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## MUNICIPAL BOUNDARIES AND ZONING: CONTROLLING REGIONAL LAND DEVELOPMENT\*

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The twentieth century in the United States has marked the transition from essentially a rural society to an urban one. The bulk of the population is now clustered in and around metropolitan areas. In the twenty years which have elapsed since the end of World War II, the urbanization of America can best be seen in the substantial growth and development of the suburbs.<sup>1</sup> The rapid and almost endless sprawl of suburbia has marked the mushroomed growth of outlying rural villages, the emergence of entirely new communities, and the proliferation of corporate boundaries and governmental units.<sup>2</sup> The development of the metropolis and its progeny has

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1. The 1960 urban population of the United States was 125.3 million, an increase of 29% over 1950's 96.8 million. Of the urban population, 112.8 million resided within Standard Metropolitan Statistical Areas, (SMA's), areas in and nearby central cities, 58 million lived within the central cities, and the balance of 54.8 million lived outside them.

During 1950-1960 the central cities grew some 10.8% in population. This growth was concentrated in a small number of Southern and Western cities. Much of it resulted from annexation. Most central cities lost population. During the same 10 years in areas within SMA's but outside of central cities there was a 48.5% increase in population. . . .

These statistics indicate immense present growth in the suburban areas surrounding central cities. Demographers predict that there will be no appreciable change in this pattern. . . . Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs On New Suburban Residents Through Subdivision Exactions*, 73 *YALE L. J.* 1119 n.1 (1964).

2. The fastest growing county in the United States, Brevard County, Florida, serves as an excellent example of this phenomenon despite the fact that the enormity of such growth undoubtedly is due to the presence of the Space Center and related activities and is unlikely to be repeated. During the period between 1950 and 1960, Brevard County's population increased by 371.1%. In 1940 its population was 16,142; 1950—23,653; and in 1960—111,435. It was estimated that its population in 1964 would be 175,258; by

aggravated old and precipitated new problems of alarming magnitude which are too often lost in the shuffle of such urbanization.<sup>3</sup> Suburbs have had to reckon with enormous increases in demands for schools, police and fire protection, and water and sanitation facilities.<sup>4</sup> They have had to con-

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July 1967—210,000; and by 1970 it is believed the population will range from 230,000 to 270,000. See NELSON, *EAST CENTRAL FLORIDA PROFILE* 11, 15 (1964).

Since 1950, this county has undergone a dramatic change in development. It had been largely rural in character with several fishing and tourist villages. It has since become a county of young suburbanites (median age 26.4) marked by urban growth and sprawl. Strangely enough this has occurred in the absence of a core city; as of 1960 none of the communities exceeded a population of 20,000. See Green, *Urban Growth in the Nation's Spaceport* 4-5 (1964) (unpublished report in Washington University Law School Library). Most of the county's population is now located in its sixteen incorporated and twenty-nine unincorporated communities. Residents of these communities are subject to the following additional local governmental units—school district, Central and Southern Florida Flood Control District, mosquito district; and to one or more of the following—port authority, hospital authority, airport authority, road and bridge district, navigation district, drainage district and recreation district. Eleven of the incorporated communities are clustered in south Brevard County. Some of the recent growth has been reflected by a merger of several communities. See Green, *supra* at 3, 5. For the most part, the urban growth has been scattered with some concentration of development, especially commercial, along highways. Such pattern of development has reinforced the tendency for new development to sprawl.

3. [I]n the last decade there has blossomed a phenomenon, not new but only slightly apparent until recently—the scattering of development hither and yon throughout the countryside.

This scattered growth has an enormous, seemingly disastrous effect on the until-now rural municipality which must provide services for the new residents, many of whom moved from the city and expect urban services in a rural climate. These types of problems occur: Each school district must provide an education for all children living within the district; neither of two developments of, say, one hundred homes each located in the same school district a mile apart, separated by open fields, is large enough to have its own elementary school; thus, bus transportation must be provided to the children in one and in sometimes both developments. A development of two hundred homes with 10,000 square-foot lots has on-lot sewage disposal units for each home, a borough a mile away has a public sewerage system which cannot be utilized because that system is used to capacity now and the cost of expansion plus laying a trunk line to the development would be prohibitive in cost. A farmer sells fifteen lots along the road to various individuals who build their own homes; but increased traffic upon what were once rural roads requires increased maintenance, the new residents request and obtain better police protection, and the new children crowd into the old two-room school; the result is higher township and school taxes because the tax return from the fifteen new houses is insufficient to pay for the increased costs of local government. Hallman, *Growth Control: A Proposal For Handling Scattered Metropolitan Development*, 33 *LAND ECON.* 80-81 (1957).

4. Brevard County, Florida, has had to face all of these problems, particularly that of water and sanitation.

The present condition of water and sewage services in Brevard County leaves much to be desired. A great part of these services has been met by private utility companies that have small plants and limited perspectives of adequate sanitation needs. There is ample evidence to suggest that some of these companies are not maintaining the same standards as the municipalities in providing these services.

A citizens committee on sanitation has reported that of thirty-four sewage treatment plants in the county, twenty-four operate without supervision and with unknown results. These facilities are grossly inadequate since an estimated 50 per cent of all housing units in the county have septic tanks. Furthermore, there are

tend with entirely new transportation problems caused by the heretofore unexperienced commuter traffic of antiquated and inadequate rural highways.<sup>5</sup> Such growth has been neither efficient nor ordered; it has been haphazard. Locational decisions have been made without regard to resulting community costs or the conservation and maximum use of important land resources.<sup>6</sup> The absence of adequate regulation has caused the cumula-

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sixty-four public water supplies that receive only minimal supervision. An estimated 9,000 homes obtain their water from private wells that are subject to surface pollution. Green, *supra* note 2, at 7.

For a dramatic illustration of the growth of public schools in Brevard County and the entire East Central Florida Region see NELSON, *op. cit. supra* note 2, at 35-36.

For a statement of the typical problems confronting a suburban community affected by rapid growth see *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962); *Gruber v. Mayor & Township Comm.*, 68 N.J. Super. 118, 172 A.2d 47 (L. 1961), *rev'd*, 73 N.J. Super. 120, 179 A.2d 145 (App. Div.), *aff'd*, 39 N.J. 1, 186 A.2d 489 (1962).

In the *Gruber* case, the town grew from a population of 2763 in 1950 to 15,287 in 1960, with most of the increase occurring between 1958 and 1960. Such growth left the township with serious fiscal and educational problems which necessitated regulation of further development. The *Christine Bldg. Co.* case concerned the legality of a regulation adopted by a community in anticipation of impending growth sanitation problems.

5. Perhaps the least soluble of all the problems of urban growth confronting Brevard County is that of transportation. Invariably as in the case of Brevard County, growth and development occur in the absence of an adequate public transportation system which is required for the satisfaction of the commuting needs of new residents. Commuting is thus nearly always done by automobile. The stress placed upon existing highways is enormous. For an illustration of the increase in the annual average of daily traffic at specific intersections between 1953 and 1963, see NELSON, *op. cit. supra* note 2, at 34 (At the intersection of "U.S. A1A S. of SR 520," daily traffic measured 855 in 1950, and 23,440 in 1963.) These highways were not designed for such increased traffic. Rush hour traffic jams have become commonplace; one causeway has been described as the "car strangled spanner." Green, *supra* note 2, at 11. (Emphasis added.)

There is also another dimension to this transportation problem. Highways constitute over 25% of all developed land. *Ibid.* They not only provide a means of transportation, but they also affect the land use patterns of areas proximate to such highways. Conversely, these land use patterns affect the capacity of roads to transport residents to and from work. For example, insoluble traffic bottlenecks are inevitable so long as intensive open-access, strip commercial and residential development are permitted in uncontrolled fashion. Thus, new and improved highways cannot solve increased traffic problems without a corresponding control of new private development.

6. The past thirty years have provided us with countless examples in which uncontrolled land development outside the boundaries of cities has stultified proper street development when population finally reached the place where integration with the nearby community was required. Is it unreasonable to say that the city planners, looking forward to the day of nearly inevitable integration, should be entitled to lay out an adequate street system and require that land development take cognizance of the foreseeable needs? Land development necessarily affects the population density of the region. Must a city, already groaning under the tax load made necessary by supplying the schools and parks which were forgotten in the past, stand idly by while nearby land is developed so intensively that the problems of

tion of neighboring, inharmonious land uses and furthered, in an effort to avoid such discord, developmental sprawl and the indiscriminate usurpation of what is no longer an unlimited land supply.<sup>7</sup> The foregoing are problems which have been experienced by nearly all of the burgeoning regions undergoing urban growth as well as nearly all of their member communities. Not only do such communities share this common experience, but also they invariably share the same problems which pervade the entire metropolitan area without recognition of or regard for local corporate limits.<sup>8</sup> Such

providing education and recreation facilities will be magnified when the region becomes politically integrated?

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You have perhaps witnessed the spectacle of having the very best farm land near a community transformed into a housing development because of the immediate monetary rewards which such development afforded, while other available land which is either of marginal value for agricultural purposes or completely unusable for that purpose was left idle, although it would have been entirely useful for housing development. . . .

Or perhaps you have observed instances where the best possible industrial sites have been consumed by premature residential development. And I am sure you have seen instances where magnificent potential recreational areas otherwise unavailable, have been destroyed by an alternative development. Is it not time, perhaps, that we extend our sights a bit more into the future and provide the means by which we can insure that our great land resources will be fully exploited in the production of goods and services for the people of the nation? Smith, *The Dilemma Faced By Municipalities In Controlling Nearby Land Developments*, 40 NEB. L. REV. 318, 323-24 (1960).

7. Once residences are established in the suburbs, other urban elements follow. Industries follow to avoid heavy metropolitan taxes, as do various businesses established to serve the new area. Such suburban expansion without adequate zoning control has three serious consequences.

First, residences, retail business, and industry settle in the same areas causing instability in property values, especially residential property. This condition is often undesirable to residents, who then move on to new suburbs, consuming still more land and re-establishing the entire pattern.

Second, the pattern of these developments usually takes place along main highways or county roads decreasing their capacity by causing congestion and increasing road hazards. This ribbon pattern creates widespread urban "sprawl" and results in public expense in the relocation of highways.

Finally, and probably most significant to the rural areas, suburban expansion not only absorbs a large quantity of land, but also the "flattest, least erodible, and most fertile farm lands." While the total number of acres absorbed per year may not appear significant, the percentage of productive farm land lost in the same period is substantial. In this connection, it should be noted that once agricultural land is engulfed by suburban growth it is effectively irretrievable and the feasibility of restoring it to agricultural use is virtually nonexistent. Comment, 44 NEB. L. REV. 151, 164-65 (1965).

8. Community interdependence can be illustrated in two different ways. First, neither the core city nor suburbs are self sufficient. They are dependent. The core city must frequently look to outlying areas "to find an adequate water supply and suitable locations for hospitals, correctional institutions, parks, sewage disposal works, and other amenities." Anderson, *The Extraterritorial Powers of Cities*, 10 MINN. L. REV. 475 (1926). Moreover,

if fringe areas were serviced by sewer and water systems, operated independently of the core city's systems, the inhabitants of the fringe would find such conditions economically intolerable. There are few fringe areas which are capable of sustain-

problems for the most part do, and ought to, reflect the presence of a mutual concern and interest among the affected communities. Their mutual interdependence is a fact which is inescapable.

It should be apparent that the aforementioned problems thrive best in an atmosphere of unmitigated freedom of choice in the use and development of land.<sup>9</sup> It should also be clear that these are matters which do not disappear by themselves.<sup>10</sup> Public solutions are essential; inertia and indifference are luxuries which cannot be afforded.<sup>11</sup> Since at the heart of most of

ing an adequate health, fire, or police department. SENGSTOCK, *EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA 3* (1962).

Additionally, many of the problems these communities face cannot be circumscribed by geographical boundaries. Disease can infest an area in total disregard of city limits. This is also true of problems generated by crime and inadequate police protection, outmoded highways and increased traffic, fire hazards and insufficient protection, drought and nonexistent control of water supply, and unemployment caused by the absence or lack of much needed industry. In the main, these problems when they exist plague an entire area. It should also be noted that the growth of suburbia invariably places a tremendous strain upon the ability of communities to supply adequate public facilities and services. The additional tax revenue derived from intensive urbanization is seldom sufficient to offset the increased costs of supplying such services and facilities. The absorption of such residential growth—finding decent places for people to live—is the burden of the entire area. It does not become a local problem for others to contend with simply because some communities elect to close their doors to all low cost residential development.

9. Something less than astute observation in almost any of the nation's cities should convince even the most skeptical that planning is desirable. A great many municipalities are conglomerates of slums, crazy-quilt street systems, and multiple-deck sandwiches of apartment buildings, small houses, industries, and businesses situated without rhyme or reason. The approaches to many cities, large and small, are nightmares of irresponsibility. Drive-ins, small businesses, and industries of all types line the highways: many of them are either architectural monstrosities or one-story, paint-peeling shacks. In any case, they not only detract immeasurably from the attractiveness of the highway and retard future development, but in many instances they also create serious health and safety hazards. These factors—and they constitute only a few of the problems—can be prevented by rational planning and zoning. They cannot be prevented without planning and zoning. Bartelt, *Extraterritorial Zoning: Reflections on its Validity*, 32 *NOTRE DAME LAW.* 367, 370-71 (1957).

10. See Green, *supra* note 2, at 5-11. Green notes that the problems which confront Brevard County have arisen in default of any attempts to make deliberate land-use decisions. It is suggested that these are problems which cannot be resolved so long as important land-use decisions are made by default. It is imperative that institutional procedures be developed and applied with respect to decisions concerning the local development of land.

11. Raw land is basically a national resource which is to be exploited to provide various kinds of values for our society. It must provide locations for residences; it must provide locations for industry and commerce; it must provide food for our society; it must provide mineral exploitation; it must provide recreational areas; and it must provide areas for the variety of public uses of land which we now deem essential to our society—roads, city halls, school buildings, and various other community facilities.

The question is: How is the land to be allocated to insure the maximum exploitation to meet those needs? Shall it be done exclusively at the will of the owner,

these problems is a private decision respecting the kind and manner of use to which land will be put, it would seem that the formulation of public solutions would at least necessitate adequate planning and the imposition of land use controls—particularly zoning.<sup>12</sup> The control of rapid urbanization of a region by the exercise of the police power is fraught with problems as

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or shall organized society play a part, with resultant restrictions upon the freedom of choice which the landowner may assert? The fact is, of course, that particular development of any piece of land has an impact upon society as a whole, and the interests of society are entitled to at least minimum recognition.  
Smith, *supra* note 6, at 322-23.

12. It should be obvious that not all of the problems of rapid urban growth reflect decisions regarding the use of land. Nor can it be said that the regulation of land use is the sole or ultimate solution to the many problems of urbanization. Nonetheless, one can affirm the fact that decisions respecting the timing, location and content of private development bear directly upon the magnitude of the problems confronted by suburbia and the matter of promoting orderly and adequate community growth.

Land use locational and content decisions indeed do affect the feasibility of providing and administering adequate public facilities and services. Strip or corridor, commercial and residential development create traffic problems which are virtually incapable of solution as well as add to the costs of serving such development. Scattered, leapfrog development of outlying areas, by unnecessarily enlarging the service area, substantially increases the cost of supplying adequate water and sanitation facilities, police and fire protection, school facilities, etc. Such pattern of development often renders it impossible to supply adequate public services. Additionally, the capacity of any community to serve the needs of its residents depends upon the revenue it receives from real property taxes. Only commercial and industrial development contribute more in taxes than they receive in public services; and except for the most expensive kind of housing, residential development is never able to pay its way. Thus, a community inundated by recent residential growth may find itself unable to meet demands for adequate public facilities and services because it is in short supply of a much needed tax base which can support such development at a reasonable tax rate.

It is not difficult to see, then, that to the extent adequate public facilities and services are at the core of orderly growth, intelligent public solutions respecting land use go a long way towards facilitating ordered and adequate development. Zoning is one kind of public solution which affords control over the location, timing and content of private development. This is accomplished through the use of measures such as minimum lot or dwelling size requirements, and districts zoned exclusively for agriculture, industry, recreation or open space. For example, excessive sprawl and premature land subdivision can be prevented by the

(3) demarcation of an urban service district and zoning of all lands outside this area for agricultural uses exclusively until such time as the city is prepared to extend its service zone; (4) high zoning in the outlying sections of the municipality with the understanding that the requirements will be lowered when a certain percentage of development has been attained in the intervening area; (5) high zoning restrictions in the outlying sectors of the community with the intention of reducing these when the city is ready to extend sewer and water utilities. Schmandt, *Municipal Control of Urban Expansion*, 29 *FORDHAM L. REV.* 637, 652 (1961).

Zoning, however, is not the only solution: the conditional use of insured loans; subdivision controls; ". . . public purchase of outlying land (or developmental rights thereto) to be placed on the market as needs dictate; . . . limiting the number of building permits that are issued each year" are some of the alternatives. *Ibid.*

to the kind, content and form of such regulation.<sup>13</sup> Quite apart from this, however, is the fact that the member communities are usually authorized to achieve independently and unilaterally solutions to problems which do not recognize corporate limits—solutions which ignore the nature of such problems and the interdependence of the affected communities. Indeed, this separatism frequently evokes no solution at all, but instead often produces conflicting controls which aggravate the already serious problems of urban growth.<sup>14</sup> Such conflict is an inevitable result which must follow from the use of measures which deny the realities of community interdependence. Therefore, some alternative solutions must be considered. This

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13. If the regulation effectively prohibits development or all reasonable use of land it may be found to be excessive and unconstitutional. See, *e.g.*, *Aronson v. Town of Sharon*, 346 Mass. 598, 195 N.E.2d 341 (1964); *Morris County Land Improvement Co. v. Township of Parsippany-Troy Hills*, 40 N.J. 539, 193 A.2d 232 (1963); *Greenhills Home Owners Corp. v. Village of Greenhills*, 202 N.E.2d 192 (Ohio Ct. App. 1964). If a regulation is founded upon a comprehensive plan predicated upon future expectations rather than existing conditions, it may be deemed unreasonable. See *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962). Similarly, if a regulation does not prevent all kinds of development, but permits some construction to occur, not qualitatively distinct from that which is prohibited, then such legislation is subject to attack on the basis of discrimination and segregation founded upon the prospective buyer's ability to pay—*i.e.*, the conservation of property values cannot be implemented by social and economic stratification. See, *e.g.*, *Board of County Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959). Therein the court found that a zoning ordinance, which imposed minimum lot size requirements and which intended to channel urban growth where the cost of operating government would be more economical with respect to furnishing police and fire protection, construction and maintenance of public schools and other public conveniences, was unreasonable and arbitrary and bore no relation to the health, safety, morals or general welfare of the residents of the area so zoned. For discussion of minimum lot and dwelling size requirements see POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 90-100 (1961); Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953).

14. This separatism is not only geographical but functional as well. A school district may encompass unincorporated as well as incorporated areas of the county. Its board is elected independently of the county or municipal government of the area it comprehends. The board is empowered and obligated to serve the educational needs of its public—of its district. It must build schools, employ teachers and raise the revenue needed to accomplish these objectives. Its primary source of revenue is the real property tax which it is authorized to levy upon the residents of its district. More residents means new schools, new teachers and increased costs. Invariably a higher tax rate is the only available solution to the problem facing the school district. However, this is not the only nor always the best solution to the problem. The content and location of new development—patterns of land use—affect both the demand for increased educational facilities and the ability to pay for it. Yet matters of land use control are not within the purview of the school district; they are within the scope of authority of both county and municipal governments. Therefore, meaningful solutions to the problems which confront a school district cannot be found in the separate and independent actions of affected governmental units. Cooperation and joint action is absolutely essential.

article, then, is concerned with the resolution of those problems of urban growth which invariably envelop an entire region. More specifically, it examines the legal machinery, particularly extraterritorial zoning, which has or may be used in accomplishing these objectives and in overcoming the obstacles posed by the proliferation of municipal boundaries.

#### I. INTRATERRITORIAL CONTROLS: EXTRATERRITORIAL CONSIDERATIONS AND THE COURTS

To some extent the courts have attempted to cope with the foregoing problems inherent in accelerated regional growth. In reviewing the reasonableness of ordinances which regulate local land use, courts have sometimes been willing to look beyond municipal boundaries. In passing upon the validity of a particular zoning ordinance, they have given serious consideration to regional development and regional needs. In the main, however, this judicial recognition of extraterritorial factors has been confined to a review of the independent efforts of communities to control development within their own borders, and any notion of regionalism embodied in these decisions has been limited and self-serving to the zoning community.

##### A. *Conflict Between Neighboring Zoned or Existing Uses—A Test of Reasonableness*

Basically there are three kinds of situations in which courts have considered regional or extraterritorial development, zoning, facilities, or needs in reviewing the validity of local legislation.<sup>15</sup> First—there is the case in which a zoning ordinance or amendment classifies a tract of land differently from land located in an adjacent municipality and the courts are asked by a landowner within either the zoning municipality or the adjoining municipality to consider extra-municipal zoning and development as evidence of the unreasonableness of such legislation.<sup>16</sup> Almost without exception courts have, in this situation, been willing to examine the character of land use in the neighboring municipality<sup>17</sup> and in so doing have in some instances

15. Note, *Zoning: Looking Beyond Municipal Borders*, 1965 WASH. U.L.Q. 107, 107-08.

16. See *id.* at 108-15.

17. A second problem . . . which would not be solved by extraterritorial control, is that of conflicting uses in adjacent incorporated areas. These may destroy the land use planning of adjacent areas just as if one area were unincorporated. Furthermore, courts have looked with increasing frequency to uses in adjacent municipalities to determine the validity of a zoning classification, arguing that zoning, to meet the statutory requirement that it be comprehensive, may have to take into account land uses in neighboring units. This indicates that municipalities in metropolitan areas will be required to work together more closely or to take into consideration the land uses in the adjoining municipality in determining zoning classifications.

Melli & Devoy, *Extraterritorial Planning and Urban Growth*, 1959 WIS. L. REV. 55, 65-66. See *id.* at 65-66, n.52; Note, 1965 WASH. U.L.Q. 107, 108-09 nn.9 & 10.



adopted a limited concept of regionalism<sup>18</sup>—that a zoning ordinance is a lawful exercise of the police power only so long as it is founded upon a plan which is *reasonable*; that a zoning ordinance is an *unreasonable* exercise of the police power if it does not have as its primary purpose the protection of the public health, safety, morals or general welfare; that the public for whose health, safety, morals and general welfare an ordinance is enacted is not limited to the residents of the zoning municipality but instead comprehends those who are directly affected by the land uses authorized by such legislation<sup>19</sup>—and therefore the reasonableness of any zoning ordi-

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18. See *Borough of Cresskill v. Borough of Dumont*, 15 N.J. 238, 104 A.2d 441 (1954). In this case the Borough of Dumont rezoned one block of an area zoned for residential purposes to business uses. The area circumscribed by this amendment was adjacent to land located in three neighboring boroughs which was zoned and developed for residential purposes. A suit was filed by the neighboring boroughs and several of its residents challenging such amendment. Their complaint charges that the amendatory ordinance was not in accordance with the *comprehensive zoning plan in effect in the four neighboring boroughs* in that it failed to take into account the prevailing conditions throughout these four communities and that it was enacted in utter disregard of the interests of the contiguous residential areas of its neighbors. The plaintiffs at the trial introduced evidence that the presence of a business district would aggravate existing traffic conditions to the detriment of the public generally, particularly the residents of the entire area, and would depreciate the value of residential property within the immediate vicinity of such business district. The Supreme Court of New Jersey affirmed a decision of the Law Division of the Superior Court setting aside such amendment. The basis of the supreme court's decision was that such amendment constituted spot zoning. However, in the course of its opinion, the court rejected the Borough of Dumont's contention that "the responsibility of a municipality for zoning halts at the municipal boundary lines without regard to the effect of its zoning ordinances on adjoining and nearby land outside the municipality." *Id.* at 247, 104 A.2d at 145. The court stated:

Such a view might prevail where there are large undeveloped areas at the borders of two contiguous towns, but it cannot be tolerated where, as here, the area is built up and one cannot tell when one is passing from one borough to another. Knickerbocker Road and Massachusetts Avenue are not Chinese walls separating Dumont from the adjoining boroughs. At the very least Dumont owes a duty to hear any residents and taxpayers of adjoining municipalities who may be adversely affected by proposed zoning changes and to give as much consideration to their rights as they would to those of residents and taxpayers of Dumont. To do less would be to make a fetish out of invisible municipal boundary lines and a mockery of the principles of zoning. There is no merit to the defendant's contention. *Id.* at 247, 104 A.2d at 445-46.

19. It is worth excerpting a portion of the opinion of the superior court in *Borough of Cresskill v. Borough of Dumont*, 28 N.J. Super. 26, 100 A.2d 182 (L. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954); particularly the courts reference to the vested rights of affected property owners.

Once a municipality adopts a valid zoning ordinance prohibiting a particular use in an established use area, the general public has a right to rely upon the provisions of the ordinance. The restriction is for the benefit of the public health, morals and welfare, which includes all those of the public who are benefited by the restriction. The public health, morals and welfare are not limited by the boundaries of any particular zoning district, nor even by the boundaries of the municipality adopting the ordinance. Property outside the established use area, and even property outside the municipality, if benefited by the prohibited use, acquires a vested right to any

nance is to be adjudged by the character of development lying immediately within and without the corporate limits of the zoning municipality.<sup>20</sup> The regionalism suggested by these cases is necessarily limited for two reasons. In most of the decisions the development, and consequently the affected public, which is considered is that extraterritorial development within an adjacent municipality which is proximate to the boundaries of the zoning municipality. Because the impact area is nearly always restricted in this fashion, it is difficult to ascribe any meaningful notion of regionalism to these decisions. Additionally, in many of these cases the courts are asked to take account of extraterritorial zoning and development in reviewing the reasonableness of an intraterritorial zoning classification with respect to land located within such district. Therein the legislative impact with which a court is concerned is purely intraterritorial; the focus of judicial inquiry is inward and not outward.<sup>21</sup> Indeed, the problem to be resolved is a local one and not extraterritorial. It is hardly distinguishable from those instances in which courts are asked to consider the zoning and character of surrounding development within a municipality when adjudging the reasonableness of a zoning ordinance as it applies to a particular plot of land.

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benefits accruing from the restriction. It is almost inevitable that an adjoining municipality will be affected in some degree by the zoning regulations along its border adopted by its next door neighbor. Zoning regulations must be in accordance with a comprehensive plan, and they must be made with reasonable consideration to the peculiar suitability of the land for a particular use, and with a view of conserving the value of property and encouraging the most appropriate use thereof. Hence, it becomes a legal requirement that the restrictions and regulations in a zoning ordinance must be made with reasonable consideration to the character of the land and also the character of the neighborhood lying along the border of the municipality adopting the ordinance. *Id.* at 42-43, 100 A.2d at 191. (Citations omitted.)

20. It has traditionally been a fundamental aspect of zoning that the police power so used must be used reasonably, that is to say, it must not be used capriciously, but according to some form of plan. The courts seem to have grasped the essential fact which has eluded legislators, namely, that a perfectly reasonable plan for the development of—say—a block may become unreasonable when looked at in terms of the municipality. Similarly, a reasonable municipal plan may be nonsense when looked at in terms of a metropolis. This unreasonability, which individual municipalities seem somewhat loath to accept, goes a long way towards rendering unconstitutional all zoning at present carried out. There can be no doubt that the courts possess a weapon of considerable force in judicially reviewing zoning ordinances, and that the imposition of a duty to accept into local planning and zoning philosophies decisions which have been communally made elsewhere, either by other municipalities or by some form of regional planning commission, may well come in the end from the courts and not from the legislature. POOLEY, *op. cit.* *supra* note 13, at 30-31.

21. See Note, 1965 WASH. U.L.Q. 107, 108-15; particularly note the discussion of *Huttig v. City of Richmond Heights*, 372 S.W.2d 833 (Mo. 1963), and *Dowsey v. Village of Kensington*, 257 N.Y. 221, 177 N.E. 427 (1931).

B. *Extraterritorial Development and Exclusion of Local Land Uses—Is This Regionalism?*

Second—there is the case in which a municipality excludes certain land uses from within its borders.<sup>22</sup> When such legislation is challenged the courts frequently are requested to depart from the traditional notion that a municipality must allocate sufficient land for commercial and industrial use within its borders to provide its residents with a place to live and work. They are asked to consider the existence of regional development and facilities in determining whether a local public need has been satisfied. Recently courts have invoked principles of regionalism in finding that certain land uses, particularly industrial and commercial development, can reasonably be excluded from a municipality if such need is satisfied by available facilities in nearby communities.<sup>23</sup> However, except in those cases in which “communities have attempted to ban uses—often necessary for civilized existence, such as a hospital, sanitarium, or jail—which they prefer to see located elsewhere than within their own borders,”<sup>24</sup> the foregoing principles have been applied only for the purpose of saving a proposed regulation. Other than to

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22. Note, 1965 WASH. U.L.Q. 107, 115-17.

23. *Valley View Village, Inc. v. Proffett*, 221 F.2d 412 (6th Cir. 1955); *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953); *Duffcon Concrete Prods., Inc. v. Borough of Cresskill*, 1 N.J. 509, 64 A.2d 347 (1949).

In both *Duffcon Concrete Prods., Inc. v. Borough of Cresskill* and *Valley View Village, Inc. v. Proffett*, heavy industry was excluded from the community by a local zoning ordinance. In both instances the courts upheld the exclusionary ordinance finding that the need for industrially zoned land was satisfied by areas beyond the community's border. In the *Duffcon* case the court stated:

What may be the most appropriate use of any particular property depends not only on all the conditions, physical, economic and social, prevailing within the municipality and its needs, present and reasonably prospective, but also on the nature of the entire region in which the municipality is located and the use to which the land in that region has been put or may be put most advantageously. *Id.* at 513, 64 A.2d at 349-50.

The court then concluded:

And where, as here, there exists a small residential municipality the physical location and circumstances of which are such that it is best suited for continuing residential development and, separated therefrom but in the same geographical region, there is present a concentration of industry in an area peculiarly adapted to industrial development and sufficiently large to accommodate such development for years to come, the power of the municipality to restrict its territory to residential purposes with ample provision for such small businesses, trades and light industries as are needed to serve the residents, is clear. *Id.* at 515, 64 A.2d at 351.

And in the *Proffett* case the court concluded:

We think that it is not clearly arbitrary and unreasonable for a residential village to pass an ordinance preserving its residential character, so long as the business and industrial needs of its inhabitants are supplied by other accessible areas in the community at large. *Valley View Village, Inc. v. Proffett*, *supra* at 418.

24. Haar, *supra* note 13, at 1053, 1053-54 n.11.

deny the relevance of extraterritorial development and facilities regarding the validity of local exclusions, the courts apparently are reluctant to second guess local legislatures regarding the question of whether a local public need has been satisfied by either internal or external development and facilities. The complexity of such a determination seems to justify such reluctance;— it also illustrates the uneasy foundation upon which such ordinances must stand.<sup>25</sup>

Quite apart from the foregoing discussion, it is difficult to say that these decisions by themselves embrace any meaningful concept of regionalism in resolving the important problems of land use. Indeed, courts have been unwilling to say much more than that municipalities, in defending the reasonableness of an ordinance which *excludes* certain land uses from within their borders, may and sometimes must rely upon extraterritorial factors. These opinions have not in any significant way required a municipality to look to the *needs* and facilities of its neighbors in formulating a zoning scheme which must be reasonable in the light of the total environment in which the municipality exists. Such application of alleged principles of regionalism by separate municipalities independent of one another, primarily to save the self-serving ordinances of each municipality, focuses on and breeds isolationism rather than collective solutions to metropolitan or regional problems. “[T]o say that a municipality *may* take action to prevent harm to itself is one thing; to say that it *must* take the legitimate needs and desires of other communities into consideration seems quite another.”<sup>26</sup> It is one thing to invoke a policy of regionalism to justify shifting the burdens of metropolitan growth to other communities; it is quite another to invoke principles of regionalism to require the absorption of the burdens of metropolitan growth in the formulation of a single community’s comprehensive plan and zoning ordinance. Moreover, though state courts are supposedly the final arbiter in these matters, they are totally without the important

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25. A conscientious determination of whether municipality “A” should be permitted to exclude a particular use when enacting its zoning scheme, demands more than a quick look at an adjacent municipality (municipality “B”) to ascertain whether “B” has allocated enough land within its borders to that use to supply the needs of both “A” and “B” for that facility. For example, although facilities in “B” are presently sufficient to satisfy the needs of both “A” and “B,” they may be insufficient in the future because of prospective residential development in either municipality. Similarly, it may be that while the facilities in “B” are more adequate for both the present and prospective needs of “A” and “B,” those facilities must also be used by a third municipality (“C”) which is less able to provide for its own needs than “A.” In both of the above situations it would seem that “A” should not be permitted to exclude the use in question. This illustration points up only two of the many possible regional questions which the court should examine in deciding these cases. A comprehensive regional plan would serve as a guide for such decisions. In the absence of such a plan, the court must construct an *ad hoc* plan for the region each time the question arises whether a local need is satisfied by facilities in an adjoining municipality. Note, 1965 WASH. U.L.Q. 107, 117-18 n.33.

26. POOLEY, *op. cit. supra* note 13, at 29.

powers to initiate—this is the prerogative of local government. Indeed, a zoning ordinance must follow from a local determination of external and internal needs, development, and facilities. Invariably, these legislative decisions are reached unilaterally despite the fact that their impact is nearly always both internal and external. This would seem to be the antithesis of any policy founded upon the notion that problems which affect and are common to an entire region ought to be resolved by the collective efforts of the communities so affected—problems which do not recognize municipal borders necessitate solutions unencumbered by territorial limitations either in their formulation or application. Finally, though the judicially sanctioned use exclusion may have some measure of permanence with respect to a particular property owner, it is hardly more than a fleeting commentary on regional development and land use patterns and the satisfaction of local needs. One can scarcely count upon the legislative determinations which underlie municipal exclusions to give rise to reliable expectations as to extraterritorial land use and development. As matters now stand, Municipality “A”, having allocated substantial acreage for industrial development, cannot and probably should not be estopped by Municipalities “B” and “C”, who have excluded industrial land use from their communities, from rezoning portions of such industrial district to exclusive residential use because “A” is now unable to satisfy the business and employment needs of the residents of “A”, “B”, and “C”. Meaningful solutions to regional problems must produce stability rather than potential chaos.

### C. *Intraterritorial Zoning and the Satisfaction of Regional Needs*

Last—there is the case in which courts are asked to find a municipal duty to serve regional needs in the exercise of municipal power to zone intraterritorially.<sup>27</sup> To begin with, one might conclude that if courts have held that the presence of extraterritorial facilities and development may save a municipal ordinance which excludes certain uses from within its borders so long as local needs have been satisfied, it must follow that these same courts ought to find a local ordinance unreasonable if it fails to satisfy regional land use needs. It appears, however, that though several courts have recognized a duty to serve a “public” which reaches beyond the territorial limits of a municipality, these courts have not yet found such regional need sufficient to justify invalidating a local ordinance.<sup>28</sup> Perhaps this has been

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27. See generally Note, 1965 WASH. U.L.Q. 107, 118-21.

28. See *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963); *Fanale v. Borough of Hasbrouck Heights*, 26 N.J. 320, 139 A.2d 749 (1958); cf. *Andrews v. Board of Adjustment*, 30 N.J. 245, 152 A.2d 580 (1959).

Whether a municipal duty to zone can be based on regional needs is a question

so because of the fundamental notion that a municipality is constituted to exercise its powers, police or otherwise, on behalf of only its residents.<sup>29</sup> This position, though traditional, rests upon a foundation which is cracking. Certainly in theory it should hardly be open to serious argument that a test of reasonableness comprehends the affected "public" whether they reside within or without the zoning municipality.<sup>30</sup> Implicit in those decisions in which courts have, in passing upon the validity of a zoning ordinance, considered the effect of a particular ordinance upon neighboring extraterritorial development is the premise that the "public," for whose health, safety, morals and general welfare a community must regulate, does and should include those who reside outside as well as within the zoning municipality.<sup>31</sup> Yet it has been said that these opinions are not authority

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that has been only partially answered. No court has directly faced the question whether the satisfaction of regional needs is a proper ground for upholding a zoning ordinance, and only two cases were found in which courts have considered whether a local ordinance could be held invalid because of its failure to satisfy a regional need.

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 In both cases in which the courts were asked to find a zoning ordinance invalid because of a regional need, the need was found insufficient to justify overturning the ordinances. . . .

.....  
 The *Wrigley* and *Fanale* cases imply a municipal duty to satisfy regional needs, but offer equivocal answers to the question of what conditions must exist before that duty arises. The *Wrigley* case suggests that the municipality should provide for the regional need if in the adjacent region there is no available land with which the regional need can be satisfied. The *Fanale* case suggests that the sizes of the zoning municipality and the region in which the need exists should be compared. The implied duty therefore appears to be a severely qualified one which does not require the municipality to consider the best possible location for the needed facility. For example, in *Wrigley* evidence indicated that the land available in the zoning municipality was better suited for the shopping center than the commercially zoned land across the street. Also a "preliminary land-use plan" of the county in which the municipality was located indicated that a commercial use would be desirable. Similarly, in *Fanale*, although land was available in the county for apartment building and the zoning borough was of comparatively small size, the zoning borough may have been the most suitable location for additional apartments from a regional standpoint because of its proximity to industry and major transportation arteries. Note, 1965 WASH. U.L.Q. 107, 118-20. (Footnotes omitted.)

29. *Id.* at 118.

30. Is not the evidence clear for all to see that the reasonableness of a municipality's land use regulations, in a metropolitan area, must bear relation to the development of the area as a whole? It is clearly unreasonable to say that the court should modestly avert its gaze once it has arrived at municipal boundaries. For while there is much sense in saying that a municipality's powers should end at its political boundaries, it does violence to reason to say that in exercising its powers (and above all its zoning powers) it may ignore the implications of the urban environment in which it finds itself. . . . [P]lanning and zoning enabling acts should require municipalities in metropolitan areas to prepare plans, and that these plans should be in conformity with those of their neighbors. POOLEY, *op. cit. supra* note 13, at 35.

31. In particular, see *Borough of Cresskill v. Borough of Dumont*, 28 N.J. Super. 26, 100 A.2d 182 (L. 1953), *aff'd*, 15 N.J. 283, 104 A.2d 441 (1954). See notes 19-20 *supra*.

for the proposition that a municipality has a duty to zone for regional needs—that the judicial review of the reasonableness of a zoning ordinance in the light of its extraterritorial effect has necessitated only a marginal and not a regional extension of the impact area that must be considered.<sup>32</sup> To be sure, these cases are distinguishable; however, the underlying principle is the same. Indeed, such decisions recognize the existence of a public welfare which penetrates the veil of municipal boundaries. If the affected “public” included only the residents of the municipality itself, a court could not justify invalidating a local ordinance because it authorized land uses which conflicted with nearby extraterritorial development. Courts may balk at approving a municipal duty to zone for regional needs, but it should not be for the foregoing reason that the police power can only be exercised on behalf of a municipality’s residents.

The existence of a regional need is not always recognized or agreed upon; it is frequently a conclusion founded upon inconclusive facts as well as a series of value judgments. The satisfaction of such need invariably requires the imposition of a burden upon the local community, particularly one which consists largely of established single-family dwelling units.<sup>33</sup> The

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32. See Note, 1965 WASH. U.L.Q. 107, 118.

33. A residential community consisting of homes on lots of two or more acres is likely to resist the influx of homes on substantially smaller lots however great the regional need may be for the suitable location of low cost housing. A burgeoning urban population means that homes and employment must ideally be found for every stratum of society. People must live somewhere and frequently the most suitable location in terms of growth and land use patterns is in or nearby a community or area devoted to other purposes. A substantial increase in residents, particularly if it raises the population density, means more cars, more police, crowded schools or perhaps new ones—in the main, enlarged demands for public services and facilities. Inevitably inexpensive housing also means that the costs of satisfying new demands for services and facilities will exceed the incremental increase in the tax base. Invariably the consequential deficit can only be erased by raising the tax rate. In the end this means that older residential development must shoulder a substantial share of the burden of urban growth so long as it is unable to insulate itself against the intrusion of low cost housing—so long as it must satisfy important regional needs.

The regional need may vary. It may consist of a need for a suitable location for housing; it may also consist of a need for adequate shopping or an enlarged industrial base. In *Wrigley Properties, Inc. v. City of Ladue*, 369 S.W.2d 397 (Mo. 1963) property owners whose land was located on the outskirts of Ladue sought to have a court declare that their ten-acre tract must be rezoned from residential to commercial. In support of their position they maintained that the growth of the region had changed conditions in the area so greatly that the rezoning of plaintiff’s ten acres to commercial use was necessary to serve the physical and economic needs of the area—to do otherwise would be arbitrary and unreasonable. The St. Louis County Planning Director and others testified that from the standpoint of county planning, but not that of the municipality, this tract was ideally located and suited for the proposed commercial use—a shopping center which would service several rapidly growing municipalities in need of such a facility.

judicial recognition of a municipal duty to zone for regional needs would seem to require that each municipality in enacting a zoning ordinance must first evaluate local and regional growth patterns, problems and interests, and then independently adopt an ordinance which must in some measure satisfy the foregoing needs by its regulation of intraterritorial land use. Each community must account for the zoning, development, problems and needs of its neighbors, and then by itself act accordingly. This may or may not be accomplished with some notion of what its neighbors are doing or are going to do about these kinds of problems. Quite apart from the fact that a court may disagree with the limited judgment of a community on these matters, it is indeed asking quite a lot of a community on its own, and as far as it may know by itself, to assume the burdens which affect the entire region. The following response should not be unexpected—"Why me? Why not them? I will if they will." Another basis for questioning the imposition of a municipal duty to zone for regional needs might be found in the external cost-benefit analysis of Professor Dunham. All of zoning restricts private freedom and in so doing a property owner is compelled to confer a benefit upon his neighbors. Yet it has been said that such benefit must be achieved only by the prevention of those land uses which impose external harm or costs upon others. Such restriction upon land use is within the proper scope of the police power—it is constitutional. It is not, however, constitutional to achieve such benefit by compelling a land owner to serve the needs of the community without regard to the external costs of his activity. Such needs can only be served by public purchase.<sup>34</sup> Similarly,

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The trial court ordered judgment for the defendants. On appeal the Supreme Court of Missouri affirmed, noting that since the question of rezoning was debatable the municipality's determination should not be upset.

Sufficient reasons which the council could have found for reaching its decision are that the proposed use as a shopping center appears to be more for the benefit of other cities and towns than for the benefit of Ladue; that there is more than ample space for such a shopping center on the opposite corner of the intersection . . . in Frontenac already zoned commercial; that traffic around present adjacent built-up residential districts would be increased, flooding conditions from rains aggravated and values adversely affected; that all of Ladue adjoining Lindbergh . . . is zoned residential with many fine homes constructed; that there was still vacant area along Clayton Road in Ladue, zoned commercial, sufficient to serve the city's population; and that Ladue still is a fine residential community with parks . . . and residential growth prospects making residential use of the . . . tract involved reasonable. . . . [I]t does not sufficiently appear that any need therefor of the entire region cannot be provided outside of Ladue but instead it reasonably could be found that there are available nearby larger commercially zoned areas to do so. *Id.* at 402.

34. See Dunham, *A Legal and Economic Basis For City Planning*, 58 COLUM. L. REV. 650 (1958).

Notwithstanding the confusion in the planning literature concerning the difference in principle between restricting (that is zoning) in order to prevent one land use from putting an external harm on others, and restricting or zoning to compel a land use which will benefit others, there is a real difference which has important



though we may have no reservations about preventing a community from authorizing land uses which impose external costs or harm upon its neighbors, we may be reluctant to require a community to confer a benefit upon its neighbors by devoting its land resources to the solution of those problems which affect the region.<sup>35</sup> Perhaps for these reasons courts have not yet

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ethical, political, and constitutional consequences. True, it may be said that when the owner of parcel A is prevented from harming the owner of parcel B a benefit is thereby conferred upon B, so that in reality all restrictions confer a benefit. Practically speaking, however, the benefit resulting from elimination of a harm does not result from any particular land use; the benefit results from non-use in a particular way rather than from any of the permissible uses. On the other hand the benefit resulting from a restriction designed to obtain a benefit most often can result only from the one or more permitted uses. No community or external benefit is obtained from zoning land to industrial uses unless the desired industrial development results from the decision of some person in the market. But the exclusion of industrial uses from a residential zone eliminates a harm, and the consequent benefit results from whatever other use, including no-use, the owner makes of his land.

[T]o compel a particular owner to undertake an activity to benefit the public, even if in the form of a restriction, is to compel one person to assume the cost of a benefit conferred on others without hope for recoupment of the cost. . . . The evil . . . is that there is no approximation of equal sharing of cost or of sharing according to capacity to pay as there is where a public benefit is obtained by subsidy or expenditure of public funds. The accident of ownership of a particular location determines the persons in the community bearing the cost of increasing the general welfare. A further consequence of an attempt to obtain a benefit by means of a restriction is that the full cost of the public benefit is thereby concealed from those in our democratic society who are given the power of deciding whether or not they want to obtain a benefit.

There is much in American constitutional law to support this distinction although precise accuracy in application is not required under the rule of deference to the legislative judgment. Thus it has been held unconstitutional to compel an owner, without compensation, to leave his land vacant in order to obtain the advantages of open land for the public or in order to save the land for future public purchase, but it is within constitutional power to compel an owner to leave a portion of his land vacant where building would be harmful to the use and enjoyment of other land (*e.g.*, set-back lines). It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need for a park results primarily from activity on other land of the owner. It is unconstitutional to compel him to use his land as a parking lot in order to obtain a parking lot for the community, but it is within constitutional power to compel an owner to provide a parking lot for the parking needs of activities on his own land. . . . It is not permissible to compel an owner to hold land in reserve for industrial purposes by restricting his use to industrial purposes only, but it is permissible to exclude industrial development from districts where such development will harm other uses in the district. *Id.* at 664-67.

35. One might suggest, however, that Professor Dunham's external harm-benefit test loses some of its appeal in its translation to community-regional relationship. This is especially so if the following assumption is accepted: that a regional land use need—whether it be low cost housing or a shopping center—must be satisfied at some time and somewhere and that its satisfaction is the problem and task of both the region and its member communities. Each time a community closes its doors to development which is vital to the area but costly or burdensome to the community—though it may be the most suitable location for such use—it is, by its very failure to assume its particular responsi-

recognized a duty to zone for regional needs, unless there is no other land available, despite the fact that the zoning municipality might otherwise have been the most suitable location for the satisfaction of such regional need.<sup>36</sup>

To call for a rigorous application of a test of reasonableness based upon regional considerations will at best afford piecemeal and often unsatisfactory solutions to the foregoing problems. Absent a regional or metropolitan land use plan, both the municipality and the courts are confronted with the exceedingly difficult task of undertaking an *ad hoc* formulation and review of legislation which must reasonably reflect and resolve those problems which confront the entire area. Such a policy should produce much and extended litigation. The end result in any specific case can hardly be certain, or

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bility in regional life, imposing added burdens and costs upon its neighbors. Consider the metropolitan area made up of municipalities "A," "B," "C," "D," and "E." "A," "B," "C," and "D," in anticipation of intensive urban growth, zone themselves exclusively for large lot—meaning high cost—residential development. Municipality "E," the core city, remains the sole repository for much needed low cost housing. It should be obvious that the independent actions of "A," "B," "C," and "D" have shifted a regional burden and cost to "E." Our sense of fairness and collective responsibility perhaps is not aroused because such zoning has done nothing more than preserve the existing character of each of these municipalities. Yet in the end, one may conclude that we ought not to be opposed to forcing individual community recognition of regional needs even though we may be opposed to compelling the individual property owner to confer a community benefit by devoting his land to the satisfaction of a local need. In the former case we can probably say that the burden is most often distributed amongst the residents of an entire community, while in the latter instance it is perhaps undemocratically placed on the shoulders of an individual property owner.

36. See note 28 *supra*.

At best this discussion should only explain the reluctance of courts to second guess the judgment of local governing bodies and to find unreasonable zoning ordinances which do not serve the best interests of the region. It should not be asserted as a final basis for rejecting satisfaction of regional needs as a factor which must have a bearing upon the reasonableness of any given local ordinance. If this argument were carried to its logical extreme it would force the condemnation of all zoning which allocates land exclusively to uses needed to serve either the community or the region. This would be so even if the zoning or planning authority comprehended the affected region or metropolitan area. This would also be so even if no other available location for such land use could be found in the area.

Land resources are not an unlimited commodity. That which we have must serve all of the varying needs of society. It ought not to be misused or squandered. One can no longer assume that the market place will, without some regulation, make the necessary or most desirable allocation of these resources. The record has been made; urban sprawl is around most everywhere for one to witness. The public interest is a vital one; it ought not to be denied participation in the making of important locational decisions. Zoning should not be confined to the prevention of only that private activity which imposes external harm or costs upon others. The problems and needs of a region are necessarily those of its member communities. Interdependence is unmistakably a reality. Lasting solutions require joint efforts and common sacrifices.

even consistent, with other decisions. Consequently, the legality of any zoning district would be subject to constant doubt so long as a court might find it invalid because it was, from a regional standpoint, the most suitable location for uses which were excluded by such classification. The fact remains then that the resolution of pressing problems of regional land use necessitates at least some centralization of authority to plan and perhaps even regulate. This is a responsibility which should not and cannot be assumed by the courts. Judicial review of the reasonableness of an ordinance must be and is limited to the specific facts of only those cases in which local residents elect to challenge a particular ordinance. At best, local courts can only afford protection against the clearly unreasonable actions of local legislatures—the problem demands more than this.

## II. SOLUTION—COUNTY, METROPOLITAN, OR REGIONAL CONTROL?

An obvious and probably a convenient place to centralize and coordinate efforts to plan and regulate would seem to be the state or one of its subdivisions—the county. Yet, in the case of the latter, and in some instances it is true of the former as well, the affected area and the resulting land use problems may not be confined to a single county.<sup>37</sup> Though a great many states have passed legislation which enables counties to zone,<sup>38</sup> such power to zone is for the most part restricted to unincorporated areas within the county,<sup>39</sup> and in some instances a county zoning ordinance applies only to

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37. See POOLEY, *op. cit. supra* note 13.

The proper planning of metropolitan areas clearly calls for the existence of a planning body whose jurisdiction is not limited by existing municipal boundaries. County boundaries may include more comprehensive areas, but again they do not in theory or in fact have a significant relationship to urban communities. County planning, therefore, while remaining an essential part of the national planning program, is unlikely to provide an adequate answer to metropolitan planning problems. *Id.* at 23.

Consider for example the urbanization of the Cape Kennedy *impact* area. By 1962 federal and local authorities had recognized that the developmental impact of the space center extended well beyond the boundaries of Brevard County, the site of most of the space related activities. In 1959, Florida had passed legislation enabling counties to partake of cooperative planning. So in February, 1962, pursuant to the recommendation of a committee fostered by the Florida Development Commission and the Federal Housing and Home Finance Agency, the East Central Florida Regional Planning Council was formed. It included the six counties which were most affected by the urban development arising out of the space center activities. In July, 1963, a seventh county was added to the membership of the Council. The Council's function was to serve as a long-range-planning advisory body. See generally EAST CENTRAL FLORIDA REGIONAL PLANNING COUNCIL, PRELIMINARY REGIONAL PLAN 1964.

38. This includes approximately one-third of the states. HORACK & NOLAN, *LAND USE CONTROLS* 101 (1955).

39. *E.g.*, ILL. ANN. STAT. ch. 34, § 3151 (Smith-Hurd 1962); WIS. STAT. ANN. § 59.97 (1957). The Illinois statute provides in part:

[T]he board of supervisors . . . of each county, shall have the power to regulate

those towns which have adopted it.<sup>40</sup> Consequently, the effectiveness of county zoning, as a comprehensive method for controlling area-wide development, is curtailed initially by the very terms of the enabling statute. Furthermore, because counties are generally not permitted to zone within incorporated communities, there is always the possibility that a county and municipality will adopt zoning ordinances which authorize conflicting land uses upon adjacent properties.<sup>41</sup>

Another point which, as a practical matter, may limit the effectiveness of county zoning or perhaps accentuate the potential conflict between county and municipal ordinances "is that cities are more apt to have experienced staffs and superior facilities putting them in a much better position than the county to administer land use controls in the urban fringe."<sup>42</sup> Moreover, the presence of enabling legislation does not mean that all counties within a state will elect to enact a county zoning ordinance.<sup>44</sup> This means, of course,

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and restrict the location and use of buildings . . . to establish building or set back lines on or along any street . . . or storm or floodwater runoff channel or basin outside the limits of cities, villages and incorporated towns; to divide the entire county outside the limits of such cities, villages and incorporated towns into districts . . . .

See generally Wehrwein, *County Zoning and Consolidation*, 11 WIS. L. REV. 136 (1936).

40. See the discussion of WIS. STAT. ANN. § 59.97(2)(d) (1957) in Melli & Devoy, *supra* note 17.

However, under the Wisconsin statute a county zoning ordinance is in force in only those towns which have approved it; in some counties such approval has been confined to one or two towns. Consequently, county zoning may be much less effective than would appear from the number of counties which have adopted zoning ordinances. *Id.* at 64.

41. In one instance known to the authors, a land owner was prevented from building the type of structure he had planned when he purchased the land prior to annexation, because the uses allowed by the city differed from those allowed by the county, even though the city on annexation did not change the type of classification. *Id.* at 64-65. However, see attempted solution to this problem in ILL. ANN. STAT. ch. 34, § 3152 (Smith-Hurd Supp. 1965) which provides in part:

If any municipality having a zoning ordinance wishes to protest the proposed county zoning provisions for the area within one and one-half miles of its corporate limits, it shall appear at a hearing and submit in writing specific proposals to the commission for zoning such territory. If the commission approves of such proposals they shall be incorporated within the report of the commission and its proposed ordinance.

. . . . If the proposals made by a municipality . . . are not incorporated in their entirety into the ordinance proposed to be enacted by the county board, the county board shall not enact the proposed zoning of such area within one and one-half miles of such municipality except by three-fourths vote of all members.

42. Melli & Devoy, *supra* note 17, at 64.

43. For example, as of 1958 the Wisconsin State Planning Division knew of forty-two counties with zoning ordinances. *Ibid.* There are seventy-two counties in Wisconsin.

For charts showing frequency in which fringe areas outside of corporate limits of a city are regulated by county zoning ordinances or otherwise see SENGSTOCK, *op. cit. supra* note 8, at 65-66. For example, only 46% of all counties in the United States have a county zoning ordinance where a city within such county has no extraterritorial zoning authority.

that the passage of an enabling statute insures neither the adoption of nor efficient administration of meaningful land use controls within the county. Finally, many of the county zoning ordinances which have been enacted are directed primarily at the regulation and conservation of the soil and the preservation of rural areas.<sup>44</sup> Frequently the county ordinance will provide for various districts such as forestry, grazing, cultivation and recreational which are not common to urban zoning.<sup>45</sup> Consequently, county zoning often differs in substance from municipal zoning.<sup>46</sup> Though a municipality may include an agricultural district, its purpose is not so much the conservation of agricultural resources but instead the control of the timing and location of intensive urban growth by the retention of a basically non-developmental use.<sup>47</sup> Because of this inherent difference in function and ap-

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44. See HORACK & NOLAN, *op. cit. supra* note 38, at 99-102. For a discussion of county zoning in Wisconsin see Wehrwein, *supra* note 39.

45. *E.g.*, WIS. STAT. ANN. § 59.97(1) (a) (1957). For a discussion of Florence County zoning ordinance see HORACK & NOLAN, *op. cit. supra* note 38, at 101-02.

46. HORACK & NOLAN, *op. cit. supra* note 38.

The meaning and purpose of an agricultural zone depends upon whether it is created in an urban or rural zoning ordinance. In a city ordinance it usually means a district from which industrial or business uses are excluded, where any type of residential structure may be erected, and where any agricultural or horticultural activity (other than processing) may be pursued . . . It is often created to complete a comprehensive plan in "fringe" areas without arousing too much opposition from the farmers. . . . The objective of the district is not to protect or preserve agricultural uses but to retain the land in its undeveloped state so that it will be available for residence, business, or industrial development as the community grows.

In a rural zoning ordinance there is less likelihood that an "agricultural zone" as such will be created; more commonly, the zones are for cultivation, grazing, forestry, etc. In other words, a true rural zoning ordinance attempts to protect and develop the proper uses of the soil. Rural zoning, of course, seeks to control non-agricultural uses as well. Thus, business and industry may be restricted to particular zones. *Id.* at 99-100.

47. See Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370, 396.

*Insincere Zoning of Entire Municipality for Agricultural or Large Minimum Lot Size Use.* At the first impact of the outward urban development, communities often react quite directly, simply, or primitively in their desire to check growth. In Waukesha county and elsewhere, officials have been known to zone an entire town for agricultural use without having any sincere intention of excluding commercial or residential use. This was done to enable the granting or denying of petitions for commercial or residential zoning according to the nature of the proposed development and the possible effect upon taxes. Spot zoning of the most illogical type has resulted and either the original zoning or the pattern of spot zoning, or both, might well be considered to be illegal because based on no comprehensive plan. However, this type of an indirect freeze on development can be defended where it is based on a comprehensive plan, on the ground that the comprehensive plan must consider the impact of the tax rate occasioned by excessively rapid development. *Ibid.*

It should be noted that counties frequently use the "agricultural" zone for the same purposes as do municipalities. In these instances, the term "agricultural" is a misnomer in that the district frequently includes many uses other than and often inconsistent with farming. The purpose of such regulation is the control of the urbanization of previously undeveloped areas. See, *e.g.*, *Mang v. County of Santa Barbara*, 182 Cal. App. 2d 93, 5 Cal. Rptr. 724 (1960); *Kotrich v. County of Du Page*, 19 Ill. 2d 181, 166 N.E.2d 601

plication between rural-county, and urban-municipal zoning ordinances, the utility of county zoning is limited as an instrument for regulating and resolving the problems of urban sprawl and development.<sup>48</sup>

The most logical unit for the planning and regulation of urban growth and development would seem to be one whose jurisdiction is not circumscribed by existing municipal boundaries but is instead coextensive with the geographical impact of the forces and problems of urbanization. Metropolitan and regional *planning* commissions have been authorized by several state legislatures, yet "present practice . . . leaves such plans as might be drawn up by regional and metropolitan planning commissions in a state of suspended animation, entirely devoid of legal effect."<sup>49</sup> These plans are virtually without means of implementation and thus afford no better method for coordinating the allocation of regional land resources than does the county zoning ordinance.<sup>50</sup> Though there may be justification for not per-

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(1960); *County of Cook v. Glasstex Co.*, 16 Ill. 2d 72, 156 N.E.2d 519 (1959); *Kaczorowski v. Elmhurst Chicago Stone Co.*, 10 Ill. 2d 582, 141 N.E.2d 14 (1957); *County of Du Page v. Henderson*, 402 Ill. 179, 83 N.E.2d 720 (1949).

48. See Bartelt, *supra* note 9, at 374:

[C]ounty or rural zoning . . . has functions different from those of typical urban zoning. Of course, it is not a perversion of its purpose if it is used in a manner complementary to urban zoning. . . . Unless those charged with the responsibility of county zoning, however, are sympathetic with the objectives of urban zoning (something not very much in evidence at the moment), the likelihood of close cooperation is somewhat remote. It is more likely that county zoning will reflect the attitudes of rural residents (as undoubtedly it should in a democracy); if that attitude is one of hostility toward what they believe to be undue restriction, county zoning will very probably be of little aid to comprehensive planning and zoning. *Ibid.* (Footnotes omitted.)

49. POOLEY, *op. cit. supra* note 13, at 36. For enumeration of states with Metropolitan and/or Regional Planning Commissions see *id.* at 24-25, 25-28, nn.70 & 74.

50. In Metropolitan Planning Acts the commission is given advisory functions only. The establishment of such a commission is purely a local matter, and is usually optional. In other words these measures represent only a willingness on the part of state legislatures to allow cooperative planning. They do not, whatever the recital of legislative purpose may say, reveal in any of the states in which they have been passed, a conviction of the state legislation that the state must itself assume some responsibility for the adequate planning of large urban areas.

. . . .  
The Regional Planning Commission is a device for coordination planning within a given area. . . . The commissions serve a purely advisory purpose, and have in most cases no power at all. . . .

A regional planning commission need not pay attention, so far as the scope of its inquiry is concerned, to political boundaries. . . . It is, therefore, on paper at least, a means which is particularly suited to the study if not to the solution of the peculiar problems of metropolitan areas where a multiplicity of local government units has hitherto precluded effective area-wide planning of land use. However, when the statutory provisions governing the makeup and proposed role of the regional planning commission are analyzed, one is led to the disappointing conclusion that little fruitful work can be expected of it; and one's baleful expectations in this regard are given added weight by the fact that although many states have for some time had regional planning enabling legislation on their statute books, no effective solution to metropolitan problems has been forthcoming. . . .

No less than twenty-nine states had passed regional planning enabling acts by 1957. The statutes vary considerably. At one time California required the establish-

mitting the centralization of the zoning power in a metropolitan, regional or even state wide commission, the metropolitan and regional commissions which have been created pursuant to state enabling acts have neither served to coordinate local efforts to plan and regulate for the region, nor have they been responsible for the formulation of a meaningful plan for the area which they encompass.

### III. SOLUTION—EXTRATERRITORIAL CONTROLS?

#### A. *Extraterritorial Controls in Theory and in Practice—What Kind of Solution?*

Quite a different approach, and perhaps one which is less satisfactory in theory, recognizes that most metropolitan areas essentially have mushroomed

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ment of a regional planning commission in each of the several planning districts into which the State Planning and Conservation Board must divide the state. . . . Generally, the enabling statutes provide that a number of cities or counties can elect to establish a commission, and the local units of government concerned are given wide discretionary powers with regard to the method of selection of personnel to serve on these bodies. . . . The commission, once established, is usually required to plan. . . . Most regional commissions, however, have no . . . clear mandates from their legislatures, and the planning which they are required to do is of the vaguest kind. If a zealous commission were to inquire, for example, whether it was to consider existing zoning regulations, subdivision standards, or official maps, either in the survey or in the planning recommendations, there is no guidance to be had from the statute. Is it to consider public development only, or should it attempt to forecast possible future industrial development? . . . There is a great deal of difference, however, between saying that a commission shall act in an advisory capacity only, and saying that its labors shall be condemned to eternal uselessness. But this is precisely what most regional planning statutes imply. For having charged the commission with the preparation of a master plan, they are in the main, completely silent as to what is to become of this document. There is sometimes a requirement that the regional commission shall "encourage the cooperation" of other units of government in carrying out the plan, or that it shall "distribute information relative to metropolitan, regional, and community planning and zoning. . . ." New York is exceptional in requiring that where a county board of supervisors wishes to adopt or amend a "county plan" (showing highways, parks, sites for public works, etc.), a public hearing is to be held at which, among others, the regional planning commission shall be heard. New York also provides that the regional planning commission may recommend a comprehensive zoning plan to the governing bodies of municipalities within its area. Such recommendations need not . . . be accepted, but at least there is some guidance here to the commission as to its proper function. Moreover, a municipality which zoned in a fashion contrary to the commission's recommendations might have some difficulty in persuading a court that its zoning plan was reasonable in that it was a necessary part of the orderly development of the region as a whole. Evidence of the regional planning commission's recommendations would presumably be evidence to which the court would attach some weight in such a case.

This, then, is the present status of regional planning. As a concept it has not been sufficiently well-defined, nor has its role in most cases been adequately explained; its goals are, at best, vague, and often illusory. The advisor (to a family—a corporation—or a municipality) must, if his advice is to be valuable, know which things can be changed, and which things cannot be changed. If he is supplied with this information, and if his advice is sound, he may, without himself possessing any powers, wield great influence. But in the context of many state enabling acts, the advice of the regional planning commission may well seem to the recipient municipalities as inane and as meaningless as advice from a fortune cookie, and will receive as much attention. POOLEY, *op. cit. supra* note 13, at 24-28. (Footnotes omitted.)

from a core city which in most respects dominates the region, and which in time either has or will annex much of the territory contiguous to it. In many instances, it is the core city which supplies public facilities to the metropolitan area and also serves as the major source of employment. It is not too difficult to see that land uses in the vicinity of the corporate limits of the core city affect the proximate growth of the city and, in turn, such outlying areas feel the impact of the city's neighboring development. Perhaps, then, it is possible to state a case for focusing in the core city itself authority to plan and regulate for the entire metropolitan area; delegating to it *extraterritorial powers over the development of its progeny*. Positing such control in the city is predicated upon the region's substantial dependence upon the core city. The core city frequently contributes to the existence of regional problems in land use and for the most part, certainly in the event of annexation, directly or indirectly shoulders the ultimate burden and responsibility for resolving the developmental problems of those satellite communities which have recently suffered the birth pains of rapid urbanization. It would seem that, given the pre-eminent position of the core city, there is good reason for delegating to it the major responsibility and authority for land use planning and regulation within its own impact area.<sup>51</sup> Though such suggestion undercuts our notion that there cannot be government without representation and though, in many instances, it would reduce considerably the significance of local government within the impact area, it would, however, eliminate some of the conflict, bickering and hard feeling which exists today and arises out of the proliferation of communities with distinct territorial boundaries.

The delegation of such pervasive power to the core city, however, has not been granted by any state government. Many states, in one way or another, have invested cities with the power to influence extraterritorial land development. Yet, in the main, the exercise of these extraterritorial powers has been confined to regulating only the development of *unincorporated* areas within a certain radius of the municipality's borders.<sup>52</sup> Those extraterritorial

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51. See SENGSTOCK, *op. cit. supra* note 8, at 67, 72. Sengstock concludes that extraterritorial zoning will not succeed unless the core city is accorded a preferential position in zoning for the metropolitan area. Specifically it will not work so long as it prevents the extraterritorial zoning of incorporated areas; and generally: "Extraterritorial zoning will prove ineffectual as a solution to metropolitan area problems unless core cities are empowered to zone the entire area, thereby rendering local governments within the rest of the fringe meaningless." *Id.* at 72.

Where a core city is restricted by tiny incorporated suburbs in drafting its plans, the growth of the metropolitan area in an orderly manner cannot but be impaired. On the other hand, if the core city is allowed to develop a master plan for the metropolitan area, would this not lead to the eventual extinction of other local governments within that area? *Id.* at 63.

52. See notes 60, 61, 69, and 71 *infra*.



powers which have been delegated to some communities have been largely directed at the prevention of haphazard and conflicting development of *undeveloped* areas adjacent to a city which cannot at present be annexed, yet which one day may be annexed.<sup>53</sup> Though limited extraterritorial powers have been granted, it should be noted that only one<sup>54</sup> of the states authorizing extraterritorial zoning has within it one of the top ten metropolitan areas.<sup>55</sup> However, in none of these states has there been any attempt to focus regional land use control or planning in the core city by according it a preferential position. In fact, extraterritorial controls do not reflect either collective or coordinated metropolitan wide efforts to resolve pressing or expected problems of urban growth.<sup>56</sup> Such controls do little more, if anything at all, toward effectuating the orderly development of the metropolitan area than the aforementioned judicial test of reasonableness which takes account of the extraterritorial impact of intraterritorial zoning.

State legislatures have enabled municipalities to influence the development of neighboring land by the delegation of three specific kinds of powers—the power to plan,<sup>57</sup> the power to zone,<sup>58</sup> and the power to approve sub-

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53. But why extraterritorial zoning? Why not plan the urban fringe, but postpone the imposition of use restrictions until annexation? . . . By annexing large areas of undeveloped land, a city perhaps could obviate the necessity for the exercise of extraterritorial powers and still accomplish its planning objectives. . . . In addition to the restrictions imposed by many of the annexation statutes, the courts have been reluctant to give their approval to large-scale annexation of underdeveloped lands. If foreseeable corporate use of the land cannot be shown—which often is the case—annexation generally will be denied. This limitation upon the city's power to annex sets the stage for haphazard development and the establishment of a myriad of nonconforming uses. . . . If the city is precluded from annexing sufficient undeveloped land, and if it is further denied the right to eliminate nonconforming uses after annexation, there must be other alternatives if long-range planning objectives are to be realized.

Bartelt, *supra* note 9, at 371-72. (Footnotes omitted.); see HORACK & NOLAN, *op. cit. supra* note 38, at 58.

54. See ILL. ANN. STAT. ch. 24, § 11-13-1 (Smith-Hurd Supp. 1965).

55. See SENGSTOCK, *op. cit. supra* note 8, at 65-67.

56. This is especially true where the metropolitan area is composed of numerous incorporated communities.

"When extraterritorial controls are exercised in an area of several municipalities, which frequently characterizes metropolitan regions, their effectiveness is greatly decreased. They are not designed for coordinated planning for an area of several incorporated municipalities, since they apply only to unincorporated areas." Melli & Devoy, *supra* note 17, at 67.

57. See notes 68-76, *infra* and accompanying text.

58. ALA. CODE tit. 37, § 797 (1959); ILL. ANN. STAT. ch. 24, § 11-13-1 (Smith-Hurd Supp. 1965); KY. REV. STAT. ANN. §§ 100.097, .350 (1955); NEB. REV. STAT. §§ 14-418 to -419, 16-901 (1943); NEB. REV. STAT. §§ 15-902, -905 (Supp. 1963); N.C. GEN. STAT. § 160-181.2 (Supp. 1965); OKLA. STAT. ANN. tit. 19, § 863.2 (Supp. 1965); OKLA. STAT. ANN. tit. 19, §§ 863.13, .19 (1962); TENN. CODE ANN § 13-711 (Supp.

divisions,<sup>59</sup> all of which are exercisable beyond their corporate limits. Considering first extraterritorial zoning and subdivision control, as previously stated, these extraterritorial powers, when authorized, do not extend to land located within another incorporated community,<sup>60</sup> are restricted to land within a certain radius of the corporate limits of such municipality,<sup>61</sup> and in some instances can be exercised only in absence of an applicable county zoning ordinance.<sup>62</sup> Extraterritorial powers are not always given to all incorporated communities within a state. Many enabling statutes generally make the size of a municipality decisive of whether any or how much extraterritorial jurisdiction will be conferred upon it.<sup>63</sup> However, in the event

1965); WIS. STAT. ANN. § 62.23(7a) (Supp. 1966); see GA. CODE ANN. § 69-1203 (1957); IND. ANN. STAT. §§ 53-753 to -754 (1964). The status of extraterritorial zoning in Indiana is somewhat unclear. See IND. ANN. STAT. §§ 53-734, -753 to -754 (1964).

59. ALA. CODE tit. 37, §§ 798-800 (1959); ARIZ. REV. STAT. ANN. § 9-474 (Supp. 1965); ARK. STAT. ANN. § 19-2829(c) (Supp. 1965); CAL. BUS. & PROF. CODE § 11528; COLO. REV. STAT. ANN. § 139-59-12 (1963); CONN. GEN. STAT. REV. § 8-25 (Supp. 1963); FLA. STAT. ANN. § 177.10 (1943); GA. CODE ANN. § 69-1203 (1957); HAWAII REV. LAWS §§ 149-185, -187 (1955); IDAHO CODE ANN. § 50-2503A (1957); ILL. ANN. STAT. ch. 24, § 11-12-5 (Smith-Hurd 1962); IND. ANN. STAT. § 53-745 (1964); IOWA CODE ANN. § 373.12 (1949); KAN. GEN. STAT. ANN. § 12-705 (1964); KY. REV. STAT. ANN. §§ 100.088, .097, .360 (1955); MD. ANN. CODE art. 66B, §§ 24-25 (1957); MICH. STAT. ANN. § 5.3003 (1958); MINN. STAT. ANN. § 471.29 (1963); NEB. REV. STAT. §§ 14-116, 15-901 (1943); NEV. REV. STAT. § 278.340 (1963); N.M. STAT. ANN. §§ 14-2-23 to -24 (1953); N.D. CENT. CODE § 40-48-18 (1960); OHIO REV. CODE ANN. § 711.09 (Page Supp. 1965); OKLA. STAT. ANN. tit. 19, 863.2 (Supp. 1965); OKLA. STAT. ANN. tit. 19 §§ 863.9, .19 (1962); ORE. REV. STAT. § 227.110 (1959); S.C. CODE ANN. § 47-1038 (1962); S.D. CODE § 45.3311 (Supp. 1960); TEX. REV. CIV. STAT. art. 974a (1963); VA. CODE ANN. §§ 15.1-467 to -468 (1964); W. VA. CODE ANN. § 3962(16) (1961); WIS. STAT. ANN. §§ 236.02(2), .10 (1957).

60. See, e.g., OKLA. STAT. ANN. tit. 19, § 863.19 (1962) (zoning); WIS. STAT. ANN. § 66.32 (1965); WIS. STAT. ANN. § 236.02(2) (1957) (subdivision approval).

61. The radial limitations that have been placed upon extraterritorial zoning have ranged from one to five miles. See, e.g., ALA. CODE tit. 37, § 797 (1959) (five miles); NEB. REV. STAT. § 16-901 (1962) (one mile for cities of the first class).

The range of radial limitations imposed upon subdivision control has been from one to six miles. See, e.g., NEB. REV. STAT. § 16-902 (1962); N.D. CENT. CODE § 40-48-18 (1960).

Such territorial limitation is not, however, always expressed in terms of miles. See Kentucky's use of the concept of "municipal area." KY. REV. STAT. ANN. §§ 100.010, .350 (1955).

62. See *Butler v. City of Little Rock*, 231 Ark. 834, 332 S.W.2d 812 (1960); TENN. CODE ANN. § 13-711 (Supp. 1965); cf. GA. CODE ANN. § 69-1203 (1957) (counties and municipalities must jointly agree on the boundaries of their respective jurisdiction).

63. See N.C. GEN. STAT. § 160-181.2 (Supp. 1965); WIS. STAT. ANN. §§ 236.02(2), 263.10(1)(b) (1957). The North Carolina statute authorizes extraterritorial zoning for cities only with a population of 1,250 or more. Similarly, concerning *subdivision approval*, the Wisconsin provisions afford a different treatment of fourth-class cities (approved within a radius of one and one-half miles of corporate limits) as opposed to the author-

the extraterritorial jurisdiction of two municipalities overlaps, the problem is resolved most often without regard for the respective size or rate of growth of such communities but instead by a determination that "the jurisdiction of each such municipality shall terminate at a boundary line equidistant from the respective corporate limits of such municipalities."<sup>64</sup> Because the extraterritorial power to zone or control subdivision approval is not tantamount to annexation, the aforementioned solution to the problem of overlap may produce the absurd result of one community exerting exclusive extraterritorial control over the development of an unincorporated area, while a neighboring community grows into the area reserved for such exclusive control. Overlap may also occur where municipal extraterritorial controls are not precluded by the existence of county regulations which apparently apply to the same unincorporated areas. One state has resolved this specific kind of conflict by requiring local compliance with the more restrictive regulation.<sup>65</sup>

The scope and effectiveness of extraterritorial zoning and subdivision control is limited. These limitations are for the most part embodied in those enabling statutes which authorize extraterritorial exercise of police power by municipalities. It is clear from a reading of these statutes that the power to zone and approve subdivisions beyond a municipality's corporate limits is directed primarily at controlling the development of unincorporated areas on the fringe of a municipality.<sup>66</sup> This has prompted one writer to say that "extraterritorial zoning will prove ineffectual as a solution to metropolitan area problems unless the metropolitan core cities are accorded a preferential position to zone territory in other incorporated areas."<sup>67</sup> Apart from a municipality's inability to zone within a neighboring incorporated community, of major importance is the fact that in none of the enabling statutes

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ity given to cities of the first, second and third classes (approved within a radius of three miles of the corporate limits).

64. N.C. GEN. STAT. § 160-181.2 (Supp. 1965) (zoning). See also, WIS. STAT. ANN. § 66.32 (1965) (subdivision approval). For an extensive discussion see Melli & Devoy, *supra* note 17, at 60-61.

65. See WIS. STAT. ANN. §§ 236.10(4), .13 (1957). For an extensive discussion see Melli & Devoy, *supra* note 17, at 61.

For a case which illustrates the potential conflict between a city and county zoning ordinance, see *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965). For a statement of the case see note 34 *infra*.

66. See W. VA. CODE ANN. § 3962(16) (1961) (subdivision control limited to land which actually abuts the municipality).

67. SENGSTOCK, *EXTRATERRITORIAL POWERS IN THE METROPOLITAN AREA* 67 (1962). By contrast, it is said that the limitation of extraterritorial control to unincorporated areas has merit for "to give municipalities the power to zone effectively in one another's territory would defeat the whole purpose of local government and lead to anarchy." POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 23 (1961).

is a community accorded extraterritorial jurisdiction which is, by the terms of such legislation, co-extensive with the impact area undergoing urban development. For these reasons, neither extraterritorial zoning nor subdivision controls affords any meaningful solution to the massive land use problems brought on by rapid regional growth. However, the fallacy of extraterritorial zoning and subdivision controls as a method for promoting orderly regional development is still more basic. Such controls are insular in nature, affording only a measure of security to the component communities of the region. They are not predicated upon and do not require a creative and joint effort in fashioning the orderly development of an entire metropolitan area. By contrast, such an exercise of the police power is a unilateral act, protective of only the regulating community's self interest. This is so because no municipality invested with such extraterritorial power is burdened with the responsibility for securing the ordered development of the entire region. However, it should be noted that this might not be so if the core city's power to regulate encompassed all of the communities it had spawned.

Most states have passed enabling legislation which authorizes the preparation of a comprehensive plan for land use development within and beyond the corporate limits of their respective communities.<sup>68</sup> Mileage limitations appear in some of the enabling legislation,<sup>69</sup> but in other statutes the authority to plan extends to areas which in the judgment of the planning commis-

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68. ALA. CODE tit. 37, § 791 (1959); ARK. STAT. ANN. §§ 19-2825, -2827 (1) (Supp. 1965); CAL. GOV'T CODE § 65300; COLO. REV. STAT. ANN. § 139-59-6 (1963); GA. CODE ANN. § 69-1203 (1957); HAWAII REV. LAWS § 149-184 (Supp. 1961); IND. ANN. STAT. § 53-734 (1964); IOWA CODE ANN. § 373.9 (1949); KAN. GEN. STAT. ANN. § 12-704 (1964); KY. REV. STAT. ANN. §§ 100.097, .350 (1955); MD. ANN. CODE art. 66B, § 15 (1957); MICH. STAT. ANN. § 5.2996 (Supp. 1965); MINN. STAT. ANN. § 471.26 (1963); MONT. REV. CODES ANN. §§ 11-3801, -3830, -3830.1, -3831 (Supp. 1965); NEB. REV. STAT. §§ 18-1302, -1306 (1943); NEV. REV. STAT. § 278.150 (1963); N. H. REV. STAT. ANN. § 36:13 (1955); N. J. REV. STAT. § 40:55-1.11 (Supp. 1964); N. M. STAT. ANN. §§ 14-2-18, -23 (1953); N. Y. GEN. MUNIC. LAW § 237; N. D. CENT. CODE § 40-48-08 (1960); OHIO REV. CODE ANN. § 713.02 (Page Supp. 1965); OKLA. STAT. ANN. tit. 19, § 863.2 (Supp. 1965); OKLA. STAT. ANN. tit. 19, § 863.7 (1962); ORE. REV. STAT. § 227.090(9) (1953); PA. STAT. ANN. tit. 53, §§ 39003, 46147 (Supp. 1965); PA. STAT. ANN. tit. 53, §§ 12129, 22765, 30653 (1957); S. C. CODE ANN. §§ 47-1029, -1072, -1075 (1962) (§ 47-1028.1 excepts planning commissions in Greenwood County); S. D. CODE § 45.3305 (Supp. 1960); TENN. CODE ANN. § 13-503 (1956); TEX. REV. CIV. STAT. art. 1011m (Supp. 1965); UTAH CODE ANN. § 10-9-20 (1962); VA. CODE ANN. § 15.1-455 (1964); W. VA. CODE ANN. § 523 (1961); WIS. STAT. ANN. § 62.23(2) (1957).

69. The radial limitations on extraterritorial planning which are expressed in miles vary from one and one-half to six miles. See, *e.g.*, ARK. STAT. ANN. § 19-2827 (1) (Supp. 1965) (five miles); ILL. ANN. STAT. ch. 24, § 11-12-5 (Smith-Hurd 1962) (one and one-half miles); ORE. REV. STAT. § 227.090(9) (1953) (six miles).

sion "bear relation to the development of the municipality. . . ."<sup>70</sup> To avoid conflicting municipal plans, the power to plan extraterritorially is confined to unincorporated areas.<sup>71</sup> With respect to such unincorporated areas, the problem of overlap in the planning jurisdiction of two or more municipalities is resolved similarly to an overlap of authority to approve subdivision plats.<sup>72</sup> However, because planning is advisory in nature and produces no direct legal consequences itself, the likelihood of a territorial dispute arising over planning jurisdiction between neighboring communities is indeed remote. For this same reason, it is highly unlikely that a court would find municipal authority to plan extraterritorially unconstitutional even if it comprehended incorporated as well as unincorporated areas. Nonetheless, no city has been expressly given the authority to plan for an entire metropolitan area or within the boundaries of an incorporated community. The ordered development of a region or metropolitan area inevitably requires some centralization of the planning function—at the very least, the effort to plan effectively necessitates the cooperation of all affected communities. Such cooperation is difficult to achieve when a primary city or cities is or are hemmed in by fringe suburbs. In the main, the responsibility for area planning has been diffused—each community to itself—the greater the proliferation of tiny

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70. *E.g.*, UTAH CODE ANN. § 10-9-20 (1962); WIS. STAT. ANN. § 62.23(2) (1957). In Hawaii such planning can extend beyond a municipality's corporate limits without restriction except that it cannot include areas zoned as forest or water reserves. HAWAII REV. LAWS § 149-184 (Supp. 1961).

71. See, *e.g.*, ILL. ANN. STAT. ch. 24, § 11-12-5 (Smith-Hurd 1962).

Municipal planning serves as a declaration to the public at large of future land use restrictions and developments; if conflicting master plans negated this key aspect of planning, the principal advantage of planning would be lost. The possibility of conflicting plans is real and immediate when two cities plan for the same area. Therefore, many planning statutes expressly exclude extraterritorial municipal territory from a city's planning operations.

SENGSTOCK, *op. cit. supra* note 67, at 62-63.

It does seem difficult, however, to say that extraterritorial planning does serve as a "declaration to the public at large of future land use restrictions and developments." Most states authorize extraterritorial planning; comparatively few authorize extraterritorial zoning. It would seem that a declaration as to a course of action is not particularly meaningful so long as there is no immediate prospect of the means by which such course of action may be made operative. Thus, one can hardly say that "if conflicting master plans negated this key aspect of planning, the principal advantage of planning would be lost," when in most cases such principal advantage with respect to extraterritorial fringe areas is never present simply because extraterritorial controls are not authorized along with the power to formulate a comprehensive plan. So long as this is the state of affairs, there seems to be no reason why the core city, for example, should not be given a pervasive power to plan for the metropolitan area—within and without other corporate boundaries.

72. See WIS. STAT. ANN. § 66.32 (1965). See also note 64 *supra* and accompanying text.

municipalities, the greater the diffusion. It is apparent that effective planning requires at least some focus of responsibility in a common planning agency whether it be the core city or a metropolitan or regional plan commission. Extraterritorial planning as such will not suffice. Furthermore, it should be noted that though many states have authorized municipalities to plan extraterritorially,<sup>73</sup> a smaller number have empowered local communities to exercise extraterritorial control over subdivisions,<sup>74</sup> but only a few states have sanctioned the use of extraterritorial zoning.<sup>75</sup> What this means is that more often than not a community, while able to project its land use plan beyond its corporate limits, is unable to enforce such plan—in the end such authority to plan extraterritorially is quite meaningless.<sup>76</sup>

### B. *The Legality of Extraterritorial Regulation*

Despite the fact that extraterritorial controls, as now authorized, promote the ordered and efficient development of the region in only a very limited way, they do serve to minimize the spread of those inharmonious external land uses which inhibit and adversely affect the growth of the city. Without more, this should be sufficient reason for examining the legality of such measures. Additionally, to the extent that such examination raises substantive and quantitative problems of constitutionality respecting the use of extraterritorial controls generally, it also sheds light on the legality of any proposal to invest in a core city the authority to plan and regulate the development of the entire metropolitan area.

#### 1. *Generally*

As stated previously, extraterritorial planning should not and has not presented problems of constitutionality. This has not been true of the extraterritorial regulation of land use, particularly zoning. The legality of any municipal exercise of land use control over outlying incorporated com-

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73. See statutes cited note 68 *supra*.

74. See statutes cited note 59 *supra*.

75. See statutes cited note 58 *supra*.

76. Bartelt, *Extraterritorial Zoning: Reflections on its Validity*, 32 NOTRE DAME LAW. 367, 369-70 (1957).

It is obvious that planning is entirely prospective. . . . The importance of planning for the future is recognized by most enabling legislation. These statutes ordinarily authorize planning commissions to plan the fringe area surrounding the municipality. A planning commission, however, has only advisory functions. Unless there is some power that can compel adherence to its determinations, the planner's exquisitely drawn master plan is worth little more than something that might have been. To make the master plan a reality is the function of zoning.

Cf. Melli & Devoy, *Extraterritorial Planning and Urban Growth*, 1959 WIS. L. REV. 55, 65 (discussion of "prezoning").

munities or over an entire metropolitan area has not been confronted for the simple reason that it has not been authorized. Yet similar issues should be raised in any examination of the constitutionality of the control of undeveloped unincorporated fringe areas.<sup>77</sup> Such extraterritorial power over adjacent unincorporated areas has been authorized and the matter of its constitutionality has received the attention of several courts.<sup>78</sup> In discussing the legality of these measures, one must observe at the outset that we are first considering a question which comprehends a great deal more than simply zoning or subdivision controls. At the core of the problem is the police power and its proper exercise. The measures used to implement a city's land use plan nearly always find their justification in the police power.<sup>79</sup> Several related questions arise whenever an authorized exercise of police power stretches beyond the corporate limits of a municipality.<sup>80</sup> Is it a violation of due process to sanction the use of governmental powers without representation of those who are governed?<sup>81</sup> Can there be any extraterritorial exercise

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77. The two problems nonetheless present issues which do differ in degree. Control of incorporated areas from without is probably a greater threat to local government than such control of unincorporated areas. This is simply because incorporation usually signifies a more advanced stage of local government—a local determination to govern oneself—an assertion of all the powers which characterize local government. The power to regulate has become an essential attribute of local government. To deny such a municipality this function of government represents a serious threat to its corporate existence. For a discussion of this point see Conclusion *infra*.

78. *American Sign Corp. v. Fowler*, 276 S.W.2d 651 (Ky. 1955); *Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949) (zoning); *Schlientz v. City of North Platte*, 172 Neb. 477, 110 N.W.2d 58 (1961) (zoning); *City of Raleigh v. Morand*, 247 N.C. 363, 100 S.E.2d 870 (1957), *appeal dismissed*, 357 U.S. 343 (1958) (zoning); *Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 160 N.E. 695 (1928) (subdivision approval); *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965) (zoning).

79. This would seem to be true despite the fact that it is sometimes said that the recording of a subdivision plat is not a right but a statutory privilege which can be conditioned in a reasonable manner. See *Ridgefield Lane Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58 (1928).

80. See Bartelt, *supra* note 76, at 396-409.

81. The exercise of governmental powers over the people embraced within any area or territory, necessarily involves control to a very material degree over their persons and property. The control in the present instance if given, not to any one chosen or elected by the people over whom they are to exercise dominion, but to the officers of a foreign body, chosen for the service of that body, and not for the people to be affected by the powers given. . . . It would . . . impose upon them the whole burden of the police powers of the city, to be exercised for the benefit of the latter, and thereby would they be caused to bear a weight borne by no other people of the State. . . . But upon the general question we do not hesitate to say that the legislature has no more power to take the property of one man and give it to a corporation, municipal or otherwise, than it has to give his property to another citizen; and no more has it power to impose burdens upon the citizen in favor of a municipal corporation of which he is not a member than it has to impose burdens upon him in behalf of another man who has rendered to him no equivalent.

of the police power without the consent of those who are accordingly subjected to such regulation? If such a regulation is not unconstitutional for the foregoing reason, then does it bear a reasonable and substantial relationship to the *public* health, safety, morals or general welfare? What kind of relationship must be established between the purpose of the regulation, its scope, and the area which it circumscribes?

The perplexing problem is not so much *whether* the legislatures can confer extraterritorial powers on municipalities, but how much power may be conferred. More specifically, may legislatures authorize municipalities to exert broad extraterritorial zoning powers over relatively large areas of unincorporated lands?<sup>82</sup>

## 2. Zoning and Subdivision Controls

Before examining the judicial treatment of the foregoing issues which are generally concerned with the extraterritorial exercise of the police power, it should be noted that there have been comparatively few decisions which have addressed themselves directly to the validity of the extraterritorial exercise of land use controls.<sup>83</sup> Several courts have decided the question of constitutionality in favor of the extraterritorial exercise of the power to

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Malone v. Williams, 118 Tenn. 390, 421-22, 103 S.W. 798, 806 (1907); see Smeltzer v. Messer, 311 Ky. 692, 696, 225 S.W.2d 96, 98 (1949).

It is interesting to note that Kentucky, which extended the authority to zone extraterritorially to the planning and zoning commissions of cities of the second class in Ky. REV. STAT. ANN. § 100.350(4) (1955), gives non-residents of the zoning municipality who are subject to such regulation representation on the commission in Ky. REV. STAT. ANN. § 100.330 (1955). This is not true of cities of the third, fourth, fifth and sixth classes. KY. REV. STAT. ANN. §§ 100.550, .610, .620 (1955). However, in the latter case such commissions are not expressly authorized to zone extraterritorially. KY. REV. STAT. ANN. §§ 100.500, .510 (1955).

KY. REV. STAT. ANN. § 100.330 (1955) (second class cities) reads in part:

(1) Each commission shall consist of five 'city members' who shall be citizens and residents of the city, and two 'county members' who shall be citizens of the county in which the city is located, residing outside the limits of the city. . . .

(3) The county members shall be chosen in the following manner: The county engineer shall be an ex officio member of the commission. The remaining member shall be chosen by the fiscal court from persons not holding any other city or county office.

Despite the statutory inclusion of non-resident representation on the commission, the Kentucky Court of Appeals chose not to give the section setting out the scope of extraterritorial jurisdiction an expanded reading. *American Sign Corp. v. Fowler*, 276 S.W.2d 651 (Ky. 1955). For a full discussion of this case see note 85 *infra*.

82. Bartelt, *supra* note 76, at 388.

83. See note 78 *supra*; Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907). Therein the Tennessee enabling act granted the city of Memphis the right to exercise all governmental powers and police powers within two miles of its territorial limits. The statute was found unconstitutional. Though authority to zone extraterritorially is itself a broad exercise of the police power, the legislation therein obviously went considerably further.



zone.<sup>84</sup> Several cases, though not clearly in point, have cast some doubt on

84. In *City of Raleigh v. Morand*, 247 N.C. 363, 100 S.E.2d 870 (1957), *appeal dismissed*, 357 U.S. 343 (1958), the Supreme Court of North Carolina upheld a local ordinance which prohibited the construction and maintenance of a trailer camp in those exclusive residential zones located both within the city of Raleigh and up to one mile beyond its corporate limits. In so doing the supreme court sustained the decision of the court below granting an injunction which required compliance with such ordinance. The municipal ordinance in issue was enacted pursuant to state-enabling legislation authorizing extraterritorial zoning within one mile of a city's limits. The land use which violated the city ordinance, herein, was located within one mile of such city's boundaries. The property owners on appeal argued:

[T]hat their property lies in an area outside the City of Raleigh, not subject to city taxes, peopled by nonresidents of the City of Raleigh, and receiving no benefits from said city. Therefore, they contend that on the face of plaintiff's complaint the ordinance sought to be enforced is unreasonable and arbitrary and cannot in any way be said to further the general welfare of the City of Raleigh. *Id.* at 366, 100 S.E.2d at 873.

The court found:

1. That zoning ordinances have been upheld as an exercise of the police power and that the exclusion of trailer camps from certain zones has generally been upheld as a valid exercise of the police power.

2. 'The Legislature has unquestioned authority to confer upon the town authorities jurisdiction for sanitary or police purposes of territory beyond the city limits.' . . . 'The legislature has power to confer on a municipal corporation police jurisdiction over adjoining territory immediately next to and within a specified short distance of the corporate limits.' *Id.* at 367, 100 S.E.2d at 873.

In *Schlientz v. City of North Platte*, 172 Neb. 477, 110 N.W.2d 58 (1961), a property owner, owning land within one mile of North Platte's corporate limits, filed suit against the city to enjoin it from enforcing a city zoning ordinance which extended city regulations for one mile beyond its borders. The state enabling act authorized first-class cities to zone extraterritorially the area one mile beyond and adjacent to their corporate boundaries; provided, that no such ordinance shall prohibit or interfere with the conduct of normal farming, *livestock operations*, existing *businesses*, or industry. The extended city ordinance classified plaintiff's land as a residential zone. The trial court entered judgment for the plaintiff finding that the state enabling act was unconstitutional. On appeal, the Supreme Court of Nebraska reversed the decision below and ordered judgment for the defendants.

In its decision the court took note of the following facts: that plaintiff's land is presently being used by him for residential purposes and the raising of livestock; that land in the vicinity of plaintiff is used generally for one or both of the foregoing purposes; that plaintiff had formerly operated an implement business on the premises, but this was discontinued before passage of the ordinance in question; that before the ordinance plaintiff's land was marketable, but afterwards realtors had told him his acreage was not salable because of such ordinance; and that the city had not taken any action against plaintiff nor interfered with his use of the premises—that plaintiff operated the premises exactly as before passage of the ordinance. Plaintiff further testified that the ordinance had caused "unpredictable damage" to his property. *Id.* at 483-84, 110 N.W.2d at 63.

On behalf of his position, plaintiff argued that:

[T]he persons living in the area adjacent to and 1 mile beyond the corporate limits of the city have no voice in the selection of elective officers and officials of the city, which amounts to a disenfranchisement of such persons because they are subjected to the jurisdiction of elected officers . . . whom they had no voice in choosing, and therefore section 16-901, R.S. Supp., 1959, is unconstitutional. . . . *Id.* at 489, 110 N.W.2d at 66.

The court replied:

Municipal corporations are creatures of the Legislature and endowed only with the powers granted . . . by the Legislature. There is no doubt but that the Legislature may provide for their officers and officials and the manner of their selection and appointment insofar as cities of the various classes are concerned. . . .

*Such persons as heretofore mentioned have neither a constitutional or inherent right to local self-government. The Legislature may subject them to the jurisdiction of officers for whom they have no voice in the selection.* This does not constitute a violation of any constitutional provision. . . . The officers and officials of the city are not constitutional officers, but are such as are created by the Legislature, and which the Legislature is empowered to so create. *Id.* at 489-90, 110 N.W.2d at 66-67. (Emphasis added.)

In conclusion the court found:

The Legislature may, and often does, expressly or by implication, grant to municipal corporations the right to exercise police power beyond and within a prescribed distance of municipal limits. . . .

Referring to section 16-901, R.S. Supp., 1959, the powers granted therein are generally defined as pertaining to zoning. They are enactments under police power of the state, and at most a partial or quasi extension of the corporate limits. Both of these are legislative powers. There is nothing unreasonable about the area included, as provided for by . . . [the enabling act or ordinance enacted pursuant thereto]. We conclude that no principle of fundamental law is violated by enactment of such statute and ordinance.

By the enactment . . . [of enabling act] it is apparent that the Legislature recognized that cities of the first class in this state are growing and expanding. The Legislature also recognized that the area within 1 mile of the corporate limits of such cities in the future would doubtless become a part of the cities and that such extension of the boundaries of the cities of the first class should, when required, be permitted. The zoning laws and ordinances incident thereto . . . are generally for the welfare and health of the citizens under the police power of the state. The foregoing is apparently the reason for the enactment of [the enabling act] . . . . *Id.* at 492-93, 110 N.W.2d at 68.

Query—whether the result would have been the same had the enabling act provided for extraterritorial authority extending up to five miles beyond a city's corporate boundaries; had it not excepted livestock or farming operations or existing businesses and industry; and if the city had filed suit to enjoin plaintiff from continuing or expanding an existing business or from carrying on farming operations.

In *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965), an action was filed by a *county*, a *town*, and a *property owner* against a city for a declaratory judgment finding such city's *interim extraterritorial zoning ordinance* invalid and unconstitutional. Pursuant to a state enabling statute, which conferred authority upon fourth-class cities to enact an extraterritorial zoning ordinance extending to unincorporated areas one and one-half miles beyond the city's corporate limits, the city of Elkhorn on February 24, 1964, adopted a resolution of intent to initiate an extraterritorial zoning ordinance. On March 2, 1964, the city, pursuant to the same enabling act which authorized the city to pass an interim zoning ordinance without first referring the matter to the plan commission, adopted an ordinance which, in accordance with the terms of the enabling act, declared:

[T]hat there should be prepared a comprehensive zoning ordinance for all of its extraterritorial zoning jurisdiction, and ordered that existing zoning uses in such extraterritorial zoning jurisdiction should be preserved in force and effect while the comprehensive zoning plan was being prepared. Under the provisions . . . [of the enabling act], this interim zoning ordinance was effective for a period of two years after its enactment. *Id.* at 32, 133 N.W.2d at 259.

Since 1946, the county had had a zoning ordinance, which was amended in 1962. Such amended ordinance was approved by 14 of 16 towns within the county, one of which was the town in which plaintiff's property was located. Plaintiff's farm lands were also situated within 1½ miles of Elkhorn's city limits. On January 31, 1964, plaintiff applied to the county zoning supervisory board to have his land rezoned from an *agri-*

the legality of such legislation,<sup>85</sup> while at least one court has expressly upheld

*cultural district to part of the general business district.* On March 17, 1964, the county board adopted such amendment and the town approved it on March 23rd. On March 24th plaintiff applied to the county for permission to locate a liquor store on his land. This use was not authorized in agricultural districts, but since plaintiff's land was now zoned for general business, his application was approved on April 3, 1964. Such approval produced a direct conflict with Elkhorn's interim zoning ordinance which had frozen those uses permitted as of March 2nd, and as of that date, plaintiff's land was zoned for agricultural purposes only.

The circuit court found the interim ordinance void because the city of Elkhorn had not obtained the necessary consent of the county board of supervisors. On appeal, the Supreme Court of Wisconsin reversed, and found as follows:

1. In the light of the legislative history of the enabling act and after carefully construing such statute, such interim ordinance was not void. The city of Elkhorn was not required to obtain this consent of the county board.

2. The ordinance was not unconstitutional.

Appellants have cited us to no case which directly holds that extraterritorial zoning violates the equal-protection-of-the-laws and due-process clauses of the Fourteenth amendment. Zoning ordinances have commonly been sustained on the theory that they constitute an exercise of the police power. . . . The constitutionality of extraterritorial zoning was recently upheld by the Nebraska Court in *Schlientz v. City of North Platte*. . . .

Our rapidly expanding population and the tendency of the greater portion of our people to live in urban areas cause most cities from time to time to extend their city limits into adjacent areas by annexation. Usually such annexations are preceded by the building of homes in adjacent agricultural areas by persons whose employment is in the city. Many of these adjacent areas are often spoiled as future first-class residence districts because of objectionable commercial or industrial developments that have taken place in the absence of zoning. These undoubtedly are the reasons which prompted the legislature to enact . . . (the enabling statute). We hold that this act providing for extraterritorial zoning is a reasonable and valid exercise of the police power.

The remaining question is whether the two-year freeze of existing uses is too long to be reasonable. We hold that it is not. Plaintiff . . . has not demonstrated any undue hardship that would result to him during such two-year period. There has been no showing that his property is unfit for the purpose for which presently zoned. The fact that he may be prevented during this two-year period from erecting and operating a liquor store is wholly insufficient to establish that the interim ordinance is arbitrary or capricious. *Id.* at 37-39, 133 N.W.2d at 261-62.

85. In *Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949), the Court of Appeals found the provisions of an extraterritorial zoning ordinance unenforceable as against property owners owning land within 3½ miles of the zoning municipality. However, it should be noted that this decision probably does not stand for the proposition that extraterritorial zoning is unconstitutional per se, despite its inclusion of language which questions the right of a city to regulate property owners who have no voice in its legislative policies. The court seems to recognize that the issue in this case was really one of legislative authorization—*noting that the power to annex underlies the exercise of extraterritorial land use control.*

In *Smeltzer*, a suit was brought by certain property owners seeking injunctive relief against their neighbors. More specifically, they sought to have them remove a dwelling house because its type and size violated the provisions of the nearby city's extraterritorial zoning ordinance. The city was located in an *adjacent county*. There was apparently at that time no clear statutory authorization by the state of such extraterritorial jurisdiction for cities of a fourth class (the classification of the zoning municipality herein).

Under KRS 100.500 the legislative body of a city of the fourth class is specifically authorized to regulate and restrict the use and type of buildings. Interpreting that section alone, there is a rather clear implication that the power granted is limited to the territorial boundaries of the city. Section 100.610 authorizes the city to create by ordinance a "City planning commission." Section 100.650 provides that the commission "shall make and adopt a master plan for the physical development of the city and municipal area." "Municipal area" is defined . . . as "the surrounding territory which bears relation to the planning and zoning of the city." . . . KRS 100.660 sets out the purpose of the master plan, which is to envision the "future growth of the city," the "harmonious development of the city and its environs," and the "promotion of good civic design and arrangement." *Id.* at 694, 225 S.W.2d at 97.

The defendants argued that the foregoing statutes clearly distinguished between the authority of the commission to *plan extraterritorially* and the power of the municipality to *zone*. The court, however, recognizing such a distinction, believed that it was unnecessary for reaching a decision in this case. The narrow issue was whether a city of fourth class had been granted authority to zone not only beyond its borders but in another county as well. Put in other terms, because in the light of past decisions *a city of the fourth class cannot annex adjacent land of another county*, a court herein must decide whether a city can regulate the use and development of land without its borders which it could not otherwise annex at any time—land which the city could not invade. The court, in answer to such questions, found:

While it may be said that any municipality has an interest in its approaches, we can find nothing in the statutes which grants the power to control the use of such outlying territory unless it may reasonably be contemplated that such territory will eventually become a part of the city. *The future expansion of its territorial limits is a basic consideration the legislature apparently had in mind when enacting the planning and zoning statutes.* Since appellees' land cannot be absorbed under annexation proceedings by the City . . . its use is not so reasonably related to the city's development as to fall within the purposes shown by the statutes. We must bear in mind that we are dealing with a police power. As a general rule, the exercise of this power, delegated to a municipality, should be strictly construed, particularly where it encroaches upon the rights of an individual. . . . Ordinarily, unless a statute expressly provides otherwise, the exercise of a police power by a municipality is limited to its territorial boundaries. . . . (I) f there is a reasonable doubt concerning the power of a city, the doubt should be resolved against its existence. *The above principles are significant in this case because the city's action, if sustained, seriously impairs the rights of a person owning property beyond its limits who has no voice in its legislative policies, and who receives no legally recognizable benefit to such property from the city government.* *Id.* at 695-96, 225 S.W.2d at 97-98. (Emphasis added.)

Indeed the court's conclusions were undoubtedly affected by the statutory definition of "municipal area" and the stated purpose of "master plans" which apparently circumscribed the authority of the planning commission to plan extraterritorially. The only clear expression of extraterritorial jurisdiction to be found in both the statutes and the court's opinion was in the commission's authority to plan.

In 1955 the Court of Appeals of Kentucky again took note of an implied statutory limitation upon a municipality's power to zone extraterritorially—that it comprehends *only* such territory as in the foreseeable future might be annexed. In *American Sign Corp. v. Fowler*, 276 S.W.2d 651 (Ky. 1955), the court was asked to consider the validity of certain zoning regulations as they applied to an unincorporated area within Fayette County but some six miles beyond the city limits of Lexington. These regulations were enacted jointly by the fiscal court of the county and the board of commissioners of Lexington and prohibited the proposed erection of a drive-in theater on a parcel of land located beyond the boundaries of Lexington. The circuit court upheld such regulation finding that the fiscal court did have authority to zone all of Fayette County; but it also found that Lexington *did not have authority* to zone the area in question—it being beyond the "municipal area"—the area of foreseeable annexation. On appeal, the court of

the extraterritorial exercise of *subdivision controls*.<sup>86</sup> One commentator has said:

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appeals found that the fiscal court was not authorized to adopt county-wide zoning regulations, and affirmed the circuit court's finding with respect to the extraterritorial authority of the city of Lexington.

It is indeed worth noting the court's analysis of the problem of municipal authority to zone extraterritorially. Such authority was said to be found in KY. REV. STAT. ANN. §§ 100.320, .490 (1955) which pertain to cities of the second class. KY. REV. STAT. ANN. § 100.320 (1955) provides: "Each city of the second class and its municipal area shall have a planning and zoning commission." KY. REV. STAT. ANN. § 100.350 (1955) (Powers of Commission) provides: "The commission may . . . establish in the city and municipal area zones or districts . . ." KY. REV. STAT. ANN. § 100.010(6) (1955) defines "municipal area" as "the surrounding territory which bears relation to the planning and zoning of the city."

First, the court noted its prior decision (*Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949)), in which it said that "municipal area" is limited to such area as in the foreseeable future might be annexed, and that there was no statutory authority for extraterritorial regulation beyond such ambit of annexation. Then, in response to the fiscal court's contention that the issue of what area is related to the planning and zoning of the city is a question of fact which was already decided by the commission, the court stated:

We can agree that the question of what territory bears relation to the planning and zoning of the city is one of fact, *once it has been determined as a matter of law what is meant by the phrase* "bears relation to the planning and zoning of the city." . . . It is our opinion that the phrase "bears relation to the planning and zoning of the city" means just what it says—that . . . the territory must be so situated as to have a bearing on the planning and zoning scheme for the city. A remote, abstract relation to the economic, commercial or social interests of the city is not enough. *American Sign Corp. v. Fowler*, *supra* at 655.

The court then found that the circuit court's declaration on "municipal area" was correct. The circuit court had declared that "municipal area," *beyond which zoning had not been authorized*, extended no further than the foreseeable ambit of annexation and that a parcel of property six miles beyond the city limits was not within the "municipal area" of Lexington.

Compare *Malone v. Williams*, 118 Tenn. 390, 103 S.W. 798 (1907). This case, decided nearly twenty years before the United States Supreme Court first upheld the general validity of zoning, involved an act authorizing Memphis to exercise all governmental powers up to two miles outside the city limits. For a discussion of this case see note 99 *infra* and accompanying text.

86. In *Prudential Co-op. Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 160 N.E. 695 (1928), a subdivider, whose land was located within three miles of a city, challenged such city's ordinance which provided for the examining, checking, and approval by planning commission of plats of lands located without the city but within three miles of its limits and the payment of a fee before such city would indorse a plat and that no plat could be recorded without such indorsement. Two state statutes appeared to authorize such an ordinance.

OHIO REV. CODE ANN. § 735.17 (Page 1953) (cited in the case as General Code § 4346):

[W]hen any person plats any lands within three miles of the city, the commissioner shall, if such plats are in accordance with the rules prescribed by him, indorse his written approval on such plat. No plat of such land is entitled to record in the office of the county recorder without such written approval so indorsed thereon. . . .

[S]ince there is some kinship, at least on the extraterritorial level, between subdivision controls (which appear to have weathered the storm), and zoning (which still is dragging anchor),<sup>87</sup> one may spec-

The Legislature at a later date enacted OHIO REV. CODE ANN. § 711.09 (Page 1953) (cited in the case as General Code § 3586-1):

Whenever a city planning commission adopts a plan for the major streets or thoroughfares and for the parks and other open public grounds of a city or any part thereof, or for the territory within three miles of the corporate limits thereof or any part thereof, . . . then no plat of a subdivision of land within such city or territory shall be recorded until it has been approved by the city planning commission and such approval indorsed in writing on the plat. . . .

In upholding the validity of the city's ordinance and the power of the state legislature to confer such power upon a city planning commission, the court made the following points:

1. Both the city and surrounding territory are mutually dependent upon each other; that the surrounding territory benefits from a city's activities and growth; that cities must annex such territory from time to time to accommodate its need to expand; that a city's obligation to provide adequate and safe streets extends to the established streets of annexed territory; and that "all highway exits and entrances must necessarily traverse the adjacent territory, and the statement that narrow streets and other obstructions without limit may be established by suburban owners, and that the legislature is powerless to intervene, is a travesty on justice and government." *Id.* at 213, 160 N.E. at 698.

2. Analogous exercises of extraterritorial police powers when authorized in this state and others have been found constitutional. These exercises of the police power have included the protection of territory outside of a city to insure cleanliness and to prevent activities which are likely to contaminate the city's water supply;—the establishment of extraterritorial quarantines to protect residents from epidemics or contagious diseases; the regulation and location of houses of detention and hospitals for contagious diseases beyond city limits;—the inspection of dairies located without the city but which sell milk within it;—and the extension of final jurisdiction of police courts over misdemeanors to within four miles of city limits (jury may consist wholly of residents within the city). Given a legislative authorization of such municipal exercise of extraterritorial police power, without which a city could not arrogate to itself the right to regulate people or property beyond its municipal borders, the only issue is one of *legislative power*.

Legislation has conferred upon cities regulatory powers over adjacent territory for so long a period, in so many jurisdictions, and in such a variety of matters, that the general principle has become firmly established, and, the question being one of legislative power, the inquiry must relate to the reasonableness of the regulation, and the justifiable question is whether the regulatory authority conferred has a reasonable relation to the governmental purpose to be served. If it has such reasonable relation, it becomes only a question of legislative wisdom with which the courts have no concern. *Id.* at 212, 160 N.E. at 698.

Such a reasonable relation existed herein between the governmental purpose, as expressed in OHIO REV. CODE ANN. § 711.09 (Page 1953), and the regulatory authority conferred upon cities. See also *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

87. Subdivision controls are indeed used to complement zoning in implementing a comprehensive plan for a community and in assuring the orderly development of undeveloped areas. Because of the presence of conditions concerning streets, utilities, parks and sometimes dedication of space for educational facilities, they frequently afford greater control over residential development than that which is ordinarily achieved by a zoning ordinance.

ulate that the courts are in the process of becoming more liberal in their approach to the concepts of planing, an attitude which forecasts calm seas for zoning cases of the future . . . .<sup>88</sup>

However, another commentator has been reluctant to find meaningful precedent in the subdivision cases concerning the future of extraterritorial zoning.<sup>89</sup>

The most recent cases on extraterritorial zoning have upheld its constitutionality. However, they should not be deemed conclusive. Although all of the recent cases in point have sanctioned the use of extraterritorial zoning, and although those cases which have appeared to hold otherwise are clearly distinguishable, in none of these decisions has a court examined in detail the complex problems of constitutionality inherent in extraterritorial zoning. Furthermore, in each of these opinions the courts have chosen to ignore those factors which might distinguish zoning from other exercises of the police power—factors which may call for a quite different result upon further analysis. Consequently, one must conclude that those cases which have spoken out on the legality of extraterritorial land use controls do not by themselves furnish any reliable basis for predicting the future success of extraterritorial zoning before the courts.<sup>90</sup> A search for precedent and yardsticks of constitutionality must press onward. Indeed, those cases, other than zoning, which deal with the extraterritorial exercise of the police power

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Nonetheless it should be noted that:

Superficially, subdivision controls are designed to prevent fraud (reasonable assurance to the purchaser that he is getting the amount of land he bargained for), and to insure the existence of an adequate street system, parks, sewers, etc. It has little to do with land use. Under many of the statutes, the controls apply only when the land is platted. In other words, they are conditions precedent to the recording of the plat, but there are few restrictions against selling parcels by metes and bounds. And, of course, without zoning restrictions, the purchaser can put the land to whatever use he chooses. Bartelt, *supra* note 76, at 394 n.89.

88. Bartelt, *supra* note 76, at 395-96.

89. Courts should have no more difficulty sustaining the constitutionality of extraterritorial subdivision control than in upholding extraterritorial planning. Recording a plat is not a right but a state granted statutory privilege. If the state conditions the privilege in a reasonable manner, no claim of unconstitutionality would be seriously entertained. Obtaining the approval of the planning commission of a nearby city as a condition precedent to recording a plat is not unreasonable if it is borne in mind that cities do expand their boundaries with the passage of time. SENGSTOCK, *op. cit. supra* note 67, at 68.

90. A search for additional precedent is not important simply for purposes of appraising the future success of extraterritorial zoning. The conclusion that, as presently constituted, it is likely to encounter judicial opposition in many states is not particularly helpful by itself. So long as extraterritorial zoning serves some useful function, and indeed it does, and so long as the bulk of extraterritorial zoning ordinances are still to be drafted, it is absolutely essential that the latent facets of unconstitutionality be understood and exposed to careful analysis. For indeed, it would be foolhardy for a state or municipality to subscribe blindly to the format of others if there is the slightest indication that such legislation lingers on the brink of disaster. To recognize such constitutional limitations and to draft around them is indeed the virtue of an "in-depth" inquiry into the legality of extraterritorial zoning.

generally<sup>91</sup> shed considerable light on anticipated questions of constitutionality.<sup>92</sup> These "cases indicate quite conclusively that there are no constitutional inhibitions precluding the legislatures from giving municipalities authority to exercise the police power extraterritorially in a *limited way*."<sup>93</sup>

### 3. *The Exercise of the Police Power—Important Precedent*

The arguments which can be marshalled against those who object to the extraterritorial exercise of the police power because it denies a fundamental right to representation have been summarized as follows:<sup>94</sup> This is not government without the consent of the governed, for such necessary consent is manifested by their representation in the state legislature;<sup>95</sup> since the state

91. For example, such exercises of the police power have included: the regulation of liquor traffic; the inspection and licensing of dairies; the inspection, licensing and location of slaughterhouses, the prohibition of pig sties and other unquestioned nuisances; the prevention of water pollution, etc. It is always possible to say that the regulation of business always affects the use and enjoyment of land. Yet such legislation is, in the main, substantially different from the kind of land use control by a zoning ordinance. It is nearly always directed at a specific problem—a specific use; *i.e.*, it is limited and narrow in scope at its inception. Moreover, it is invariably prompted by an immediate and pressing problem and is hardly ever prospective. This cannot be said of the modern application of zoning and subdivision controls.

92. *But see* Bartelt, *supra* note 76.

All of these (ordinances), of course, are related to police power objectives; and if they have been sustained, so then perhaps should zoning. There is, however, the possibility that the courts might consider a comprehensive zoning ordinance that imposes general restrictions over land use in a wide area *in anticipation of possible future problems* quite differently from ordinances that are relatively narrow in scope and directed toward an existent and immediate problem. Police power restrictions antedated zoning by a considerable length of time, and the courts may not be entirely receptive to the contention that since specific extraterritorial restrictions have been sustained, extraterritorial zoning ordinances should be accorded the same respect and treatment. *Id.* at 390.

93. *Id.* at 388-89 (Emphasis added.); see, *e.g.*, *Lutz v. City of Crawfordsville*, 109 Ind. 466, 10 N.E. 411 (1887); *State v. Rice*, 158 N.C. 635, 74 S.E. 582 (1912).

Though many states have enacted legislation authorizing municipalities to exercise certain extraterritorial police powers, comparatively few cities have exercised such powers when granted. For a chart listing such legislation state by state see SENGSTOCK, *op. cit. supra* note 67, 52-54.

The fact that local governments are reluctant to use extraterritorial police powers may be explained by an awareness upon their part of the practical difficulties in the enforcement of such power beyond the corporate limits. Invasion of noncorporate territories through police regulations would create very strained relationships between officials in charge of those areas and city administrators. . . . *Id.* at 55.

94. See generally Bartelt, *supra* note 76, at 396-404.

95. Granted that there shall be no government without the consent of the governed, the argument is enhanced but little, since the governed have given their consent through their representation in the legislature. The difference between legislative authorization for a particular purpose, such as regulating liquor sales beyond the corporate boundaries, on the one hand, and authority to exert a more general power, such as zoning, on the other, is one of degree only, at least so far as the



legislature is supreme in its exercise of the police power, it can confer such power upon local authorities and prescribe a jurisdiction for its proper exercise as the legislature sees fit,<sup>96</sup> and finally, a municipality, though it may appear otherwise, is a composite of incongruent jurisdictions; that is, for a particular purpose the state legislature may exercise its discretion to establish a municipal jurisdiction which is not synonymous with such municipality's corporate limits.<sup>97</sup> The proposition that the extraterritorial exercise of the police power *as such* is not a violation of due process—government without representation—has found support in a number of decisions.<sup>98</sup> Yet the important guiding principle to be drawn from such precedent is that these same courts are likely to stop short of sanctioning an unlimited exercise of these powers.

We have seen that, *ex necessitate*, a limited police power may be granted to municipalities over a small section of country surrounding their boundaries for their protection against nuisances, and to safeguard the health of the people residing in them; but even this is hard to

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representation question is concerned. If the former is not in violation of fundamental rights, the latter should be considered of equal compatibility. Bartelt, *supra* note 76, at 400.

96. A side door approach to this problem of representation is premised on the axiom that the legislature is supreme in matters of local government, a doctrine qualified only by constitutional limitations. . . .

This approach is admirably suited to the zoning problem. The city councils could be considered as the delegates of the legislature for the purpose of zoning a district to include the particular municipality and as much of the fringe area as the legislature deems proper and necessary. This would logically stop any argument based on lack of representation, for it is extremely doubtful that the legislature's right to exercise the police power for zoning purposes, and the further right (given proper standards) to delegate it would be questioned. Bartelt, *supra* note 76, at 400-02.

97. It is predicated upon the accepted notion that the situs and extent of a municipality's boundaries are within the absolute discretion of the legislature. Exercising this discretion, the legislature can—and does—establish multiple limits within which the city may operate for particular purposes. For example, there can be one boundary for political purposes, another for schools, and still another for streets and sewers. Using this approach, it can be argued that the legislature can establish the municipality's corporate limits for zoning purposes at a point different from its limits for political purposes. Bartelt, *supra* note 76, at 402-03.

98. See, *e.g.*, Jourdan v. City of Evansville, 163 Ind. 512, 72 N.E. 544 (1904); State v. Rice, 158 N.C. 635, 74 S.E. 582 (1912); Malone v. Williams, 118 Tenn. 390, 103 S.W. 798 (1907).

Particular attention should be paid to Schlientz v. City of North Platte, 172 Neb. 477, 110 N.W.2d 58 (1961)—an extraterritorial zoning case. Therein the court concluded that residents of the state have no inherent or constitutional right to local self-government and that the state legislature can subject them to the jurisdiction of officers in whose selection they have no voice. See City of Raleigh v. Morand, 247 N.C. 363, 100 S.E.2d 870 (1957) (an extraterritorial zoning case). Implicit in this court's upholding the ordinance was a repudiation of the appellant's contention that the ordinance was unreasonable because it subjected non-residents to regulation without benefit. *Cf.* Smeltzer v. Messer, 311 Ky. 692, 225 S.W.2d 96 (1949).

justify on any principle other than that the municipality is in such matters the agent of the state itself for the protection of the people of the state. But that agency cannot be used as a basis for conferring power upon municipalities over territory outside of them any further than bare necessity requires. Certain it is there can be no justification for extending over an outside strip of country, two miles in width, or of any less width, all the governmental powers of the city, or even all the police powers of the city.<sup>99</sup>

Many existing enabling acts do authorize broad and seemingly unlimited extraterritorial exercises of the police power.<sup>100</sup> However, virtually all of the decisions upholding the constitutionality of enabling acts, despite the generality of much of the language in these opinions,<sup>101</sup> involved cases in which the scope of either the statute or the ordinance was limited.<sup>102</sup> In one case in which the enabling grant of authority was on its face a broad one—"that all ordinances . . . 'in the exercise of police powers given to it for sanitary purposes or for the protection of the property of the city, shall apply to the territory outside of said city limits within one mile of same in all directions' "<sup>103</sup>—the ordinance in question was not nearly as far reaching—"it shall be unlawful . . . to keep any hogs or pigs within the corporate limits of the city of Greensboro or within one-fourth of a mile of said limits."<sup>104</sup> For the most part, then, the enabling legislation and/or municipal ordinances which have survived judicial scrutiny have been confined to specific matters of health, safety and morals extending but a short distance beyond the municipality's corporate limits. In the main, they have been directed towards nuisances and other activities which are likely to

99. *Malone v. Williams*, 118 Tenn. 390, 420-21, 103 S.W. 798, 806 (1907).

It is certainly clear that a state in pioneering legislation conferring extraterritorial police powers, in the absence of specific judicial decisions directly on point, is treading on dangerous grounds. When the grant of powers is unlimited, the statute is apt to be declared unconstitutional. The territorial limitations will sway the courts in their decisions. It is submitted that limited but broad grants of power will also be stricken by the courts. SENGSTOCK, *op. cit. supra* note 67, at 50-51.

100. See chart prepared by SENGSTOCK, *op. cit. supra* note 67, at 52-54. Though most states have legislation which is limited to the control of uses (nuisances) which might affect the health, safety, and morals of a municipality's inhabitants, eight states have authorized in some form the full use of the police power. This has not necessarily meant that municipalities in these states have chosen to exercise such broad authorization. See note 93 *supra*.

101. *City of West Frankfort v. Fullop*, 6 Ill. 2d 609, 613, 129 N.E.2d 682, 685 (1955); *Lang v. Sanitary Dist.*, 160 Neb. 754, 71 N.W.2d 608 (1955); Bartelt, *supra* note 76, at 389.

102. See SENGSTOCK, *op. cit. supra* note 67, at 50 & n.168; Bartelt, *supra* note 76, at 386-94.

103. *State v. Rice*, 158 N.C. 635, 74 S.E. 582 (1912).

104. *Ibid.*

affect the well-being of the inhabitants of the municipality itself. For example, such legislation has authorized the regulation of slaughterhouses, the sale of liquor beyond city limits, activities which might pollute water or spread disease, sewage, pig sties, etc.<sup>105</sup> The powers authorized or actually exercised were hardly broad or sweeping. They have been largely protective in nature and have been inspired by the presence of existing and immediate problems which were narrow in scope. In almost every instance it has been possible to conclude that the enabling legislation has conferred no greater power on the municipality "than bare necessity requires."

#### 4. *A Method of Analysis—The Future of Extraterritorial Zoning*

What use then can be made of the foregoing opinions concerning the extension of a city's police power, particularly zoning, beyond its corporate limits with respect to developing a framework for understanding and predicting judicial reaction to extraterritorial zoning? To begin with, in the abstract one can probably expect the courts to continue to affirm the exercise of police powers beyond city limits without the representation or consent of those affected; provided of course such authority has been conferred upon the municipality by the state legislature. This being so, the significant issue becomes how much and what kind of an extraterritorial exercise of the police power will be permitted.<sup>106</sup> Or to put it another way, to what extent and in what manner must legislatures and municipalities adhere to the warning of the courts that such exercise must be limited? Therefore, it is with respect to these matters that it becomes necessary to enumerate those factors which are likely to influence the courts in deciding the fate of extraterritorial zoning.<sup>107</sup>

*a. the scope and substance of the ordinance.* First—one must consider the scope and substance of the controls embodied in such legislation. To what extent do they curtail a land owner's free use and enjoyment of his property? Are our notions of what constitutes an unreasonable restriction at all affected by the fact that the impact of such regulation is extraterritorial rather than intraterritorial? Zoning may be subjected to the same kind

105. See cases and ordinances cited in *Jourdan v. City of Evansville*, 163 Ind. 512, 72 N.E. 544 (1904); *State v. Rice*, 158 N.C. 635, 74 S.E. 582 (1912).

106. Practical considerations aside, the concept of extraterritorial zoning, *as such*, should not find the courts hostile. This obviously does not imply, however, that the power of either the legislature or the municipality will be unlimited. It does mean that the law relative to what is and what is not permissible will be developed by a case to case process through the media of variances, exceptions and amendments, all of which are encompassed by the word "reasonable." Bartelt, *supra* note 76, at 403-04.

107. See *id.* at 404-09.

of territorial limitations as an ordinance which controls the location of slaughterhouses, the quarantine of a communicable disease, or the sale of liquor; yet, however limited geographically, zoning is, in substance, a comprehensive and broad grant of extraterritorial power. Zoning ordinances may regulate matters of land use, the height and area of buildings, lot size, and even in some cases the architectural design of permitted structures.<sup>108</sup> The breadth and subject matter of these controls alone may be sufficient to warrant finding an extraterritorial zoning ordinance virtually unlimited and accordingly unreasonable. Consequently, the scope of an ordinance, that is the extent to which it pervades the existing fabric of land usage, and the kind of uses prohibited or permitted by it, may yet determine the outcome of a particular case.<sup>109</sup>

In *Schlientz v. City of North Platte*,<sup>110</sup> for example, the court upheld both the extraterritorial zoning ordinance, which classified as residential a property owner's land situated beyond North Platte's boundaries, and the enabling state statute, which authorized first class cities to zone the area one mile beyond and adjacent to their corporate limits; provided, no such ordinance prohibited or interfered with the conduct of normal farming, livestock operations, or existing businesses or industry. This case arose out of a suit filed by such property owner to enjoin the enforcement of the city zoning ordinance. However, the city had made no attempt to interfere with either the activities of plaintiff or his neighbors who were currently using their land for residential, farming and/or livestock purposes. The ordinance, though not entirely innocuous, presented no serious threat to plaintiff's free use and enjoyment of his land. Essentially, it did little more than zone for the preservation of existing uses.<sup>111</sup> At most, the ordinance affected the ease

108. POOLEY, *op. cit. supra* note 67, at 84-90; Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 LAW & CONTEMP. PROB. 218 (1955).

109. It is true, of course, that the regulations of land use in the urban fringe very often are considerably less restrictive than they are in the municipality itself. It is common to preserve the *status quo*, which usually means agricultural and residential uses. The courts may be more inclined to sustain an ordinance which permits rather liberal land use than they would be if the ordinance were comparable to those in effect within the municipality. . . . How much restriction is reasonable restriction within the ambit of the police power, very probably will be determined by application of the accepted standards, qualified negatively by the element of extraterritoriality and its various facets, and positively by the coming of age of foresightedness. Bartelt, *supra* note 76, at 409.

See *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965) (interim zoning ordinance preserved existing uses).

110. 172 Neb. 477, 110 N.W.2d 58 (1961). For a statement of the case see note 84 *supra*.

111. See *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965). The ordinance in question ordered existing zoning uses ("agricultural") pre-

with which plaintiff might market his property. Given the facts of this case, the territorial limits of the ordinance, and the exclusions of the enabling statute, it is understandable why the court had so little difficulty in upholding the constitutionality of such legislation. However, despite the strong language of this decision in support of extraterritorial zoning,<sup>112</sup> one cannot be certain of how this same court would have reacted to legislation which contained no exclusions regarding prevailing land uses in the area and also severely restricted private discretion concerning the development of such outlying areas—for example—a restriction to residential development only, on minimum lots of three acres. Though such court might find reasonable an intraterritorial ordinance which curtails the expectations and operations of a developer to subdivide into lots of less than three acres, it might find the extraterritorial application of this same kind of ordinance unreasonable and arbitrary; especially if such extraterritorial coverage exceeded one mile. Furthermore, though courts have upheld intraterritorial zoning ordinances intended to advance or preserve residential property values by the imposition of minimum lot or dwelling size requirements, and zoning ordinances intended to make feasible the provision of necessary public services and facilities at a reasonable tax rate by controlling the timing, location and content of new development or by the creation of districts zoned for exclusive industrial use,<sup>113</sup> these same courts might find such ordinances unreasonable when stretched beyond a city's corporate limits. Such legislation must be justified principally as an exercise of the police power for the general welfare of the public. Perhaps this will not suffice. It may be that courts will sanction only those extraterritorial controls which are clearly founded upon the protection of the public health, safety and morals; regulation intended to prevent primarily those discordant land uses which may have a deleterious effect upon neighboring development. For example, the courts may be quite willing to uphold an ordinance which curtails an outlying property owner's expectations of commercial and industrial use because such development

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served, pending preparation of a comprehensive zoning plan. The court found: "Plaintiff . . . has not demonstrated any undue hardship that would result to him during such two-year period. There has been no showing that his property is unfit for the purpose for which presently zoned." *Id.* at 39, 133 N.W.2d at 262.

112. *Schlientz v. City of North Platte*, 172 Neb. 477, 489-90, 492-93, 110 N.W.2d 58, 66-67, 68 (1961).

113. *E.g.*, *Lionshead Lake, Inc. v. Township of Wayne*, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953); *Josephs v. Town Bd.*, 24 Misc. 2d 366, 198 N.Y.S.2d 695 (Sup. Ct. 1960). For a discussion of the *Wayne Township* case, see Haar, *Wayne Township: Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986 (1954); Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051 (1953); Nolan & Horack, *How Small a House—Zoning for Minimum Space Requirements*, 67 HARV. L. REV. 967 (1954).

would present a serious threat to the safety and health of those who live immediately within and without the zoning municipality. They may, however, be unwilling to sanction the dedication of outlying land to industrial use only in anticipation of local needs. Yet to circumscribe the permitted control of land use in this manner may very well thwart the fulfillment of a major objective in the regulation of fringe areas.<sup>114</sup>

*b. timing and the question of necessity.* Second—one must consider the timing of a municipality's decision to regulate beyond its corporate limits. This is a question of necessity. Over how large an area must a city regulate and how soon is it necessary for it to do so? It is indeed the issue of necessity which underscores the all important determination of whether an ordinance has a reasonable and substantial relation to the public health, safety, morals or general welfare.

Early zoning legislation, which was exclusively intraterritorial, was directed at preserving the integrity of development which had already taken form. It was not intended to contribute to new patterns of development. Its primary function was to protect existing development from the encroachment of injurious and discordant land uses. The rapid expansion of urban areas following World War II marked a dramatic change in growth patterns. The role of land use regulation changed accordingly. It became a useful device for shaping and controlling new development so as to satisfy community needs and community goals. It focused upon the future; no longer did it reflect simply the status quo. As a logical consequence of this shift in emphasis, the frontiers of new zoning techniques were to be found in substantially undeveloped areas rather than in the fully matured community.

As stated previously in those cases in which the police power was successfully exercised extraterritorially, the problems remedied were largely existent, not prospective. The detrimental effect of the uses regulated or

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114. Restriction of outlying areas to simple residential or agricultural classifications may be quite adequate in those instances in which the primary purpose of extraterritorial zoning is the prevention of conflicting land usage, *i.e.*, the exclusion of industrial uses for the protection of neighboring residential development. Yet extraterritorial zoning ought to serve a purpose which may comprehend something more than the public health, safety and morals. It ought to serve whenever necessary as a device for controlling fringe development in accordance with a community's ability to supply necessary public facilities and services. Most important it ought to be used to maximize the benefits to be achieved from the development of land resources. This may involve or require the exclusion from designated areas of certain uses which have no apparent deleterious effect upon neighborhood development; that is, it should facilitate the allocation of necessary land resources to industrial use by the exclusion of all residential development. In theory, such an ordinance cannot usually be supported as simply an exercise of the police power for the public health, safety and morals.

prohibited was immediate and deserving of immediate action. In some of the instances in which extraterritorial zoning measures will be proposed, one can expect that the land use problems which warrant regulation will be immediate and not anticipated; for example, where the fringe area has been or is rapidly being developed, and especially where such development is currently inimical to proximate and existing development within the municipality. However, most often the fringe area will be largely *undeveloped*. The need for regulation of such areas is then essentially prospective in nature—it must rest upon events of the future.<sup>115</sup> It is founded upon judgments as to the kind and timing of anticipated development, the problems expected to be generated by such development, and the needs of the community. Despite the fact that courts have generally upheld intraterritorial zoning of substantially undeveloped areas, the case for doing so is not an easy one,<sup>116</sup> and in addition, courts have stressed the importance of a *comprehensive plan* founded upon anticipated events and problems of the *reasonably foreseeable future*.<sup>117</sup> Unlimited speculation as to the future has not served as a sufficient basis for restricting the use of undeveloped land. In fact, one court has gone so far as to hold that “the test of validity is not whether the prohibition may at some time in the future bear a real and substantial relationship to the public health, safety, morals or welfare, but whether it does so now.”<sup>118</sup> Not unexpectedly, the problem of futurity is compounded when it concerns the regulation of land beyond the borders of the zoning municipality. Indeed, courts may treat differently the zoning of undeveloped land within and without the municipality.<sup>119</sup> Finding a need to

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115. Bartelt, *supra* note 76, at 408.

[I]n most of the cases in which extraterritorial police regulations were sustained, the uses regulated or prohibited had, or would have had, a present inimical effect, whereas extraterritorial zoning purposes to control something which might in the future have such an effect if the municipality grows to the projected size.

116. See Reps, *The Zoning of Undeveloped Areas*, 3 SYRACUSE L. REV. 292 (1952); Note, 30 U. CIN. L. REV. 297 (1961).

117. Bartelt, *supra* note 76, at 404-06.

118. *Gust v. Township of Canton*, 342 Mich. 436, 442, 70 N.W.2d 772, 774-75 (1955); *accord*, *Christine Bldg. Co. v. City of Troy*, 367 Mich. 508, 116 N.W.2d 816 (1962).

119. The courts could very well consider zoning of unincorporated areas as being quite different from zoning annexed lands, although they both may be rural in character. Annexation assumes necessity, and necessity presupposes development within the reasonably foreseeable future. The courts always have been decidedly antipathetic toward speculation. Secondly, but directly related, the amount of land encompassed by an extraterritorial zoning ordinance can be infinitely greater than that involved in most cases in which ordinances zoning undeveloped lands were challenged. Development of land situated on the three-mile periphery of the extraterritorial jurisdiction of a municipality is in the rather remote future. This would be especially true of a small or medium-sized city, unless there was an indication of a coming boom in oil, steel or uranium. . . . Whether it is reasonable for a small town to control an area sixteen times its size is the type of question with which the courts will be faced. Bartelt, *supra* note 76, at 406-07.

support the regulation of undeveloped areas without the corporate limits of a municipality would seem to require greater reliance upon the assumptions and facts expected to be borne out by the future. Because the extraterritorial zoning of substantially *undeveloped* areas will be in issue in almost every case, one can expect to find the courts reluctant, if not unwilling, to gaze into their educated crystal balls. They may indeed place a premium upon immediacy. Thus, it has been said that:

In order to legitimize the concept of extraterritorial zoning, the courts very probably will have to formulate new criteria of reasonableness. These will require a greater emphasis on foresight and development *in futuro*, with the concomitant acceptance of opinions and advice of experts, speculative though they may be.<sup>120</sup>

Assuming, however, that the courts will not reject summarily the extraterritorial zoning of undeveloped land as unreasonable and premature regulation, the resolution of the question of necessity reflects a consideration of several related problems. To date it appears that extraterritorial zoning has been devoted largely to controlling the development of those fringe areas which are likely to be comprehended by the growth of the municipality within the foreseeable future. In the main, it has been an exercise of the police power on behalf of the zoning municipality's present and prospective residents. Despite the fact that it is difficult to find the foregoing limitation embodied in existing enabling legislation,<sup>121</sup> one court, in construing its enabling statute, found no legislative authorization to zone beyond that which would be annexed within the foreseeable future.<sup>122</sup> Nevertheless, most courts which have been given an opportunity to adjudicate the legality of extraterritorial zoning have at least emphasized the fact that the notion of prospective annexation underlies such broadened exercise of the police power.<sup>123</sup> Whether this concept of prospective growth reflects a constitu-

120. *Id.* at 407-08.

121. Nearly all of these statutes impose geographical limitations upon such extraterritorial authority. In the main then, these statutes permit extraterritorial control of only a relatively small area, especially if one excepts incorporated areas from the scope of such regulation. At the very least one can say that such territorial limitations are imposed without regard to the existence or size of the metropolitan area or region. Indeed, these statutes have in no way conferred authority to legislate beyond a city's corporate limits generally for the needs of an entire metropolitan area. However, though these statutes, subject to the foregoing geographical limitations, expand the zoning municipality's jurisdiction over a relatively small area, there is nothing in the language of any of these statutes which expressly confines the exercise of such power to the area of foreseeable annexation. See statutes cited note 58 *supra*.

122. *American Sign Corp. v. Fowler*, 276 S.W.2d 651 (Ky. 1955); see *Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949). For an extensive discussion see note 85 *supra*.

123. See cases cited notes 84, 85, 122 *supra*.

By the enactment of section 16-901, R. S. Supp., 1959, it is apparent that the



tional limitation as well, is indeed subject to conjecture; this is so simply because the courts have not as yet had to face up to such issue.<sup>124</sup> We can, however, say this much—that up until now they have sanctioned legislation which does not appear to have stretched the police power beyond that area which falls within the zoning municipality's ambit of foreseeable annexation. Thus, one must bear in mind when reviewing the notion of foreseeable annexation as a possible limitation upon the power to zone extraterritorially,

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Legislature recognized that cities of the first class in this state are growing and expanding. The Legislature also recognized that the area within 1 mile of the corporate limits of such cities in the future would doubtless become a part of the cities and that such extension of the boundaries of the cities of the first class should, when required, be permitted. The zoning laws and ordinances incident thereto relating to the regulations of buildings . . . are generally for the welfare and health of the citizens under the police power of the state. The foregoing is apparently the reason for the enactment of section 16-901, R. S. Supp., 1959. *Schlietz v. City of North Platte*, 172 Neb. 477, 493, 110 N.W.2d 58, 68 (1961).

124 A decision concerned with statutory construction may sometimes go beyond the matter of statutory authorization and by implication shed considerable light upon the question of constitutionality. This is especially so if a court is impelled to construe a statute most favorably in the presence of constitutional limitations. Indeed, it is possible to conclude that in Kentucky, the constitutional limits of extraterritorial zoning are synonymous with the scope of existing enabling legislation. See *American Sign Corp. v. Fowler*, 276 S.W.2d 651 (Ky. 1955); *Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949).

In both these cases the court of appeals was confronted with the application of the term "municipal area." Such term was defined by statute to mean "the surrounding territory which bears relation to the planning and zoning of the city." There was nothing in the statute itself which suggested any limiting notion of foreseeable annexation. Yet in both cases, without any mention of or reliance upon legislative history, the court restricted "municipal area" to such area as might fall within the corporate limits of the municipality within the foreseeable future. In *American Sign Corp. v. Fowler*, *supra*, the court emphasized that the territory must bear relation to the planning and zoning scheme for the city itself. Apparently then, land which would be comprehended by the growth of the city within the foreseeable future would bear relation to the city's planning and zoning simply because it would one day become a part of such city. Such regulation bears relation to the planning and zoning of the city itself since it is in reality nothing more than advanced zoning of the future city. This would not be so if such area was located beyond the area of foreseeable annexation.

As a matter of simple statutory construction such conclusion does not seem sound absent any clear expression of legislative purpose. It is obvious that land use within an adjacent municipality can "bear relation" to or *affect* the planning or zoning of its neighbors. There is much to be said for a literal construction of the definition of "municipal area" which would seem to be founded upon a notion of *land use impact*. It was precisely this construction which the court rejected. Such conclusion seems ill founded *unless* the court was construing the enabling statute in the light of an implicit constitutional limitation of foreseeable annexation. If such limitation existed the court was bound to construe the statute in such a way as to preserve its constitutionality. However, this reason, if indeed it was the basis for the court's decision at all, was never expressed in either case. Yet one might predict in the light of these two decisions that foreseeable annexation will become a test of constitutionality in the state of Kentucky when and if such issue is litigated.

that in terms of what courts have actually said or decided, this subject has been raised as a matter of legislative purpose or authorization and not as a matter of constitutionality.

Of what importance then will be the notion of annexation or ambit of prospective growth in deciding the constitutionality of a particular ordinance? Because the courts have said so little, one must recognize that it becomes exceedingly difficult to separate intelligent conjecture from artful rumination of what ought to be. Nonetheless, as we shall see, such an attempt is essential to understanding the problem of timing and necessity. To begin with, it should be noted that at the heart of this matter of conjecture is the "public" for whose benefit the police power must be exercised. Not only have the states failed to authorize municipalities to zone extra-territorially for the benefit of the regional public, but there is good reason to believe that the courts would balk at approving legislation so broad. Though cities may and sometimes must account for the needs and facilities of the regional public when formulating intraterritorial zoning ordinances which satisfy a test of reasonableness, this does not mean that such public interest will serve similarly as a basis for permitting a municipality to stretch its police power beyond its boundaries and assume the role of big brother. This much is clear—decisions which have upheld extraterritorial exercise of the police power have stressed that such power may not be unlimited. It would indeed be difficult to demonstrate any significant limitation upon such power if the public, and consequently the authority to regulate, encompassed an entire region. Thus, the "public," for purposes of evaluating the need to regulate, is likely to be and perhaps ought to be that which is embraced by the municipality itself. This then rules out regionalism as a likely alternative to foreseeable annexation.

At this point one must observe the impact extraterritorial land use may have upon the development of a municipality. A city must supply public facilities and services to lands within its borders; it must also legislate for the health, safety, morals and general welfare of its public. Land use patterns affect the city's performance of these responsibilities.<sup>125</sup> Poorly designed and constructed roads and private thoroughfares aggravated by "scattered and

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125. For example,

Scattered Development—Growth occurs in a patchwork pattern, making the provision of adequate transportation and services costly and difficult to administer. Corridor Development—Growth occurs along major roadways choking them with traffic and encouraging strip concentrations of businesses and residences which are difficult and expensive to serve.

Compact Development—Growth occurs around existing cities and/or around completely new towns, allowing maximum use of all facilities and creating a sound basis upon which to anticipate future needs. EAST CENTRAL FLORIDA REGIONAL PLANNING COUNCIL, PRELIMINARY REGIONAL PLAN 18 (1964).

corridor development" invariably become a municipality's millstone upon annexation. Thus, a municipality may wish, quite justifiably, on behalf of its present and prospective public, to preset the land use patterns of areas which will be comprehended by its growth in the foreseeable future and which it must one day serve. The impact and need to regulate may be described as *advance intraterritorial zoning*. It appears, in the light of the several decisions upholding extraterritorial zoning and their discussion of legislative purpose, that advance intraterritorial zoning is constitutional.

Even if, however, an area falls without a city's ambit of foreseeable growth or annexation, its land use patterns may have a substantial impact upon the development of a nearby city. Proposed extraterritorial industrial development may conflict with adjacent residential growth within the city. It may also generate serious traffic problems even if it lies several miles beyond the municipality's border. Though courts will on occasion afford the city a measure of protection against such dangers,<sup>126</sup> they have done so only when asked to review the reasonableness of a zoning ordinance which authorizes a land use which does not harmonize with the prevailing land use of its neighbors.<sup>127</sup> Absent such judicial protection, a city justifiably may wish to foster harmonious land development immediately within and without its corporate limits. It may wish to serve its immediate public needs by the use of an *extraterritorial protective zone*. Such zone may or may not extend beyond the ambit of foreseeable annexation. Though there is nothing in the decided cases which suggests that the courts are about to distinguish between advance intraterritorial zoning and the use of an extraterritorial protective buffer,<sup>128</sup> one may anticipate that the latter is likely to give the courts some difficulty on occasion. To begin with, in theory at least such zoning constitutes the regulation of an outlying public primarily by and for the benefit

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126. See *Borough of Cresskill v. Borough of Dumont*, 28 N.J. Super. 26, 100 A.2d 182 (L. 1953), *aff'd*, 15 N.J. 238, 104 A.2d 441 (1954). For a discussion of the problem of conflicting uses in adjacent municipalities as it bears upon the reasonableness of a particular ordinance see note 18 *supra* and accompanying text.

127. If there is no county zoning ordinance which authorizes such conflicting use, the city is left without a basis for contesting the action of the developer.

128. In a particular case it may be different for a court to make a factual distinction. An enabling statute and local ordinance may authorize a city to zone extraterritorially for one mile beyond its borders. Though this area may be within the ambit of prospective annexation, such *carte blanche* authorization suggests that there are some cases in which it may not. Even so, the immediate concern of the city may not be problems which might arise upon annexation but rather protection of existing development within the municipality. A court may decide the reasonableness of the extension of jurisdiction to zone without ever concerning itself with whether the city has imposed a protective buffer or zoned in anticipation of annexation. This should be especially true where the extraterritorial jurisdiction falls within the ambit of future growth.

of another—the city. Moreover, the *need* to regulate would always seem to be greatest with respect to that which a city ultimately must serve. Self-preservation and protection do not rest upon as solid a foundation of *necessity*. Finally, since the need to protect really depends just as much upon the kind of land involved as opposed to the proximity of such use, a truly protective zone does not always lend itself to an easy and uniform geographical demarcation.<sup>129</sup> Consequently, courts may choose not to uphold the use of extraterritorial buffers especially when they are intended to protect areas not yet a part of the city proper. *Advance* extraterritorial protective zoning should encounter some problems of constitutionality not just because a city is ordinarily not burdened with the responsibility for serving and securing the welfare of a public which may never become part of its civic design,<sup>130</sup> but rather because in the end such notion may justify virtually unlimited territorial jurisdiction to protect the city's present and prospective public—a judgment which places even greater reliance upon the uncertain future. Yet absent such element of futurity, a municipality ought to be permitted to impose an extraterritorial buffer arising out of an immediate need to protect its present public quite apart from whether such area will ever fall within the municipality's corporate limits. Practically speaking, however, the area encompassed by such an extraterritorial protective zone will seldom reach beyond the ambit of prospective municipal growth and development except in those special situations in which a city is prevented by law from annexing land proximate to its borders.<sup>131</sup>

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129. *Land use impact* is a variant of the *kind* and *proximity* of the use in question. Usually extraterritorial jurisdiction is measured in terms of uniform and fixed radial limitations without regard to the subject matter of such regulation. Some variation in jurisdiction may exist according to the size of the zoning municipality, but none as to particular land uses. Such a legislative scheme may serve the purpose of protection in the many cases in which concentric circles of restricted land use are intended to insulate the municipality against conflicting land development. This kind of regulation, intended to inhibit varying intensities of development, works well regarding land uses whose land impact is primarily a variant of *proximity*. Yet because such radial limitations express primarily the factor of proximity, one cannot expect such system to impose an adequate protective buffer against uses whose impact reflects not proximity but the nature of the use itself. For example, a one-mile extension should permit the city to protect itself against hazardous industrial uses. But such limitation is really without meaning regarding a drive-in theater, ball park or other traffic generator located on a highway affecting a municipality several miles away.

130. This does not mean of course that the city can zone intraterritorially in complete disregard of the well being of its neighbors. For a more extensive discussion see note 21 *supra* and accompanying text.

131. See *Smeltzer v. Messer*, 311 Ky. 692, 225 S.W.2d 96 (1949). Therein the court noted that since a city of a fourth class could not annex *adjoining* lands located in another county, it could not zone such lands.

The foregoing discussion not only imposes some fundamental restrictions upon the utility of extraterritorial zoning,<sup>132</sup> but also brings into sharp focus a latent weakness in the use of fixed radial limitations to carve out a municipality's zoning jurisdiction. The fact that a municipality anticipates and wishes to control development of outlying areas is not in and of itself enough to establish a case for necessity. It must be such development as will affect the public for whose health, safety, morals or general welfare the municipality must legislate. If the reason for an extended exercise of the police power is *advance intraterritorial zoning*, then the growth rate of the zoning municipality itself looms as a matter of vital importance, and this is often, though not always, a function of its present size. Indeed it is the anticipated growth of the community which provides the essential link between land use and the need to regulate. Extraterritorial zoning ordinances have usually expressed this relationship in terms of an inflexible quantitative limitation; that is, the power to zone up to one mile, two miles, etc., beyond a city's corporate limits. Occasionally a state will classify its cities according to population and then vary its delegation of authority to zone extraterritorially accordingly. Nevertheless, even in that case the radial limitations for each respective municipality remain fixed and uniform within each classification. Such a demarcation of extraterritorial jurisdiction then constitutes a formal expression of the anticipated growth of the municipality and its need to regulate. If made without regard to the size of a community, it is no expression at all. If made without regard for the growth rate of a particular community, it is at best a crude approximation of the need to regulate. Furthermore, if a *protective buffer* is the reason for an extension of the power to zone, the use of inflexible radial limitations ignores completely the fact that land use impact is a variant of both proximity and kind of use. Indeed in a particular case the subject matter of outlying development may be all important and to confine a municipality's extraterritorial jurisdiction to a defined geographical area may afford it too little or too much protection. Thus, the outright delegation of arbitrarily determined and uniform extraterritorial jurisdiction quite possibly may weaken the claim of necessity and reasonableness, and consequently, the case for the constitutionality of both the enabling statute and the ordinance may also be weakened. To be sure this exercise of the police power cannot be un-

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132. See *Smeltzer v. Messer*, *supra* note 131. The court therein considered the inability of the zoning municipality to annex at any time the property in question as a matter of critical importance in construing the state enabling statute. See also *American Sign Corp. v. Fowler*, 276 S.W.2d 651 (Ky. 1955).

restricted, but the use of radial limitations is at most a half-hearted attempt to take heed that the police power must be limited.<sup>133</sup>

Finally, the imminency or urgency of a need to regulate is nearly always a reflection of the kind of problem to be remedied by the application of extraterritorial land use controls. Once again, the subject matter of an ordinance may be of critical importance. One can probably say that a need is apt to be recognized more readily by the courts if a particular ordinance can be justified as an exercise of the police power on behalf of the public health, safety, and morals. For this reason an ordinance which curtails the use of land for a liquor store<sup>134</sup> or industrial purposes by permitting residential or agricultural use only, is apt to receive more favorable treatment than an ordinance which regulates the architectural design of permitted structures. The case for establishing a *need* to regulate is made more difficult when advancement of the general welfare serves as the only basis for exercise of the police power. Public health and safety ought to occupy a higher place on the scale of community values than the creation or preservation of property values. If this is so, it is only natural that the courts will view an external threat to the public health as more serious and more urgent than the intrusion of external development which jeopardizes the maintenance of local property values.

#### CONCLUSION

In conclusion, several points should be emphasized concerning the resolution of regional land use problems and the utility of extraterritorial zoning.

First, extraterritorial zoning has not been nor will it ever be entirely successful in fulfilling its apparent objective—controlling the development of the fringe area. To begin with, its jurisdiction is nearly always limited to a predefined geographical area which may or may not be synonymous with the need to regulate extraterritorially. Furthermore, enabling statutes

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133. A quite different approach has been taken by the state of Kentucky—one which this author regards as sensible. Cities of the second class have been empowered to zone within their "municipal area." KY. REV. STAT. ANN. § 100.350 (1955). "Municipal area" is defined as the "surrounding territory which bears relation to the planning and zoning of the city." KY. REV. STAT. ANN. § 100.010 (1955). This approach has the virtue of flexibility. It expressly avoids the problems posed by the use of fixed and uniform radial limitations. Indeed, it approximates the standards of constitutionality suggested in the text. To be sure, the concept of "municipal area" does not advance a notion of unlimited extraterritorial jurisdiction. Quite the contrary, it serves as a realistic and meaningful limitation of extraterritorial power. However, it should not be concluded that this author favors the limitation drawn by those Kentucky cases which have construed this statute. See *American Sign Corp. v. Fowler*, *supra* note 132.

134. See *Walworth County v. City of Elkhorn*, 27 Wis. 2d 30, 133 N.W.2d 257 (1965).

authorizing the exercise of the power to zone extraterritorially have restricted its application to unincorporated areas immediate to the municipality. If a municipality is isolated—surrounded by uncontrolled, undeveloped and unincorporated land—extraterritorial regulation does permit a municipality to secure itself against conflicting and deleterious land uses.<sup>135</sup> However, if a metropolitan area consists of a patchwork of incorporated communities, and this is today almost always the case, its utility is negligible. There may be no fringe area which can be zoned simply because it is incorporated, or the state legislature may have arbitrarily allocated extraterritorial powers to neighboring communities without regard to community needs or rate of growth. Moreover, it is doubtful that any statutory revision would enhance the utility of extraterritorial zoning. It appears that the courts have upheld and will uphold the legality of extraterritorial zoning when it is confined to those insubstantial fringe areas which are likely to be comprehended by the future growth of a zoning municipality or when it curtails development which otherwise would conflict with existing uses. How much further courts will go in permitting the control of extraterritorial undeveloped land, a matter predicated upon the acceptance of farsighted expectations, is still in issue.

Second, extraterritorial zoning as authorized has not been and cannot be used to promote the orderly and efficient development of a metropolitan area. Its use reflects diffusion rather than essential centralization of authority and responsibility. It neither necessitates nor encourages joint efforts to plan and regulate regional growth; if anything, extraterritorial zoning permits a local community to adopt self-serving answers to pressing problems which may have regional ramifications.<sup>136</sup> The absence of any requirement for a regional or metropolitan land use plan, which carves out a standard of reasonableness to guide communities and courts alike, necessarily translates extraterritorial zoning into largely self-protective regulation of fringe areas.

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135. A sound argument for the use of extraterritorial zoning could be made with respect to rapidly developing Brevard County, Florida—a county which was only recently rural but has within the last fifteen years spewed forth urban growth and sprawl with a vengeance. Most important is the fact that such urban growth has not resembled that which usually characterizes the mature metropolitan area. It has lacked a concentration of new development reaching outward from a focal community. It does not have a central city; indeed it is a collection of rapidly developing communities—a bundle of population clusters, some of which are unincorporated. See Green, *Urban Growth in the Nation's Spaceport* (1964) (unpublished report in Washington University Law School Library).

136. Extraterritorial services and controls are not important as a means of meeting the needs of, nor of relieving the pressure from, metropolitan government. Their use may lead to jurisdictional conflicts, bickering and hard feelings, rather than to cooperation between the governments of metropolitan areas. Jones, *The Organization of a Metropolitan Region*, 105 U. PA. L. REV. 538, 542 (1957).

Zoning beyond a municipality's corporate limits has not provided a panacea for the massive regional problems of land use. These problems reflect the actual interdependence of a region's member communities; extraterritorial zoning is not a solution predicated upon the realities of such interdependence.

Concentration of extensive extraterritorial authority and responsibility in the core city for the development of those communities which it has spawned, may facilitate the resolution of metropolitan land use problems. However, it is doubtful whether the courts would find such legislation constitutional. Implicit in this proposal is a shift away from the cornerstone of annexation which underscores existing extraterritorial controls—that the public for whose health and safety such ordinance is enacted must fall within the present or prospective ambit of the municipality's boundaries. The cry of government without representation is likely to take on new proportions. A finding of *necessity* will require a clear recognition of the power and duty of a municipality to legislate on behalf of a public which comprehends the entire region. However, despite the fact that some courts have, when reviewing the reasonableness of an intraterritorial zoning ordinance, expressed a willingness to view the matter of public need as coincidental with regional need, they may not be receptive to legislation which confers upon a municipality virtually unlimited authority to zone extraterritorially for the regional public. Even so, because this proposal strikes at the very heart of the self determination of local government, it will undoubtedly produce hard feelings and serious conflict which can only minimize its effectiveness. All of this would seem to indicate that extraterritorial land use regulation, however structured, is not likely to provide an effective solution to the problem of controlling regional land development.<sup>137</sup> The answer must lie elsewhere.

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137. The foregoing problems of extraterritorial control of a metropolitan area are not necessarily symptomatic of the deficiencies of regulation as a means for securing the orderly and efficient development of a region. Similar problems are apt to arise with respect to the use of the eminent domain power to implement a plan for ordered private development; that is, by condemnation of certain developmental rights or the fee simple itself. Assuming the formulation of a meaningful master plan for the metropolitan area, which would be essential in the case of either regulation or condemnation, it seems unlikely that one could escape the same kinds of jurisdictional and intergovernmental conflicts that plague extraterritorial zoning by the use of measures which compensate for the restriction imposed. In fact, it would appear to be more difficult to obtain a regional consensus to condemn than it would be to regulate. Condemnation involves a purchase of private property. Though the taking is a compensatory one, it may entail the arbitrary and total abolition of one's interest in property—something which can be expected to arouse the emotions of a great many land owners. The prospect of one governmental body owning, if only for a short time, land within another governmental unit is likely to accentuate whatever friction might otherwise be expected in the event of extraterritorial regulation. Also, the exercise of eminent domain involves a substantially greater expendi-



Perhaps it lies in regional or metropolitan government vested with the power to zone as well as plan. Or perhaps it lies in the use of local intraterritorial zoning which must conform to a regional or metropolitan plan.<sup>138</sup>

ture of funds—a fact which is likely to obstruct both the adoption and administration of such means of implementing a plan for the metropolitan area. And so the need for centralization of authority and responsibility—metropolitan government—does not become any less by the selection of other legal instrumentalities. Indeed there is no reason to expect that there would be any marked diminution of the zealous preservation of the local prerogative. Though the content and territorial scope of such exercise of the power of eminent domain would no longer present the same questions of necessity and reasonableness, the constitutional issue would still remain in different form—is such taking for a “public use.” The “public use” requirement is currently in a state of flux. To the extent that a state court is unwilling to equate it with a requirement of “public benefit,” regulation may be the only alternative where the land in question is not blighted. Additionally, other problems raised with respect to extraterritorial zoning—regulation without the consent of the governed, and the exclusion of incorporated communities—are no less important, if not more significant, in the case of condemnation than in the case of regulation.

Finally, although it is true that the effectuation of a regional master plan by the use of eminent domain, however costly, appears on its face to require essentially a single act of implementation, this does not mean that the orderly development of a region will require any less cooperation and collective effort. It is neither likely nor desirable that a land use plan for the entire area be prescribed at once and once and for all. Continuous administration and adjustment cannot and should not be avoided. A developmental plan must take account of growth and changes in events and needs. Moreover, unless the fee simple or developmental rights are leased, and this probably would not be feasible or desirable, in the end regulation, and in particular zoning, must carry the burden of enforcement. If the land is to be resold by a governmental body to a private developer, then the constitutionality of the initial condemnation may depend upon the kind of assurances present that the land will be devoted to the public purpose which justified the exercise of the power of eminent domain. Restrictions in the deed itself may be undesirable. If they create a defeasible fee simple, they may be ineffective because of the severity of the sanction. Financing would undoubtedly be hard to acquire. If these restrictions take the form of a covenant they may be ineffective because they do not permit sufficient supervision of the activities of a developer. Thus, since private agreement may provide inadequate control over the developer's use of the land, it appears that the fulfillment of the public purpose must be achieved by supplemental land use regulation. Indeed then, except for issues of constitutionality, the problems of achieving orderly regional development arising out of the use of eminent domain would be virtually indistinguishable from those which inhere in the use of regulation.

138. One such solution has been offered by Pooley, who concludes:

That it is primarily the responsibility of the state governments to foster and support the proper planning of their urban areas, and that in carrying out this responsibility the state must not shrink from making decisions which cannot properly be made by any one of the constituent municipalities. The state, for example, should require, and not simply permit, the establishment of metropolitan planning commissions for each metropolitan area within the state. This commission should, again, be required to draw up a master plan for the development of the area as a whole, and this plan should be given a legal status, in that it should be designated as the yardstick by which the courts of the state are to judge the reasonableness of the plans and plan enforcement techniques of the municipalities within the area. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 35 (1961).

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Thus Pooley recommends:

1. The present techniques of land use control are equal to the problems posed by the rapid growth of metropolitan areas, provided that the state government is prepared to accept its proper share of the responsibility for such areas. The recognition by the state government of this responsibility would involve, amongst other things; a) the establishment of an adequately staffed state planning commission, b) the establishment of metropolitan planning commissions in each metropolitan area, and c) the establishment of metropolitan zoning boards of appeal.

4. The metropolitan planning commission should be required to draw up a master plan for the development of the metropolitan area.

5. The metropolitan planning commission should consist of representatives or appointees of the constituent municipalities and should have at least one representative of the State, appointed by the Governor.

6. The local government units within a metropolitan area should be allowed to retain the zoning power, but any zoning plan should be made in accordance with the metropolitan master plan.

7. All land within a metropolitan area should be subject to planning and zoning control.

8. The metropolitan board of zoning appeals should hear and decide all applications for variances or special exceptions within the metropolitan area. A vote in excess of a simple majority should be required for the grant of a variance. The intended scope of judicial review of the decisions of the board of zoning appeals should be more carefully delineated than is at present the case, and the avenues by which such review may be had should likewise be clearly described.

The board should in appropriate cases recommend amendments to the zoning ordinance of any constituent local government unit. Any amendment of a zoning ordinance should require more than a simple majority unless the approval of the metropolitan planning commission has been first obtained. *Id.* at 122-23.