4 families with not less than 90% one bedroom units, while R-5 is for multiple-family units not less than 3-story buildings.

South Milwaukee has 3 residential zones, of which 2 are zoned for multifamily dwellings. Apartments are also provided for in the commercial areas. The lot size for single-family dwellings is a minimum of 7,200 square feet with a lot width of 60 feet; the minimum dwelling unit is not less than 850 square feet of floor area.

Wauwatosa is in the process of changing its zoning ordinance from 14 residential districts to 6. The proposed zoning will have 2 single-family districts, 1 two-family, 1 four-family, 1 eight-family, and 1 residential planned development district.

West Allis has 3 single-family districts, one 2-family district and 2 multifamily districts of which one is for low density and the other for high density.

The Village of Bayside has 3 residential districts. There is no provision for multifamily dwellings. There is, however, provision for a planned residential development district.

The Village of Brown Deer has 4 residential zones, of which one is for multifamily dwellings. Minimum square footage and open space is required for different size apartments. An efficiency apartment for example must be at least 300 square feet with 900 square feet of open space, while a 3-bedroom apartment must have 1,300 square feet and 2,000 square feet of open space. Lot sizes in single-family residential zones vary from 10,000 square feet to 18,000 square feet.

Fox Point has 5 residential zones; multifamily dwellings are permitted in some by ordinance. Lot requirements vary from 10,500 to 40,000 square feet.

In Greendale there are 5 residential districts, of which 3 are for single families, 1 for single-family, semidetached and 2-family residences, and 1 district in which all uses, including multifamily dwellings, are special uses. Single-family lot area varies from 30,000 square feet in R1 to 8,400 in R3 and 4,200 for single-family and semidetached in R5.

River Hills has 3 residential zones; none provides for multifamily dwellings. Lot acreage varies from one to 3 acres.

Shorewood has 7 residential districts, of which 2 are multifamily and one both 1 and 2-family.

West Milwaukee has 2 residential zones; multifamily dwellings are permitted in Class C — residential and commercial.

Madison metropolitan area — Sixteen cities and villages out of 25 in Dane county responded to our questionnaire. Madison has 6 residential zones; multiple dwelling units are permitted in all, but the density differs from zone to zone.

Middleton has 5 residential district classifications, of which 2 are for duplexes and 2 for multifamily (2.5 story and 5 story respectively).

Monona likewise has 5 residential zones, with 2 of them for multifamily.

Stoughton has one single-family, one 2-family and one multifamily zone.

Of Sun Prairie's 6 residential zones, multifamily residences are permitted in 2 and 2-family in a third.

Among the villages in the county, Black Earth is apparently in the process of developing zoning regulations, and Mt. Horeb is updating its ordinance. Cambridge has one family and one multiple-family district.

Cottage Grove has a single-family, a single and 2-family, and a multifamily district.

Cross Plains has 2 single-residence zones (minimum lots 7,500 and 9,000 square feet) and one multifamily zone (15,000 square feet).

Deerfield has one single-family and one multifamily residential district.

DeForest permits multiunit dwellings in 3 of its 5 residential districts, one designated low density, one medium density and one high density.

Maple Bluff is zoned only for single-family dwellings.

One of 3 residential districts is set aside for multifamily dwellings in McFarland.

Shorewood Hills has 4 residential districts, none zoned for multiple-family dwellings.

Wisconsin Counties — Fifty-six out of 71 counties replied to our questionnaire. Because there are no towns in the county, we did not query Milwaukee County. Thirteen said that multifamily housing is permitted in all districts; the remainder had some qualifications.

## VI. ZONING: THE QUESTION OF TECHNIQUES

### Planned Unit Developments (PUDs)

A major development in zoning in recent years has been the planned unit development, commonly called PUD. The traditional zoning pattern provides for each zone to be restricted primarily to a particular use — commercial, industrial, residential — and for each residential area to be designated single-family, duplex, or multifamily. Within each zone the requirements must be uniform, but can vary from zone to zone. Thus, the lots in one residential zone must all be of a certain specified minimum size, but may be of a different specification in another zone. Housing follows the "envelope" style — each house is packaged in its own yard on its own lot.

What are PUDs? — The planned unit development is a different concept developed by the National Association of Home Builders. As described in the July 1971 issue of the association's magazine, NAHB JOURNAL OF HOMEBUILDING ("How Open Space Opens Markets" by Robert I. Gould), "PUD entails pre-planning of the mix of land uses making up a community. A PUD may include all forms of residences with supporting commercial and office structures, and may also include industrial buildings. A unified open space and recreational system is included in the PUD." According to the article, the Federal Housing Administration considers a PUD as being composed of single-family, semi-detached, and row dwellings; rental apartments; or a combination of these with privately owned common property. Although PUD ordinances most commonly include provisions for residential and commercial uses only, Mequon, Wisconsin also provides for industrial development. Minimum requirements for the size of a PUD vary from place to place. An interesting provision of Baltimore County, Maryland's ordinance is its classification of PUDs by their size as neighborhoods (250 acres minimum), communities (1,500 acres minimum), and towns (5,000 acres minimum).

To summarize, a PUD is supposed to provide for a variety of residential and related uses; the standards within a PUD are not uniform as in conventional zoning but provide for differing densities of housing; the housing is developed as a unit; and common open space is provided. Thus, the zoning controls are more flexible. A planned unit development constitutes a form of floating district which is placed within an existing district.

The Advisory Commission on Intergovernmental Relations describes a PUD as combining "zoning, subdivision control and other land-use procedures to allow a developer more design flexibility while replacing the traditional, rigid, limited-use zoning districting standards with broad general standards and with detailed administrative review and approval of specific plans." Its 1970 CUMMULATIVE ACIR STATE LEGISLATIVE PROGRAM, issued August 1969, includes a model draft legislation on PUDs.

Open space and cluster development — Two concepts closely associated with the planned unit development are those of open space and cluster development. Most of the thinking in terms of the planned unit development has been that such a development will provide housing in clusters, particularly townhouses and garden apartments, saving on individual lot size, and leaving more land for a common open space. Such open space may be used for children's play areas, commons, parks, or golf courses, for example, and may consist of natural features like lakes, woods, or marshes. The JOURNAL OF HOMEBUILDING refers to planned unit developments as open-space communities. The open spaces are preserved common open land rather than the conventional lot.

There are 3 methods of owning open space that are most commonly used. (1) The community may have title to the open space. (2) It may be privately owned by a neighborhood association, with each homeowner responsible for a share of the maintenance cost and taxes. (3) The open space may be deeded to a trustee (the funded community trust concept), who gives to each individual owner an easement over the land. The trustee makes a charge against each unit for upkeep. Although a PUD may utilize cluster housing, clusters in and of themselves do not constitute a PUD; the latter provide for mixed uses.

Density bonus — This is an ordinance provision that allows a PUD to increase the density per acre in relation to the amount of open space that is provided. (This term is also used to mean the additional units allotted a developer in return for including low-cost housing units in his project.)

Zero-lot-line construction — This type of construction permits apartments or townhouses to be built wall-to-wall rather than with open space between. It envisions a front courtyard for automobiles and a sizable common open space for all the buildings on the block at the rear. This concept, which, of course, requires modification of "envelope" zoning laws, has recently been adopted in Madison. It is considered a solution to the too small central city lot where there is very little space between the buildings and too much space is taken up with driveways leading to back yards.

Planned development zone — While the idea of planned unit development envisions a sizable tract of land developed in an already existing zone, the planned development zone is the idea of a separate zone for planned development only. According to the report, "Alternatives to Urban Sprawl: Legal Guidelines for Governmental Action," prepared for the National Commission on Urban Problems, the planned development zone should comprise single-family homes on 10-acre lots, agriculture, and planned developments. It is advanced as a method for preventing urban sprawl, which is defined as "the growth of a metropolitan area through the process of scattered development of miscellaneous types of land use in isolated locations on the fringe, followed by the gradual filling-in of the intervening spaces with similar uses."

The rationale for PUDs — The arguments for planned unit developments are that they make better use of land, are better designed to preserve natural features, avoid the monotony of sameness which tends to develop in the typical suburb, and make it possible for work and residential areas to be developed closer together. A 1971 report on Twin-Cities housing problems, "Better Use of Land and Housing," by the Citizens League of Minneapolis, further explained the advantages of PUD as possibly being: "Large tracts of open space, providing both esthetic and functional bonuses; separate and distinct neighborhood housing clusters centering around a cul-de-sac or a square; more convenient shopping and school facilities; better traffic patterns and correspondingly safer streets and walkways; additional amenities; a greater range of housing alternatives; higher land uses; and closer regulation by city planners."

The League's recommendations for Minneapolis-St. Paul suggested that there should be a gradual rebuilding of the older areas of the inner fringe, which may include older suburban as well as older central city areas, making use of the PUD device and a land-assembly mechanism. The League contends that the rebuilding should be not of individual 2- and 3-story walk-ups, as is tending to occur now in the Twin Cities, but relatively large planned unit developments. The result of this would be more valuable property for the developer, a better tax base for the city, and a superior living environment for the residents.

Wisconsin law on PUDs — The Wisconsin Statutes defines a PUD by stating its purpose. Sec. 62.23 (7) (b) of the statutes permits city councils, with the consent of the owners, to establish special districts called planned development districts, which will "tend to promote the maximum benefit from coordinated area site planning, diversified location of structures and mixed compatible uses. Such regulations shall provide for a safe and efficient system for pedestrian and vehicular traffic, attractive recreation and landscaped open spaces, economic design and location of public and private utilities and community facilities and insure adequate standards of construction and planning. Such regulations may also provide for the development of the land in such districts with one or more principal structures and related accessory uses, and in such districts the regulations need not be uniform."

1971 Assembly Bill 162 would change the council authorization "with the consent of the owners" to "upon the petition of the owners" to make clear that the establishment of planned development districts is not contract zoning, which the Wisconsin Supreme Court has invalidated.

Wisconsin local governments on PUDs — Milwaukee metropolitan area — How has the planned unit development fared on the Wisconsin scene? Of the 15 responses to our questionnaire from the Milwaukee metropolitan area, 12 municipalities stated they have provision in their ordinances for planned unit developments. Most said they are allowed in all residential districts. South Milwaukee said that they are not permitted in R-A residential zone. The South Milwaukee code also requires that the proposal be for housing a minimum of 16 families and that the

average lot area and the area for open space be not less than required in the district. If row houses are built, there can be no more than 8 families per building without the intervention of a court of not less than 25 feet in width.

The Bayside ordinance describes a "planned residential development district" as "an alternative residential district which applies to any territory of over 10 acres which is wholly owned by one person or legal entity." The landowners can apply for discretionary approval by the village board of the district.

The Village of Shorewood's ordinance contains the purpose of planned development districts and sets a minimum lot area permitted for application of such a district as 100,000 square feet or — if undertaken in connection with a public improvement — 25,000 square feet.

Among the municipalities, cluster housing was generally permitted, sometimes only in planned unit developments. Open spaces, however, were generally not specifically provided for in the ordinances.

Madison metropolitan area — Of the 16 out of 25 cities and villages in Dane County which replied to our questionnaire, 5 stated they have provisions for planned unit developments. Four of these are cities; one is a village.

Wisconsin counties — Fifty-six counties replied to our questionnaire. About half of them have planned unit development provisions. A scattering of zoning ordinances that were sent to us by a few counties produced the following provisions on planned unit developments. Bayfield County, for example, provides that a planned development shall have a minimum area of 30,000 square feet times the number of permitted dwelling units, not exceeding 4 per each 150 feet of lake frontage, and the minimum lake frontage to be 600 feet.

Dane County is one of the largest counties without a planned unit development ordinance, but is in the process of developing one. In its tentative recommendations, "Land Use Standards," issued September 1, 1971, the Dane County Regional Planning Commission endorsed the planned unit development idea, but did not define it.

The Douglas County zoning ordinance states that a PUD district shall have no definite boundaries until approved by the county board on the recommendation of the Zoning Committee. The plans may provide for a combination of single- and multi-family development as well as related commercial uses, but the plan must involve a single area of at least 5 acres and each residential building and lot in the district must conform to the R-1 District requirements and each commercial building and lot to the C-1 District requirements.

The Grant County zoning ordinance, which has a comprehensive section on planned unit development, states that the purpose is to encourage a more efficient use of land and of public service by allowing

"a more flexible means of land development than is otherwise permissible under lot-by-lot restrictions generally." Design principles are set forth, including cul-de-sac streets, underground utility placement, preservation of natural site characteristics and the development of open space. The minimum area requirement for a planned residential development is set at 10 acres; for a planned commercial development, 5 acres; and for planned industrial development, 10 acres. The planned residential development is permitted in all 3 residential districts and in the agricultural district; the planned commercial development is permitted in the commercial, agricultural, and residential R-3 districts; the planned industrial development is permitted in industrial, agricultural and residential R-3 districts. There are also provisions for planned resort developments, planned mobile home parks (in R-3 residential districts only) and planned trailer parks and camp grounds.

The Juneau County zoning ordinance says that a PUD shall contain not less than 40 contiguous acres under one ownership or control. "Within such planned communities, 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 Racine County zoning ordinance has designated R-8 residential district as a planned residential district. A mixture of clustered one-family, 2-family and multifamily units are allowed in areas of 10 acres or more. There is also a B-4 planned business district.

#### Density Zoning

A very different concept of zoning now emerging is "density zoning." This can be utilized outside the PUD pattern as well as within a PUD. Like planned unit development zoning, density zoning provides for all residential uses. Unlike the traditional Euclidian zoning, which classifies land use and places each use in a separate zone (called Euclidian zoning after the landmark U.S. Supreme Court decision, Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 1926, which determined that zoning was a proper function of the police power), density zoning mixes uses and makes the degree of density the criteria for each zone. Density may be established by establishing as the standard the number of dwelling units that would be built under conventional zoning or by permitting a reduction in lot sizes, the land thus saved to be used for open space. Density zoning may be considered as a special use, in which case each application will be considered by the zoning commission and a public hearing held, or it may be considered as a permissive use, which gives the developer the option of subdividing either according to the regular minimum lot sizes or by density of occupancy, such as number of families per acre.

Baltimore County, Maryland, adopted a zoning ordinance in 1970 which embodies this principle. Calling it density residential zoning,

the ordinance allows any type of dwelling in a D.R. zone. Lot sizes and type of dwelling are dispensed with. Instead, the Baltimore County Office of Planning and Zoning took the lot size requirements of a zone and converted the figures to density. Thus, an R-10 area, which had one dwelling unit per 10,000 square feet, was translated to a density of 3.2 units per acre. This was subsequently increased slightly to be 3.5 - D.R. 3.5.

The conversion table from the July 1971 issue of the NAHB JOURNAL OF HOMEBUILDING is as follows:

Density Unit. In areas zoned D.R. 16 and in other areas where medium- and high-rise apartments are permitted, a new measure of residential density may be used. Called "density unit," the new measure accounts for the different number of residents who will occupy dwelling units with different numbers of bedrooms. This permits the planners to make more accurate projections of population within the zone. Dwelling units are converted to density units according to the table below and density is measured as "density units per acre."

Efficiency apartment	1/2 density unit
One-bedroom dwelling unit	3/4 density unit
Two-bedroom dwelling unit	1 density unit
Three-, or more, bedroom dwelling unit	1-1/2 density unit

Conversion and Redesignation of Residential Zoning Classifications

Thus, the difference between zones is the degree of density, with the degree of density being determined in a manner different from traditional methods.

The county requires a certain amount of open space in D.R. zones, a percentage of the site acreage determined by multiplying the gross area by the minimum percentage for the particular density. For example,

the minimum requirement is 3% in D.R. 3.5 (density) Zones, while the minimum in PUD areas is 20%.

### Agricultural Zoning

One of the problems of current land use is the extent to which agricultural lands are rapidly being overrun as municipalities expand outwards. This may involve land that is considered "prime" land especially well suited for agricultural usage and, perhaps, for particular crops. According to a WALL STREET JOURNAL article of July 20, 1971, "About 20% of all U.S. farms are within what the government considers urban areas." They account for about a fourth of the value of all agricultural products sold. Various attempts have been made to stem the take-over process. California passed a Land Conservation Act in 1965, which provides for assessment of farm lands at low agricultural rates if farmers obligate themselves to keep the land in agriculture for 10 years. Other states have passed similar laws. Maryland law requires assessors to appraise farm land on the basis of present use rather than potential sale price. "Most state plans require that farmers voluntarily enroll their land for tax assessment protection," but a New York law passed in June of 1971 provides that after 3 years the state can put up to 3 million acres of prime farmland in protected agricultural districts. Another suggested solution, advocated by a Ralph Nader associate, is for Congress to remove the capital gains tax treatment of land sale profits and, instead, tax such sales at 40% or 50%.

Kurt W. Bauer, the director of the Southeastern Wisconsin Regional Planning Commission has said that, if development is uncontrolled, about 410 square miles in southeast Wisconsin of land would be converted from rural to urban in the next 25 years. The commission's plan calls for zoning prime farmland for exclusive agriculture use. Some Wisconsin counties are said to have already taken this step. Racine County, for example, under a recently adopted ordinance, is zoned for 4 agricultural districts. One of these, A-1, is strictly limited to agricultural uses and farm residences, whereas Agricultural A-3 is to be reviewed every 5 years to see if other uses should be allowed. According to Mr. Bauer, both Kenosha and Walworth Counties are in the process of adopting new ordinances which will include exclusive agricultural use zones. Waukesha County has incorporated an exclusive agricultural use zone in its shoreland ordinance. Several towns in Ozaukee County, which has no county ordinance, have included exclusive agricultural use zones in their ordinances.

The Dane County Regional Planning Commission has adopted "Land Use Objectives and Policies", in which it cited as one of its policies the preservation of "those quality agricultural lands that are located on soils identified as highly productive for farming." On October 14, 1971, the commission adopted a set of "Land Use Standards" to implement its objectives and policies. It recommended that prime agricultural land, except when such land abuts existing communities and is in sewered areas, not be developed for urban use.

### Miscellaneous Techniques

Performance standards — Traditionally, uses permitted in an industrial district have been listed in a zoning ordinance. In recent years it has been advocated that any type of factory should be allowed providing it meets certain standards regulating the emission of smoke, noise, odor, gasses and similar items. Performance standards in zoning classify land use by effect rather than by type.

It might be noted that the zoning ordinance of Greendale, Wisconsin has a combination of permitted uses and performance standards. Its one manufacturing classification lists types of manufacturing activities which are prohibited and says that those that are permitted must conform to performance standards regarding noise, vibration, smoke and particulate matter, toxic and noxious matter, odorous matter, fire and explosive hazards, and glare and heat.

Noise standards — The HARVARD JOURNAL OF LEGISLATION, May 1971 issue, proposes "A Model Ordinance to Control Urban Noise Through Zoning Performance Standards." Sound is measured in 3 ways — by decibels, which measure intensity or volume; by frequency in Hertz or cycles per second, which measures pitch or wave length; and by time, which measures duration. The model ordinance applies noise performance standards to residential, commercial and industrial zones. It protects all zones from sounds above the hearing damage level of 85-90 dB(A), protects in all zones from sounds of significant duration above the speech interference level of 65-70 dB(A), and provides limited protection in residential zones at night from sounds above the annoyance or rest-interference level of 40-45 dB(A) (a nighttime maximum of 51 dB(A) for industrial noises in a residential area is permitted).

In August 1971 the Madison City Council enacted a new noise ordinance for Madison. For R1, R2, R3 and R4 residential zones and R4L and agricultural zones, it set a maximum dBA of 70 at night and 75 during the day. For R5 and R6 zones it set a 75 dBA nighttime and 80 dBA daytime limit, while the commercial and manufacturing limits were set at 80 dBA and 90 dBA respectively at all times.

Design review — Some municipalities review plans in order to exercise some design control. The major purposes of such review are either to promote a harmonious scheme of architectural style in an area or to prevent too much sameness. In State ex rel. Saveland Park Holding Corp. v. Wieland, 69 N.W. 2d 217 (1955), the Wisconsin Supreme Court upheld design control as a valid exercise of the police power. This is an area, however, in which it is considered difficult to legislate wisely.

In answer to our questionnaire, 14 counties stated they exercise some form of design review; 12 cities and villages in Dane County and 11 in Milwaukee County say that they do.

In Madison the design for commercial structures only is reviewed, while in Oak Creek architectural control is exercised in planned

developments only. An ordinance has been proposed to create an Urban Design Commission for the City of Madison, which would make recommendations to the City Council on the design of public and private buildings, including planned unit developments; would designate geographically defined areas within the city as urban design areas, all proposed development within such areas to be approved by the commission; and would recommend ordinance changes that would promote a visually and functionally improved city.

View control — View control can include such items as regulating signs, requiring fences or greenery between service stations and adjacent residential areas, and requiring a minimum space between buildings.

Fifteen Wisconsin counties, replying to our questionnaire, state they exercise some form of view control, 7 Dane County municipalities, and 7 Milwaukee County municipalities also say they do.

Floor area ratio — Floor area ratio is the ratio of building area to lot area. It is determined, according to the Greendale, Wisconsin zoning ordinance, by dividing the floor area within a building on a lot by the area of the lot. The floor area ratio requirement multiplied by the floor area square feet gives the maximum permissible floor area on the lot. This procedure could be used to prevent a too large house, for example, from being built on a too small lot. The Greendale ordinance qualifies this with regard to subdivisions where qualifying permanent open spaces are provided. In such instances, the maximum floor area ratio may be increased by not more than 15%.

#### VII. WISCONSIN 1971 ASSEMBLY BILL 162

Current legislative proposals relating to exclusionary zoning have been described in the section on that topic. Another measure, a major revision of the state zoning law is pending before the Legislature. 1971 Assembly Bill 162, was introduced by the Legislative Council following an interim study of its Local Government Committee, to revise the entire zoning and planning law. It would reorganize the scattered statutes relating to planning and zoning, bringing them together in a single chapter of the statutes and clarifying and modernizing the language.

Substantive changes in the bill were made "to enable and encourage local governmental units and regional planning commissions to effectively deal with those matters within their respective jurisdictions relating to planning and land use regulation and control." Changes are designed to help local governments update their planning and zoning techniques. When possible, parallel procedures and powers were established for counties and incorporated municipalities.

Specifically, one of the most significant changes that would be made by the bill would deprive towns of the ability to block county zoning ordinances by ratio. The towns would still have zoning authority where no county ordinance exists or could adopt a more restrictive zoning ordinance if approved by the county board, but item veto power is deleted (Sec. 63.45). This would be a step toward lessening the fragmentation discussed in earlier sections of this study. An explanatory note in the bill states that county shoreland zoning ordinances and subdivision regulations are not subject to veto by the towns, but that counties give strong consideration to town views on these matters. Furthermore, the veto power is difficult to administer and costly.

Section 63.02 (1) would enlarge the scope of the master plan prepared by the city plan commission. Whereas current law says the master plan is for the "physical development" of the municipality, the bill deletes the word "physical" to enable it to include all aspects of municipal development.

The word "aesthetics" is added to "health, safety, morals or the general welfare" among the purposes for which zoning may be undertaken. It was held in State ex rel. Saveland P. H. Corp. v. Wieland, 269 Wis. 262 (1955) that zoning for aesthetic considerations appears to be for the general welfare. In this same section (Sec. 63.04 (1)) the words "character, pattern and sequence of buildings" were added to "height, number of stories, size" in describing the powers of the common council to regulate zoning of buildings.

In Section 63.04 (2) (b) on planned district developments (this appears to be the designation for PUDS in the Wisconsin Statutes), the only change from the present law was in the sentence "The council may upon the petition of the owners establish special districts to be called planned development districts...", in which "upon the petition of the owners" was substituted for "with the consent of the owners". This is to clarify that the establishment of planned district developments is not contract zoning, which the Wisconsin Supreme Court declared invalid in State ex rel. Zupanivic v. Schimenz, 46 Wis. (2d) 22 (1970). No attempt is made in this section to define a planned district development by size. The main techniques requisite for a PUD, however, seem to be included in the provision.

Maintenance of the overall quality of the environment and the protection of the natural resource base were added to the list of items which the zoning regulations shall be designed to accomplish (Sec. 63.04 (3) (a)).

A new section (Sec. 63.09) requires all state, county and other governmental entities to conform to local zoning and building codes in their construction activities.

The nonconforming use law (Sec. 63.10) is continued, allowing the continued use which was lawful before an ordinance took effect, but municipalities would be permitted under the bill to establish

amortization and termination formulas for nonconforming uses. Compensation to the landowner would be required upon termination of any nonconforming use under the provisions.

Concerning county planning and zoning, set up under Subchapter II, Sec. 63.26 would delete the provision which prevents counties in a regional planning area from doing their own planning. Counties would be permitted to do their own planning whether or not there is a regional planning commission.

The list of purposes or goals of county planning and zoning was expanded to include "adequate housing".

County boards may combine or merge the planning commissions of cities, villages or towns within the county with their consent, and the county board may participate in joint office or staff arrangements with local planning commissions under Sec. 63.27 (5).

Section 63.28 on the county development plan contains a new provision requiring a county planning and zoning committee to invite cities and villages to include their jurisdictions in the plan at the time it directs preparation of the plan. The word "physical" is removed from the "physical" development of the unincorporated territory and that incorporated territory which desires to be included in the plan. Removal of this restricting adjective permits the county to broaden its planning activities to include economic, social or whatever. The development plan may identify goals for the future development of the county with respect to factors which will improve the "social" as well as "physical and economic" situation of the county. When a development plan is adopted by a county, a copy shall be sent to any regional planning commission serving the county. A new provision requires referral of any conflict between a county development plan and a regional master plan which a county board and the regional planning commission cannot settle to the secretary of the State Department of Local Affairs and Development.

Section 63.29 rewords the county's zoning powers, providing that zoning districts may be for the exclusive use of various purposes and providing for the use of planned unit developments and conditional uses.

Similar to a provision in the zoning for cities and villages is a provision to require all governmental entities to conform to county zoning and building laws. Exceptions are provided for, however (Sec. 63.39).

With regard to town zoning, Subchapter III, Sec. 63.45 (3) permits a county board to freeze existing uses while a comprehensive county zoning ordinance is being developed if a town has not approved a county ordinance at the time the bill is enacted. Governmental entities must conform to town zoning and building restrictions where applicable.

The bill also includes a subchapter on regional planning, rewriting the law on regional planning commissions. With regard to

zoning, Section 63.60 (3) modifies the law to state clearly that a commission may review plats if the local units or state agencies agree. The word "physical" was again removed (sec. 63.61 (1)) to allow a commission to adopt a master plan for the development, not just the "physical development" of the region. A new section permits municipalities to participate in joint discussions and plans with their neighbors to promote cooperative arrangements and coordinated actions.

There is also a subchapter in the bill dealing with flood plain and shoreland zoning, which is not pertinent to our present study.

The Assembly Committee on Municipalities has recommended the bill out of committee with several amendments. One of these amendments, Assembly Amendment 7, is of particular interest. It would allow the jurisdiction of a county zoning ordinance to include a city or village if the common council or village board has transferred zoning jurisdiction to the county. Such transfer must be concurred in by the county board. A city or village may also subsequently withdraw from the county's jurisdiction. Assembly Amendment 8 would add to the objectives for future development of a county development plan "The location, character and extent of acquisition, leasing or sale of lands for public or semipublic housing, blight elimination and slum clearance." A similar sentence was added to the list of items that a regional planning master plan may include.

On October 7 and 8 the bill was debated on the floor of the Assembly, and numerous additional amendments were offered. The provision taking away town board veto powers was a major point of controversy. By a 58 to 39 vote representatives refused to kill an amendment to restore to the bill the town veto power (Assembly Amendment 15). On October 15, another amendment was introduced, and the bill was tabled. As of October 15, 1971, that was the status of 1971 Assembly Bill 162.

## VIII. CONCLUSION

Although the longest section of this study is devoted to the economic integration of housing through revision of zoning laws, the necessity of delving into other aspects of zoning became increasingly clear as the study progressed. Economic integration cannot be considered in a vacuum; all facets of the zoning problem are closely interrelated. Jurisdictional problems, fiscal effects of our tax system on zoning, and the techniques that are being used or can be used in zoning — as well as economic integration — are all an integral part of the zoning question — Why do we zone? How do we zone? Who carries out the zoning?

Why do we zone? Originally, zoning was adopted to improve the aesthetics of a municipality and to preserve the value of residential property. It sought to deter the haphazard, indiscriminate development

of land and the proliferation of unsightly or ill-matched types of land use. As the nation became increasingly urbanized and industrialized, zoning was a logical and necessary development. The comparative homogeneity of small town life gave way to the heterogeneity of cities; in cities people tended to cluster into various types of homogeneous communities — communities based on race, nationality, income, religion or special interests. Zoning came to reflect these patterns. Traditional zoning reached its zenith, perhaps, in suburbia, with its planned layouts of similarly-sized, similarly-priced homes and its careful exclusion or segregation of any commercial or industrial activities that might detract from that harmony. Since laws have now decreed an end to racial zoning, the most visible form of zoning which has caused increasing criticism is economic zoning. Zoning is based on the police power. How large a lot, it is asked, can be justified on the basis of legislating for the health, safety and welfare of the people? So far, court decisions have not been definitive.

How do we zone? At the same time that the purposes of zoning have been coming into question, new ideas have been developing on the how of zoning. Expanding population, suburban sprawl and what they consider the monotony of present-day zoning have led some land-use planners to reflect unfavorably on the wisdom of Euclidian zoning or at least to favor a greater variety of approaches to zoning. Hence, the development of PUDs, clusters, density zoning and similar variations. They are trying to demonstrate that an assortment of ways may be used to achieve an aesthetic environment.

Who zones? Finally, modern transportation and communications have brought a realization of the interrelatedness of communities and the awareness that very often a community does not act in isolation; what it does affects its neighbors. This has led to the consideration of the level at which zoning is performed, whether the traditional local zoning level is adequate or whether zoning should be performed by a higher level or in concert with a higher level.

Where, then, does Wisconsin stand in relation to these developments?

#### Jurisdiction

Obviously, the fragmentation of the zoning effort which some spokesmen criticize is shared by Wisconsin with her sister states. Cities, villages, towns and counties all are authorized to zone. Not all counties or municipalities have zoning ordinances, and those that do are frequently too small to have professional staffing.

This situation is, of course, mitigated to some extent by the presence in Wisconsin of several regional planning commissions. Although these commissions are advisory only, they do prepare comprehensive plans for their entire region, enter into contractual arrangements with municipalities to prepare individual plans for them, and provide advice on drafting zoning ordinances.

State involvement in zoning, here as elsewhere, has been at a minimum, at least so far as any direct state zoning is concerned. The State Department of Local Affairs and Development, however, through its Bureau of Local and Regional Planning, provides technical assistance to counties, municipalities and regions in developing and implementing comprehensive planning programs.

Thus, Wisconsin is fragmented, but expertise is frequently available for those communities that care to use it. This does not, however, necessarily solve the problems of conflicting interests among municipalities and the enforcement of an overall plan.

With regard to other existing alternatives already in use in some areas of the nation, no metropolitan government has yet been adopted anywhere in Wisconsin, although it has been advocated for Milwaukee. So far, there has been a greater inclination to reallocate some functions by transferring them from the municipal to the county level, such as the Madison Municipal Airport, or for suburban municipalities to cooperate in the financial support of certain central city functions. Currently the Milwaukee County Sheriff is trying to promote a contractual arrangement with 4 suburbs to provide complete police services, with the county as the central agency. Assembly Bill 162 would require counties to invite cities and villages to come under their planning and zoning jurisdiction, but such municipalities would not be obliged to do so.

At the convention of the Wisconsin County Boards Association in Fond du Lac in September 1971, opinion was expressed for the need of some kind of consolidation of various functions, possibly at the county level. Assembly Bill 162, as we have noted, would strengthen county control of zoning with regard to unincorporated areas by discontinuing town veto power, but would not affect cities.

#### Fiscal Effects

To counteract the use of fiscal zoning, it would be necessary either for a municipality to place less reliance on the property tax, for the property tax base to be expanded to include exempt property, or for the tax to be collected by a higher level of government and distributed throughout the broader area without regard to source. To date, the last-named is the only to be used in Wisconsin, having just been incorporated into the 1971 budget act.

#### Techniques

There are provisions in many local ordinances for such techniques as planned unit developments. So far, local developers have not used them to any appreciable extent, although the term may be used vaguely to describe developments that are not truly PUDs by strict definition.

Some thought is being given to prime agricultural zoning, but much apparently remains to be done.

### Economic Integration

We have said that all the aspects of zoning are interrelated, because to solve or try to solve the problem of exclusionary zoning could involve all these other features. One approach to the problem, of course, is by direct legislative action of the kind contemplated in 1971 Assembly Bill 509 or by those adopted on a local level in Ohio and Maryland. If you believe, however, that there is also merit on the side of those against compulsory economic integration, then it is useful to explore other approaches to the problem.

The effect that fiscal zoning has on exclusion is obvious; this can only be approached through a change in the tax structure, particularly to take the pressure off the property tax as a source of school support. If local governments were less fragmented and, in a metropolitan area, were organized as a unit, this too would equalize taxes in an area. There would be less need to keep out high density, low-income housing, for example, from suburban areas if the tax were equalized all over the metropolitan area; on the other hand, there would be less need — from a fiscal standpoint — to try to relocate such housing in suburban areas if the financial pressure were removed from the central city.

If planned unit developments were to be utilized as urban renewal projects in central city areas, such developments to include a mixture of housing types and price ranges, it might also attract a greater variety of income groups back to the city. On the other hand, if these proved to be attractive and feasible projects, suburban areas might not object to them in suburbia in addition to traditional zoning.

There are nowadays many types of so-called public housing for low-income groups. There are a variety of sophisticated federal programs aimed to assist low and moderate-income people. They need not be the old-style, high-rise housing project which quickly degenerated into a slum itself and which is what comes to mind when public housing is suggested in a municipality. There probably needs to be a greater exploration of the various means of housing the poor, including rent supplements to the poor in private housing. Not all ways of housing the poor have the same degree of acceptability or unacceptability. Although economic segregation is not so severe a problem in Wisconsin as it would be in the larger states, there is a problem. Whether one believes it should be ended entirely or believes housing problems should be handled in other ways, the question calls for imaginative action.

Zoning itself seems to be entering a new era of expanding horizons. As 40 years of use have demonstrated, zoning is not a panacea for rural and urban blight. Innovative techniques, however, used in conjunction with other procedures could make a contribution toward making today's environment a more attractive and satisfying place to live.

Finally, if it can truthfully be said that all the problems of zoning are interrelated, it can also be said that zoning itself

represents one facet of larger problems, for when we get into zoning, we get into problems of local government organization, state and local fiscal problems and broader housing problems.

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