Subdivision Controls and the Law

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One of the burdens of an atomic age is a continual lag between problem and solution. No sooner does one manage to cope with the problems of yesterday than one is faced with the new and even more pressing problems of today. Planning, zoning, and subdivision control are no exception to this rule. In just a short time, a minimum of land-use regulation has been accepted which will bring order into the community; i.e., regulation which, so to speak, will keep the pig out of the parlor. Even these controls would probably shock our grandfathers; however, in the last several years, planning authorities have considered even more drastic approaches to the regulation of land use. Subdivision controls will have an important role to play in this process. The metropolitan building boom goes on at a rapid pace, forcing municipalities to use subdivision regulations to shape the new urban growth which is sprouting on the edge of almost every city. It is thought that a discussion of some of the difficult legal questions which this new approach to planning will bring will be of interest.

Since the war, communities have been faced with what some call galloping suburbanitis. New terms and expressions exist which reflect the atomic era: metrofission, the exploding metropolis, urban sprawl. How do subdivision controls fit into this picture? A little bit of history will be helpful here. Originally, the purpose of subdivision regulation was to make more convenient and certain the conveyance of land and the recording of titles to land. It is well known that the legal description of land can often be very complicated. The legal description is often called the metes-and-bounds description because it describes the plot in terms of boundaries. It may go something like this—"beginning at a point 100 yards from where the bear crossed the river, down the Old Granny Road to where the mill used to stand," and so on. This may be an exaggeration, but there are worse examples. These descriptions may often be very difficult to trace on a map. They are very cumbersome to use in conveyancing if for no other reason than that errors are possible when the description is too complex and too complicated.
The original purpose of subdivision regulation was to permit the subdivider to divide land into lots and blocks. This technique is primarily useful in urban communities. The subdivided tract is shown on what is called a plat, which is recorded with the county recorder. Thereafter, the subdivider can convey the land with reference to the plat—Lot One in Jones Addition to the City of Huntersville, and so on. This process is simple and once the plat is recorded, the possibility of error in land conveyancing is considerably less.

The next step in subdivision control was to recognize that when raw land was subdivided, the community has an interest in seeing that certain necessary standards are imposed on the developer to insure that the development will take place in a proper way. At first, the standards were what may be called quantitative; that is, they were related to physically measurable requirements such as the width and paving of streets, the provision of drainage facilities, setbacks, and lot sizes. With hardly an exception, the courts have now recognized that these requirements may properly be imposed on the subdivider, without compensation, as a reasonable exercise of the police power.

In this metro-atomic age, however, many have begun to feel that the restrictions and regulations applicable to land subdivisions should take on a different character. Sometimes the phrase "qualitative control" is used; that is, it is desired that the subdivision fit into the general community structure in a way that will not be harmful to community development. That is a lot of language and a very general statement. Perhaps it will be more helpful if the subject is divided into three more specific categories.

First, to isolate a preliminary difficulty, as subdivision regulations have become more common and have grown tighter, difficulties have occurred with evaders. A way must be found to handle the wildcatting subdivider before thought can be given to tighter quality subdivision controls. Second, municipalities are beginning to recognize that new subdivisions impose costs on the municipality which are very difficult if not impossible to recoup by way of special assessment or by way of the general property tax. Partly because of convenience, partly because of a feeling that the subdivider should bear some of these costs, some municipalities in some states have begun to impose lot fees on the subdivision of raw land.

Finally, much attention is being given to the placing of controls on the wholesale subdivision of land itself. In particular, concern has been voiced about the problem of timing in relation to subdivision development. Can we continue to afford the land wastage which occurs when
subdividers leapfrog and pepperpot all over the fringe area of a municipality? Can one afford to let new subdivisions outrun the provision of schools and other community services?

To borrow the atomic metaphor once more, each of the solutions to these problems presents questions of legal limits which are similar to the space limits which are presently faced by the astronauts. Not all of the attempts to conquer outer space have been successful, and not all of the attempts to deal with land space have been successful either. They have run up against legal limitations which have been as difficult as the limitations faced in space travel. The writer is convinced that legally acceptable solutions will be found.

What about the builder who seeks to evade the subdivision regulations? How can this problem arise? To get an answer to this question, the planning enabling statute must be examined. The general statute, passed in 1947, which applies to most of the planning commissions in the state of Indiana, provides (in § 53-745) that after a master plan and subdivision ordinance have been adopted, no plan of a subdivision shall be filed with the auditor or recorded with the recorder unless it has first been approved by the plan commission. The trouble with this section is twofold. It does not state that everybody must file for approval with the plan commission before conveying property. Nor does the section contain a definition of the word subdivision.

It is not intended that every individual who conveys land must first obtain permission from the plan commission which has jurisdiction. For example, certainly no permission would be required if the owner of a farm wishes to convey that farm to a son or to another purchaser. Nor would prior permission be necessary in other cases in which an owner of farm land wishes to sell off part of it for farm purposes. However, when raw land is split up for urban purposes, some action should be taken by the plan commission to insure that the necessary minimum requirements for urban living and urban design are met.

At the present time, since there is no definition of a subdivision and since the approval of the plan commission is not required for conveyance, the situation is this—a builder may in fact subdivide land and make a plat. The approval of the plan commission is not necessary because the subdivider simply may not record the plat and convey by metes-and-bounds. In this manner, the law is evaded. In other words, there is nothing to prevent the builder from drawing up a plat showing the lots and then conveying, not with reference to the plat, but by the legal description. Of course, there are various penalties contained in the planning law which seek to prevent this from happening, but they are
not strong enough, they have not been enforced often enough, and therefore they do not really work.

As previously stated, the difficulty lies partly in the definition of subdivision. The statute should perhaps indicate first of all what a subdivision really is. Having done that, the law should indicate that any person who subdivides will have to come to the plan commission for approval and it should include a penalty sufficient to prevent the subdivider from conveying land with reference to a plat without first obtaining permission.

Taking the problem of subdivision definition first, it would be helpful to refer to a recent California law. This law is typical of the laws in many states which define subdivision as the division of land into a given number of parcels during any one year. The California law states that subdivision means the division of land by the subdivider into five or more parcels within any one-year period. Perhaps the one danger with this kind of definition is that the small builder who only sells off two or three houses a year is left out of this law. So the law would be tighter if subdivision were defined as the division of any one tract into two or more tracts. The laws in some states are so written, and of course this kind of definition is practically air tight. Any time land is divided into two or more plots, then the subdivision regulations apply.

However, this kind of a regulation has other dangers. It does not, in terms, exempt the selling off by a farmer of a certain part of property for agricultural uses. One way to take care of this problem would be to define the agricultural uses which would be exempt from the subdivision law. Then, any conveyance for an agricultural use would not be under the provisions of the ordinance. The trouble, of course, with this definition is that it is very difficult to enforce. Not every subdivision of land would come before the commission. The interpretation of the exclusion would be left with the subdivider, and the plan commission would have to find the violators.

The California law does not approach the exclusion problem in this way. Two general exclusions are made from the planning requirements. The first exclusion is any parcel of five acres or less which abuts on an existing street, which does not require a street opening or widening, and for which the lot design meets the approval of the governing body. Notice that this is not a complete exemption from the subdivision law, but because the parcel abuts on an already existing street or highway, the subdivider need only comply with the lot design requirement of the governing body. The second exclusion from the California law consists of those parcels of land of a net area of one acre
or more for which a tentative map has been submitted to the governing body and which have been approved as to street alignment, street width, drainage, and lot design. Again note that the exemption is only partial. Again the subdivision or lot must be submitted to the planning body and again certain minimum requirements are imposed.

This approach is subject to question. Legitimate objections may be raised as to the need for so comprehensive a definition as well as to the necessity of including every division of land within the subdivision regulations. In fact, the California exclusion provisions follow closely the practice which has been adopted in some Indiana counties of requiring the subdivider who does not fall under the subdivision regulations to file a petition for exclusion from the subdivision law. The writer understands that this petition works in a way which is similar to the method contemplated by the California statute. The subdivider need only comply with certain minimum requirements of the subdivision regulations and having so complied, is exempted from any further compliance. This particular practice has led to protests in some areas. It is felt that the legal status of this regulation under existing law is doubtful. The writer does not believe that there is explicit authority to engage in this practice, and it is thought that if challenged in a court suit, the practice might be held to be ultra vires—that is, beyond the provisions of the enabling act. In the last legislature, a bill was introduced which would have forbidden this practice. It was drafted so widely, however, that it would have thrown a very serious doubt on the propriety of all subdivision regulations. This bill was not passed. Perhaps the whole problem should be reconsidered with a thought to the eventual clarifying legislation.

If a statute similar to the California law were adopted the question of penalties would still have to be met. The writer feels that criminal penalties and injunction provisions are of limited usefulness. Some states have attempted other approaches to the matter with varying success; a few of these are presented for consideration. It is possible to link the issuance of building permits to the subdivision regulations. Under this approach, no building permit would be issued unless the subdivision regulations had been complied with. A second approach is to provide by law that a purchaser may set aside the sale of a piece of property in a subdivision which has not been approved. This solution would approach the problem of planning through the land title. It is felt that this approach has real possibilities if the cooperation of the real estate and banking professions can be obtained. For example, it might be desirable to provide by law that no mortgage may validly be
issued on land which is not in an approved subdivision. This would be pretty stiff. But it might be a very helpful way of checking the evader.

As an alternative, the laws might be tightened on the acceptance of deeds for recording and it made very clear that the recorder is not to accept any deed which is not in an approved subdivision. It could then be made clear that a recorded deed in an unapproved subdivision would be incapable of passing title to property. Perhaps the county recorder is not the official to enforce the subdivision law, however. A final approach which deserves mention is the "Blue Sky" approach. It is known that the procedure in securities regulation is to let the issuer market any security, but the financial background of the company must be very carefully specified. A similar suggestion has been made in planning circles. If the conveyance is in a subdivision which is not in compliance with the subdivision law, it would be stamped or otherwise marked to indicate quite clearly to the purchaser that the lot is in an unapproved subdivision and that the purchaser is subject to all the penalties and costs which follow from making such a purchase.

The second development discussed herein is the lot fee. When levied, these fees are used to provide for services which are difficult to provide for by special assessment or by the general property tax. One example would be recreational spaces and parks. Another example would be schools. Still another example would be drainage facilities. The difficulty, of course, is that new homes in residential areas create a considerable demand for services on the municipality. It is common knowledge that homes do not begin to pay in taxes for the benefits which they require. One way out of this dilemma is to require the subdivider to dedicate at least the land for parks and schools. It is felt that there would be no difficulty with such a requirement as it would probably be held to be reasonably incidental to and related to the land subdivision regulations. Practical problems would arise, however. What does a municipality do, for example, with the very small subdivision of six lots? Obviously, in that case the subdivider cannot be asked to dedicate part of the property. The municipality would end up with a small strip of land which would be practically worthless for park or any other purposes.

Furthermore, it usually happens that the drainage facilities or sewage facilities which are needed for new subdivisions are not all located on or near the subdivision. In many cases, they will consist of facilities or mains which are located away from the subdivision area, but which are nevertheless required because the subdivision has been built. In
these cases it is very difficult to apportion costs. If one thinks solely of dedication of land, for example, the subdivision which happens to be close to the particular facility will have to dedicate. The subdivision which is not close will not have to dedicate the land. The problem is even more acute if the total cost of the facility is placed on the subdivision that happens to be nearby. Nor would use of the special assessment procedure help. Special assessments can only be levied for benefits received. For example, it is doubtful that a lot could be assessed for a pumping facility located several miles away. One court has recently voided an assessment of this type. An Indiana law exists which permits the costs for a main sewer to be apportioned on a local and on a wider, district basis. But the procedure is very cumbersome. Again, one way out of this dilemma is to charge a lot fee.

During the past few years there have been several cases adjudicating the status of the lot fee. Two of them were decided within the last few months. In practically all of these cases, the decision of the court was unfavorable. This is cautionary, but it is felt that this current of authority should not lead to giving up attempts to levy a lot fee. It is felt that the unfavorable judicial reaction is due in part to the fact that the device is a new one. The courts are not used to it. They do not know how to catalog it. They do not known how to deal with it. As an original proposition, it would seem that if the municipality can demand of a builder who has a large subdivision the donation of several acres for playgrounds, then it can demand of a builder who has a small subdivision the donation of an equivalent in the form of a money payment.

Some of the courts have treated the question as one of vires—that is, as a question of statutory authority. In an Oregon case which was decided just this February, the county charged a lot fee of $37.50 which was to be used for park purposes. The approach of the court was to hold that the lot fee was not authorized by the enabling legislation. This legislation was in the usual form and it was similar to the enabling legislation which exists in the state of Indiana. It provided, for example, that the subdivision standards could take into account the public health, safety, or general welfare of the community. However, the court held that the statute did not authorize a fee or a tax but simply authorized a regulation of land use. Consequently, the fee was beyond the intent of the statute.

There was an alternate ground for the courts decision, and it presents a very difficult question. The subdivider contended that the fee was a revenue measure designed to produce money for public purposes, and,
therefore, was a tax which the county had not been authorized to levy. The contention of the county appeared to be that the fee was simply incidental to the regulation of subdivisions, and therefore was merely secondary to an exercise of the police power. For example, if the county had seen fit to levy a small fee to bear the cost of inspecting new subdivisions, there would have been no difficulty with the case. In that event, the fee would have been incidental to the subdivision regulation.

The court skipped away from this problem. It held that the regulation “authorizes the county to lay a tax upon one class of landowners for a public purpose, which may be but need not be related to the activity being regulated.” In other words, the contention of the court was that there was no limitation on the area in which the money could be spent, since the money could be spent for parks which were not located near or which would not be used by the new homes. Therefore, it was not related to the regulatory purpose.

A similar conclusion was reached by a lower California court in a decision handed down a few years ago. Their subdivision enabling act was more limited and only authorized regulations dealing with the design and improvement of subdivisions. The court again held that the statute did not authorize the levy of a fee. As in the Oregon case, the money was to be used for park purposes and could be spent anywhere in the area and not necessarily in the area in which the new homes would be built.

A final and very interesting decision was handed down a couple of years ago by the Supreme Court of Michigan. This case involved the levy of a permit fee which was supposed to take care of the incidental police and other costs which were incurred in connection with the building of new subdivisions. For example, the city alleged that fires had to be put out while a subdivision was being built and that during construction it had to be policed so that vandalism would not occur. The purpose of this lot fee was to pay for the costs of policing and otherwise taking care of the new subdivisions while they were being built. Again, the issue was discussed in terms of whether or not this was a tax which was not authorized or simply an incidental fee which contributed to the regulatory police power. In this case, the amounts raised by the fee were so great that they were out of proportion to the costs which were incurred. The court held that the amount raised was excessive and that the fee was not authorized to this extent. However, they did say that it was permissible under the statute for the municipality to levy a lot fee which would take care of the actual costs which the city would have to incur in policing new subdivisions while they were under construction.
Attention is directed once more to a recent California statute which seeks to clear up the problem raised by lot fees in that state. This California statute now authorizes the levy of lot fees to defray the actual or estimated costs of constructing what are termed planned drainage facilities. The statute is quite detailed. One of the conditions imposed is that the costs of the drainage facilities must be fairly apportioned throughout the drainage area either on the basis of benefits conferred or on the need for facilities created by the proposed subdivisions. Furthermore, the fee imposed must not exceed the amount which would be imposed on the lots in the area if the assessment were on a per acre basis rather than on an area basis.

This statute is very carefully drawn. It makes the legislative intent very clear and an analogy might be drawn to a special assessment. In other words, it could be claimed that this particular lot fee was not a tax but was in the nature of a special assessment. A special assessment need not meet the constitutional rules as to uniformity of taxation, but the special assessment, on the other hand, can only be levied for benefits conferred. The difficulty with the special assessment analogy in this case is that no notice or hearing provisions are provided, as the California legislature has definitely tied the fee in with the subdivision regulation process. To the writer's knowledge, this statute has not been tested. It is believed that it would be quite helpful if here in Indiana some thought were given to legislation of this type and to possible ways in which lot fees could be levied on subdividers to help defray the cost of the facilities which new subdivisions require.

Finally, it was indicated that something was to be said about the planning of new development in fringe areas. Many are worried by the fact that new development often outstrips the provision of new community facilities. There is also worry about the fact that new developments seem to hop, skip, and jump all over the countryside without any relationship to facilities that are offered or that might be offered within a reasonable period of time. The solution to this problem has, so far, been indirect and communities have, so far, proceeded under zoning ordinances rather than under the subdivision regulations. For example, one approach has been to provide for acre zoning in the fringe areas. Lots are zoned so as to require five, six, or ten acres per house. This will obviously discourage the large scale subdivision and will thereby prevent the building of houses which will require new services and facilities in advance of demand.

What about a direct approach to the timing problem? In one recent case, a small New York town enacted a regulation which pro-
vided that when taking into consideration the granting of a permit for a subdivision, the municipality could consider whether or not the existing community facilities were adequate. A subdivider applied for a permit to double the permitted density requirements. The municipality found that existing school facilities were inadequate and therefore rejected the application. In this case, the regulation was upheld as it was found to be within the terms of the enabling statute and was found not to have exceeded the limits of the police power.

Other more direct methods have not fared so well in the New York courts. One small New York town passed an ordinance which provided that the building of homes was a business. They then sought to license this business of building homes and they took care of the problem of new homes by restricting the number of licenses in any one year and thereby the number of homes that were built. This ordinance was thrown out as being unauthorized by the statute because, said the court, it was an attempt to impose a subdivision regulation in the guise of a licensing provision. Since the municipality does not have the statutory power to license, the regulation could not stand.

These cases highlight the familiar fact that suburban communities in a metropolitan area usually are not anxious to take on new housing. If they accept anything at all, it will not be a large-scale subdivision which generates a lot of children and thus a need for schools and other facilities. To a certain extent, these suburban municipalities cannot be blamed for this attitude. It has been noted earlier that new residential subdivisions cannot pay their own way and have generated a greater demand for services than the taxes which are paid on the property. Furthermore, under present planning laws the suburban municipalities have no way of deciding just when and just where the new subdivisions will be built. Fortunately, in Indiana ample and adequate legislation exists which provides for planning and zoning on a metropolitan basis as is presently being done in Marion county and other counties. When planning is projected on a metropolitan level, some of the problems which arise because of competing municipal needs and desires do not develop.

Even within a metropolitan framework, some attention will have to be given to the question of regulating the tempo, timing, and sequence of new residential development. One approach is that taken by the New York municipality already discussed which regulated the density of new subdivisions according to the availability of community services. Another approach would be for the subdivision ordinance to set up a priority system for the use of land. The planning department would
then decide which vacant areas would be used first, which second, which third, etc. The provision of new schools, new parks, and other community facilities could then be geared to the building of housing. A question then arises as to whether the planning and zoning enabling act in Indiana is broad enough to permit this kind of priority zoning.

One case came up in Connecticut which involved the attempt of a small town near New Haven to engage in subdivision regulation of this type. In this case the municipality turned down the subdivision because it was found that additional housing would impose a financial burden on the community. As in the New York case, findings were based on the absence of school facilities. Contrary to the New York court, however, the Connecticut court held that the enabling act did not authorize a refusal for this reason. Because the planning and enabling legislation did not speak directly to the problem of timing, sequence, and need, the Connecticut court is probably correct.

There is a technical distinction between the New York and Connecticut cases, however, which is very important and which probably explains why the courts reached different results. In the New York case the town did not attempt to prohibit the subdivision entirely. In that case the town simply refused to lower the density requirements. The ordinance called for building lots of 40,000 square feet and the builder wanted a special permit which would have authorized building at a density of 22,500 square feet. In other words, the density would almost have doubled. Since the enabling act speaks directly to the question of density and explicitly authorizes municipalities to regulate density when passing subdivision ordinances, the New York case is probably correct. Because the enabling acts do not give explicit authority to reject outright an application for a new subdivision because of need, the Connecticut court is also probably correct.

In the course of this discussion some court opinions have been reviewed which in many cases have been unfavorable to the kinds of subdivision regulations presented in this paper. In the opinion of the writer, these unfavorable court opinions do not necessarily reflect judicial antagonism to this kind of subdivision control. Instead, it seems that the unfavorable court decisions simply reflect a growing tension in the administration and in the operation of subdivision requirements. We are, for the most part, operating under enabling acts which were drafted and enacted in the 1920s. Municipalities operating in the 1960s now see problems of land-use control which were never thought about in the 1920s. These municipalities attempt by one device or another to work out regulations and ordinances which fit into the statutory scheme
of the 1920s and which will still permit them to handle the new problems which have arisen. Many times, however, the statutory scheme is inadequate. In many of the cases which have been discussed and which have reached unfavorable conclusions, the basis for the decision was not necessarily that the ordinance passed or the regulation enacted was unconstitutional but that there was no statutory authority for the municipal action which was taken.

Where does all of this lead? Several problems have been briefly reviewed in the operation and administration of subdivision controls. New problems have arisen even before the basic essentials of subdivision control have been fully assimilated, and even before some municipalities and many counties have enacted the necessary basic regulations. It has been seen that in many cases the wildcatting builder manages to evade the subdivision laws because of a technicality in draftsmanship. It has been seen that existing provisions for the dedication of land and levy of assessments for public improvements are inadequate and that municipalities in some areas of the country are experimenting with lot fees in order to raise the necessary additional funds. Finally, it has been seen that in some cases, the municipality has regulated the tempo, sequence, and timing of new development in order that new housing will not outstrip the provision of community facilities and in order that development will take place in an orderly fashion.

What is needed now is a wholesale rethinking of the aims and the purposes of subdivision control. The provisions which define a subdivision and the scope of the subdivision regulations need to be tightened. New and more adequate techniques of local government finance are needed. Finally, more attention must be given to the shape and form of communities in order to prevent land wastage and in order to insure that all citizens are able to enjoy adequate community facilities. These are just some of the problems which planning, zoning, and subdivision regulation must face in the new, metro-atomic age.