WASHINGTON UNIVERSITY
LAW QUARTERLY

Volume 1969 Summer, 1969 Number 3

THE POLICE POWER AND MINIMUM LOT SIZE ZONING
PART I: A METHOD OF ANALYSIS*

DAVID M. BECKER**

INTRODUCTION

The extension of urban communities far beyond core cities has been one of the most dramatic developments of the past twenty years, one which is continuing today, and at a constantly accelerating pace. The dream of the good life in suburbia has finally reached the minds and hearts of the great mass of Americans huddled in heavily populated areas of those core cities. Their central desire is for new and better housing for people with modest incomes. The accommodation of this dream is not an easy matter. Its fulfillment requires provision of the full spectrum of urban needs: shopping centers, parks, schools, utilities, police and fire department facilities.

The impact has been greatest on the older, established suburban communities which lie in the path of the new growth. Communities consisting of large estates and inhabited by people of considerable means have suddenly witnessed the arrival of new neighbors who want, and are able to pay for, unpretentious, inexpensive homes. The residents of these older suburbs have been largely unprepared for these events – unprepared to accept the psychological and economic consequences of this development.

* Part II will appear in Volume 1970.
** Professor of Law, Washington University School of Law.

A number of factors which are frequent concomitants of urbanization has caused them to resist urban growth in their communities. First, the value of already developed land often wavers and sometimes decreases. Second, the community's fiscal burdens may increase because high-density low-cost homes may not contribute as much in new taxes as it costs to service them. This translates into higher taxes for established residents without a proportionate increase in the level of new services to them. Third, the general appearance of the community as well as its living patterns may be affected. The aesthetic value of the suburban "style" is lost, or at least changed, when high and low density living areas are mixed. Fourth, the standard suburbanite is white, some—perhaps many—of the new arrivals are black. Obviously, the latter reason has been articulated most often in recent years in private, although not too long ago it was not so confined.

The resistance to new growth, however, has not always been total. Particularly currently, many suburban communities have resisted unplanned helter-skelter urban growth, in current jargon, "urban sprawl," rather than any urban development at all. This reflects, of course, an awareness of changing social attitudes, coupled with a wish to retain as much as possible of the suburban aesthetic and a desire to control the timing and location of the new growth so as to minimize the economic burden it imposes on the community. When timing and location decisions are made by private developers primarily according to how cheaply land—the raw product—can be obtained, the problems have been compounded. Tracts of land best suited to non-residential uses have been used for new high-density development simply because they could be obtained more cheaply. Furthermore, residential development has frequently assumed a "leap-frog" pattern. The result is that the cost of the necessary new services is increased to an even greater extent, and taxes have been driven even higher.

In any event, whether the resistance has been total, or whether it has taken the form of efforts to control the timing and location of new development, barriers, legal and extralegal, have been devised to implement that resistance. The most common of these legal devices is zoning.

Some ordinances have been enacted which zone exclusively for agricultural or other non-developmental uses, while other ordinances zone exclusively for commercial or for industrial use. All of these are presumably intended to prevent any residential development in the

affected area. To prohibit high-density residential development in those areas in which residential uses are allowed, ordinances may permit the erection of only single-family residences and, in addition or alternatively, impose minimum lot size requirements, minimum home size requirements (commonly in terms of a required number of units of floor space) and occasionally even unit cost requirements. Probably the most versatile of these devices—certainly the most popular and most often litigated—is the minimum lot size requirement. Nearly every municipality which has felt the impact of urban mushrooming since World War II has enacted some kind of minimum lot size zoning ordinance. The general range is from 10,000 square feet to five acres.

This study, which will be done in two parts, examines in detail the use of that particular device in the context of the socio-economic-legal problems generated by the spread of urban communities into suburbia. Although other devices could have been selected, minimum lot size zoning primarily because of its versatility raises more of the problems which are endemic to the area than do any of the others. Hopefully, a detailed study of this device, made with full consideration of not only the legal factors involved but the social and economic factors as well, will contribute to, and pave the way for, similar analyses of other devices with similar purposes. To accomplish that broad goal the balance of this article describes in detail the analytic structure which will be applied in the subsequent article. In particular, a schemata of various legal doctrines and concepts, "taking," "public use," "police power," and others will be established. The second article will consist of an application of that analytic scheme to the minimum lot size zoning device and a critique of what will have gone before, structured in terms of social and economic realities, plus some observations about possible future applications of similar analyses.

THE SCHEMATA

An important attribute of land ownership is the privilege to use it: the legal freedom to devote land to those objectives which its owner desires.[1] This privilege supplies the value of and reason for owning land.

1 The private and public control of land use occupies a large part of property law. One need only examine the index to legal periodicals, the case reports, or the table of contents to property casebooks and treatises to see that this is so. Nevertheless, Felix Cohen in developing a pragmatic meaning of private property concludes that the privilege of use is not essential to the ownership of private property. Only the privilege of exclusion is critical to a system of private property.

Private property may or may not involve a right to use something oneself. It may or

However, no civilized society can tolerate the absolute exercise of this privilege despite its importance to the individual and to a system of private property.[2] Government exists for the benefit of those whom it governs and in serving its public it is inevitable that the desires of some will conflict with a governmental statement of public needs and aspirations. Accordingly, courts have in principle acknowledged, without challenge, the inherent[3] power of legislatures to regulate without compensation on behalf of the public even though such regulation may circumscribe the options individuals have respecting the use of their land. Indeed, its universal acceptance has had a definitional impact on the concept of private property. Seldom has a law student escaped his first year property course without having observed somewhere that property ownership is likened to a bundle of sticks, the size and content of which will vary from time to time dependent upon

---

may not involve a right to sell, but whatever else it involves, it must at least involve a right to exclude others from doing something. . . . Private property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision.

Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 371, 373 (1954). These assertions are amplified at 369-74.

Cohen's conclusions about the relation of use and private property can be illustrated. Typically the trust indenture for a large tract residential development will include a provision restricting all land within the subdivision to residential use. Because these provisions are enforceable, the trustees—and accordingly all the homeowners—have very significant rights with respect to each lot within the subdivision. Each lot is subject to a property interest owned by someone other than the person who occupies or uses the lot. The indenture, by its restrictions on land use, has created privately owned interests in property which do not afford the privilege of actual use.

These conclusions should not, however, in any way diminish the importance of *use* to a system of private property. Though ownership of private property may exist without the privilege of use, the system would have little meaning if the privilege of use was not prevalent regarding the subject matter of these relationships. Certainly this is true when land is the subject matter of private property. Property exists because of society, because of the relationships it wishes to establish. These relationships spring from societal needs. These desires do not exist just because society chooses to admire land in the same way it may choose to admire a painting. They exist because of the use to which land can be put.

2. Though the privilege of use may be the primary reason for land value, if its exercise were allowed absolutely by all, the privilege would indeed be self-defeating.

> To permit anyone to do absolutely what he likes with his property in creating noise, smells, or danger of fire, would be to make property in general valueless. To be really effective, therefore, the right of property must be supported by restrictions or positive duties on the part of the owners, enforced by the state as much as the right to exclude others which is the essence of property.

Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 21 (1927).

3. *See* 1 A. RATHKOPF, ZONING AND PLANNING 2-1 to 2-2, 2-9 to 2-13 (3d ed. 1969). *See also* E. FREUND, THE POLICE POWER 1-3 (1904).

the state of the public law, and that the scope of rights, privileges, powers and immunities that may exist with respect to any tract of land may be diminished by legislative act without denial or redefinition of private property.[4] This power to regulate—to control land use—is founded on the police power.[5]

The police power has its origins in the realities of administering to a civilized society.[6] Though limitations on its exercise are frequently embodied in express constitutional provisions, courts have not, in acknowledging either the existence or the scope of the power, had to resort to specific constitutional authorization.[7] It has been assumed to be an essential incident to government, at least state government.[8]

---

4 *See* RESTATEMENT OF PROPERTY § 5(e) (1936). *See also* R. AIGLER, A. SMITH & S. TEFT, CASES ON PROPERTY 506 (1960); J CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 319 (1962).

5. *See* 1 A RATHKOPF, ZONING AND PLANNING 2-1 to 2-27 (3d ed. 1969). *See also* 1 J. METZENBAUM, THE LAW OF ZONING 16-17 (2d ed. 1955), which describes the police power as "The Community Power." Though the police power serves as the primary basis for public control of land use, and is the only basis for zoning, courts have sometimes given other reasons for upholding land use regulation. For example, subdivision controls have been justified on the basis of the state's power to condition the privilege of recording subdivision plats. Nevertheless, this basis as well as others has been questioned. Indeed, it has been suggested that the police power must serve as the basis for subdivision control just as it does for zoning. *See* Cunningham, *Land-Use Control The State and Local Programs*, 50 IOWA L. REV. 367, 415-17 (1965).

It should be observed at this point, that what is meant by land use control is public control, more specifically government control by legislation. There are, however, other methods for the control of land use For example, the law of "nuisance" and "waste," both of which affect the use of land, are ancient products of the common law. Additionally, land use has been controlled by private agreement reflected in conditions of defeasance, easements, and restrictive covenants. These controls, though they may be even more effective than zoning, are not within the scope of this article.

6. Governments find their reason for existence and their justification for continuance in the services which they render to the health, safety, morals, conservation of resources and general welfare of the group governed. It is, therefore, not surprising to find courts repeatedly asserting that property rights are always held subject to the police power, that is, the power of the government to do that for which it exists.

6 R POWELL, THE LAW OF REAL PROPERTY 72 (1969).

7 The Index Digest of State Constitutions, prepared by the Legislative Drafting Fund of Columbia University, contains only two entries under the heading of Police Power. These entries refer to the provisions of two states, Georgia and Louisiana, both of which simply declare that the power shall never be abridged. Nevertheless, when discussing the validity of an exercise of the police power, courts seldom have difficulty in affirming its existence or in giving it a general definition, that it must be on behalf of the public health, safety, morals or general welfare. *See, e.g.*, Board of Educ. v Miles, 15 N.Y.2d 364, 207 N.E.2d 181, 259 N.Y.S.2d 129 (1965). which viewed the police power as the only possible basis for upholding a statute which extinguished possibilities of reverter and rights of entry unless recorded pursuant to the statute. The authority which the court gave for its definition of the police power was judge-made and not a part of a written constitution.

8 Nowhere in the Constitution of the United States is Congress given the power to enact any

Because it operates inevitably to diminish the totality of options which exist in the absence of its exercise, the very recognition of the police power has required courts to avoid altogether or retreat from any absolutist construction of express constitutional provisions which purport to preserve the rights of individuals and land ownership.[9] And

law simply because it promotes the general welfare. Similarly, the expression of a broad police power is absent from state constitutions. Nevertheless, there is a striking difference in theory between the police-like powers which Congress and states may exercise. The power of Congress is limited to that which is conferred by the Constitution; its power is not inherent. States may exercise all powers, including a police power, not delegated to Congress or prohibited by the federal Constitution. In theory, though Congress may legislate in the interest of the "public health, safety, morals or general welfare," it must act pursuant to a specific grant of power. The national power is not complete, it is not all encompassing. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); United States v. Butler, 297 U.S. 1 (1936). *See also* Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (dissents). For a more recent decision in which the Supreme Court denies enforcement of a Congressional act because of the absence of specific constitutional power, *see* Trop v. Dulles, 356 U.S. 86 (1958). Yet to say that Congress may not exercise a police power is misleading; it ignores reality. Whether the power Congress exercises be regarded as inherent or as delegated, and therefore limited, it has been successful in legislating extensively in the area of health, safety, and general welfare. And on most of these occasions, if a state rather than Congress had been the author of the legislation, it would have been characterized as an exercise of the police power. Not since the 1930's has the Supreme Court had much difficulty relating Congressional action to a specific delegation of power, especially the commerce power. *See, e.g.*, Daniel v. Paul, 395 U.S. 298 (1969) in which the Supreme Court found a privately owned recreational facility, which admitted members only and was self styled as a "club," a place of public accommodation whose operations affect commerce, and therefore subject to the Civil Rights Act of 1964 which prohibited discrimination on the basis of race in places of public accommodation, in spite of the warning of Justice Black that:

> While it is the duty of courts to enforce this important Act, we are not called on, nor should we hold subject to that Act this country people's recreation center, lying in what may be, so far as we know, a little "sleepy hollow" between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me.

So long as the Supreme Court continues this policy, the distinction between the exercise of state and federal police powers will remain relatively unimportant.

9. Federal and state constitutions alike prohibit legislation which impairs contractual obligations, which deprives a person of property without due process of law or which takes property for a public use without just compensation. Nevertheless, courts have upheld recording acts which void otherwise valid but prior unrecorded conveyances and zoning ordinances which prohibit valuable land uses. "Statutes may be enacted under the police power to prevent fraud or oppression in business or commercial transactions . . ., and, if within the scope of the police power, legislation is not invalid even though there be retrospective modification of private contractual obligations. . . ." Board of Education v. Miles, 15 N.Y.2d 364, 369, 207 (N.E.2d 181, 184, 259 N.Y.S.2d 129, 133 (1965). "The constitutional declarations that private property shall not be taken for public use without just compensation or without due process of law are always subordinated to the interest of the public welfare as expressed through the exercise of the police power." Dube v. City of Chicago, 7 Ill. 2d 313, 324, 131 N.E.2d 9, 15 (1965).

on occasion the conflict between the public interest and the rights of the individual property owner has been severe enough to justify the curtailment of all land use options, if not the abolition of all incidents of ownership, as a proper exercise of the police power.[10] Yet just as it is inevitable to ordered society that individual prerogative must be subject to public control, it is also true that private ownership of property cannot persist without the retention of some private discretion as well as some predictable basis for the assertion of limitations which encroach upon these options.[11]

Not nearly as essential to the theoretical recognition of private property, but yet quite as important to a society whose economy is greatly dependent upon continued capital ownership and investment, is the notion that there are fundamental limitations on the kind and extent of regulation which government may impose without compensation. These limitations are as basic as the police power is itself. They arise out of both a sense of fairness and necessity or, more specifically: A fear that governmental excesses and abuses of power may cause an individual to suffer a total or substantial loss in economic value; continuous uncertainty about the legitimacy of the legislative articulation of the public interest; and, finally, mounting

10 In Consolidated Rock Products Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962), *appeal dismissed*, 371 U.S. 36 (1962). The court conceded that plaintiff's land which was zoned for agricultural and residential use, thereby prohibiting plaintiff's rock and gravel operations, had virtually no economic value other than for the use which had been prohibited. *Id.* at 530, 370 P.2d at 351, 20 Cal. Rptr. at 647. Nevertheless, the court had no difficulty in upholding the ordinance. Zoning inevitably curtails some uses, and quite often it curtails a use to which land is particularly suited. Yet private choice must at times give way to the public good. *Id.* at 529-30, 370 P.2d at 351-52, 20 Cal. Rptr. at 647-48. However, it should be noted that this was not simply a case in which the land owner contends that the ordinance deprives him of the use to which the land is most readily adapted. Indeed, the ordinance had deprived him of all economic use.

Recording acts have gone even further. At common law a prior purchase of legal title was superior to a subsequent purchase for value and without notice from the same grantor. Recording acts have, under certain circumstances, afforded a subsequent purchaser a superior title even though they have not usually made recording a requisite to valid title as between the prior purchaser and the common grantor. Whenever a recording act operates to extinguish the title of a prior purchaser in favor of a subsequent purchaser, all incidents of ownership have been vitiated by the state in exercise of the police power. The supposed purpose for recording acts is the prevention of fraud. However, the acceptance of "pure race" statutes might suggest otherwise.

11 See Cohen, *supra* note 1, at 371-73. "[T]he existence of private property presupposes not only sovereignty but some predictable course of sovereign action, so that the so-called property owner can count on state help in certain situations. . . . Private property, then presupposes a realm of private freedom. Without freedom to bar one man from a certain activity and to allow another man to engage in that activity we would have no property. If all activities were permitted or prohibited by general laws there would be no private property."

concern that unrestrained public control will seriously interfere with incentives essential to a society and economy predicated on capital investment. So it is that the police power which is central to the administration of government is not a power which can be exercised absolutely.[12] Indeed, there is hardly a year that has gone by in which each state court has not made some significant attempt to establish a sensible basis for limiting the content and scope of the public regulation of land use.

Courts have, in the main, justified their interference with the legislative exercise of the police power on bases which are either both definitional or constitutional.[13] Whatever the basis, the results which

12. See dissenting opinion of Justice Bell, Bilbar Const. Co. v. Easttown Twp. Board of Adj., 393 Pa. 62, 104, 141 A.2d 851, 872 (1958): "If police power or general welfare were *unlimited*, virtually every right of liberty, every right of property, and every right to a free press, and to due process, as well as all other fundamental rights which are ordained in and guaranteed by the Constitution would soon be superseded, abrogated and extinguished by 'general welfare'."

13. It has been said that the police power is incapable of definition. Berman v. Parker, 348 U.S. 26, 32 (1954). Perhaps to define a police power, as such, is totally misleading. In the end, a comprehensive definition describes nothing more than the legitimate exercise of governmental power. Subject to specific constitutional limitations, including the obligation to award compensation under certain circumstances, the legislature has the ultimate right to elaborate the public interest. This interest changes; indeed it is always what the legislature says it is. Therefore, to define the scope of governmental power—to state the purposes for which the police power may be exercised—is a fruitless and self-defeating attempt to fix the public interest. Nevertheless, courts have always subscribed to the notion that the police power must be exercised on behalf of the "public health, safety, morals or general welfare." Furthermore, whenever they have reservations about whether a regulation is in the public interest, they are apt to evaluate the legislation in terms of their definition of the police power. And frequently when the regulation is found unconstitutional, it is because a court has said that the legislation does not fall within the scope of the police power. *See, e.g.*, Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954). Yet the closer one examines these decisions, the more he is apt to find express constitutional restrictions lurking in the background; the police power may not be used to violate freedom of speech or religion, to deny due process or equal protection, to discriminate on the basis of race, and other such reasons.

> Use restrictions upon real property must find their justification in some aspect of the police power, reasonably exerted for the public welfare. The police function cannot be expressed in terms of a definitive formula that will automatically resolve every case, for its quality and scope are commensurate with the public exigencies arising from overchanging social and economic conditions. But it is basic to zoning, as with every exercise of the police power, that it be contained by the rule of reason; constitutional due process and equal protection ordain that the exertion of the authority shall not go beyond the public need; there cannot be unnecessary and excessive restrictions upon the use of private property or the pursuit of useful activities; a substantial intrusion upon the right infringes essential individual liberties immune to legislative interference. The restrictions may be so unreasonable as to be confiscatory, and the regulation then transgresses the organic law as arbitrary and oppressive. . . . The constitutional principles of due process and equal protection demand that the exercise of the power be devoid of unreason and

have been achieved have been neither logically consistent nor constant in principle. The substance and scope of the police power is ever changing; it has and undoubtedly will continue to grow. The process of judicial supervision can, I would think, be accurately described as a guarded recognition of the public need to expand rather than contract the police power. What should be clear is that frequent judicial attempts to demark definitional and constitutional truths respecting the proper exercise of the power have failed. They have failed not because of inadequacy of judicial definition or constitutional construction but because courts have not recognized that these limitations arise out of notions of fairness and necessity quite apart from any express constitutional prohibitions. These notions are inevitably in constant need of reevaluation. Just as the need to limit public regulation is basic, there is also a continuing need to reconsider rationales used to support resulting limitations on exercises of governmental power. Despite this, some factors have and probably will endure. These are considerations which ought to weigh heavily in any judicial review of a specific exercise of the police power. For purposes of isolation, analysis and criticism of these factors, it becomes necessary to develop a framework for inquiry, even if the formulation of this framework requires some deference to those definitional and constitutional limitations which have proved unworkable as statements of absolute truths.

Frequently, when a court decides that a particular legislative restraint on land use is unlawful, it characterizes the operation of the regulation as a "taking" or as "arbitrary and unreasonable." Whenever this occurs, judicial supervision manifests itself for essentially the same reason—a basic concern with governmental overreach. Perhaps because of this, the use of special language to describe unlawful governmental regulation is understandable. Nevertheless, one can and should always isolate more specifically the problem which arouses concern and thereby at least eliminate some of the confusion which arises out of the indiscriminate use of the word "taking" and other terminology. When a court has determined that a public land use control is unlawful it is generally for one or more of

---

arbitrariness, and the means selected for the fulfillment of the policy bear a real and substantial relation to that end. . . . It is fundamental in zoning policy that all property in like circumstances be treated alike. The use restraints must be general and uniform in the particular district. . . . Undue discrimination in treatment and classification vitiates the regulation.

Katobimar Realty Co. v Webster, 20 N.J. 114, 122-23, 118 A.2d 824, 828-29, (1955).

the following related reasons: (1) the regulation has as its purpose an objective for which the police power ought not to be exercised; (2) it may operate unfairly and arbitrarily as to the particular landowner; or (3) private options may be so diminished and the attributes of ownership so substantially affected that the public goal can properly be attained by compensation only—in simple terms *too much has been taken.*[14] It should be obvious that these are reasons which are not entirely distinct, and that it is difficult to evaluate a problem in terms of one of these criteria without careful consideration of the others. The problem of unfairness cannot be judged without consideration of the impact of the act upon the bundle of sticks nor can there be any sensible determination of whether there has been an unlawful diminution of property rights without regard for the purpose for which the police power has been exercised.[15] And by the same token there surely must be measures which ostensibly fall within the acknowledged ambit of the police power, but which, upon more careful examination, achieve their objectives only by taking too much.[16] Nevertheless,

14. For example, in County of Du Page v. Halkier, 1 Ill. 2d 491, 496, 115 N.E.2d 635, 638 (1953), the court concludes: "The means employed by the county zoning board do not appear to have any real substantial relation to the public health, comfort, safety or welfare, and are arbitrary, unreasonable and void as applied to appellee's property." The county had sought to enjoin the landowner from erecting an additional residence on his property in violation of an ordinance which zoned his property for "Estates" and which allowed single-family homes on lots not less than 165 feet of average width and 2½ acres in area. Though the court found the ordinance unreasonable because it bore no substantial relation to the goals for which the police power may be exercised, it had nothing to say at all about what the ordinance did or was intended to accomplish, nor did it discuss what is properly within the scope of the police power. Rather its decision ultimately rested on the fact that enforcement of the ordinance would inflict substantial economic loss on the landowner and would also operate unfairly because none of the surrounding land uses met the standards of the "Estate" requirement. Though the court's conclusion was cast in terms of reason *one*, in reality the decision was based on reasons *two* and *three*.

15. For example, we may hesitate to sanction legislation which denies a developer the right to construct low cost housing in the interest of preserving the value of neighboring homes; yet we may at the same time tolerate legislation which denies all developmental use because of the danger of flood, fire or landslide.

16. For example, surely there is reason to question legislation which forbids all developmental use or additional improvements in the interest of minimizing the costs of future acquisition for parks, highways, schools or other public improvements. We may find it within the public interest to regulate the timing and location of intensive residential development because of the indiscriminate waste of land resources and excessive community costs which occur in the absence of such control. Yet whenever this is accomplished by measures which deny substantial economic use—and this is nearly always the case if new development is to be deflected to areas in which it can be serviced conveniently—surely there is good reason to ask whether this ought not to be achieved by awarding compensation.

initially it is useful to focus one's inquiry and framework for analysis on these specific reasons.[17]

It should be observed that each of those reasons reflects an adherence to either accepted definitions of the content and scope of the police power, definitions which can be found in neither federal or state constitutions, or to express constitutional limitations which preserve various kinds of individual rights and otherwise limit the scope of governmental activities. To illustrate the latter point, a regulation may be unlawful because it infringes upon freedom of speech or religion, or because it discriminates on the basis of race, or otherwise denies equal protection of the laws. This paper focuses in part on a specific provision common to federal and state constitutions alike, principally because it underscores many of the problems which have arisen and are apt to arise in the use of large lot zoning.

The fifth amendment to the federal constitution provides "nor shall private property be taken for a public use without just compensation." This amendment has been made applicable to the states through the fourteenth amendment.[18] In the main, however, the protection afforded by the fifth and fourteenth amendments has been unnecessary because the constitution of each of the states includes a provision which says essentially the same thing as the fifth amendment,[19] or even in some instances goes further in protecting the rights of property owners: "Private property shall not be taken or *damaged* for public use without just compensation."[20] This succinct statement introduces three complex

17 The remainder of the paper, specifically Sections I and II which follow, concentrates primarily on the first and third reasons: is the goal appropriate; has there been a taking. The second reason, having to do with unfairness and arbitrariness, is considered in the schemata, but only indirectly. As stated in the text, the specific reasons for finding unlawful an exercise of the police power which controls the use of land are not entirely distinct but are related. For example, an ordinance which forbids all developmental use, not because of special burdens or dangers arising from development but because of benefits the community wishes to achieve from nondevelopment, may be characterized as unfair and perhaps arbitrary and may constitute a taking. A discussion of the problems presented by this kind of regulation, problems dealt with in the schemata, necessarily involves the question of fairness. Accordingly, the schemata which follow do not avoid completely a consideration of the second reason. Nevertheless, independent study of this criterion, which would require special consideration of matters of equal protection and of official machinery, such as the variance, developed to raise and rectify the problems of unfairness, is beyond the scope of this paper.

18 *See* Chicago B & Q R.R. v. City of Chicago, 166 U.S. 226, 235-41 (1897), in which the Supreme Court concluded that the taking of private property without compensation for public use by a state is a denial of the due process guaranteed by the fourteenth amendment.

19 *See, e.g.*, N.Y. CONST. art. I, § 7. For a complete list of citations, *see* INDEX DIGEST OF STATE CONSTITUTIONS 464 (2d ed. 1959).

20 *See, e.g.*, MO. CONST. art. I, § 26. For a complete list of citations, *see* INDEX DIGEST OF STATE CONSTITUTIONS 464 (2d ed. 1959).

concepts, each of which has been extensively litigated: (1) that compensation must be made for property which is *taken* by the public; (2) that property can be taken for a *public use* only; and (3) that, *just compensation* must be made for property taken for a public use. In simple terms: what is a taking; what is a public use; and what is just compensation? These concepts taken together serve to limit the exercise of *two* powers basic to the existence of government—the police power and the power of eminent domain. The questions of public use and just compensation nearly always arise when a governmental body exercises its right of eminent domain.[21] Can it condemn for the purpose intended and how much does it have to pay? However, the question of whether there has been a taking arises not within the context of condemnation suit initiated by the government, but when a landowner is protesting the application of a regulation in exercise of the police power.[22] For example, should a community be permitted to forbid all residential development in a given area if to do so would deny all economic use

21. It would be surprising if the issue of just compensation was not the subject matter of much litigation. The appraisal of land values is hardly an exact science. The records of cases in which damages are in issue are replete with testimony which favors both sides. The problem of assessing land values is a difficult one; there is bound to be disagreement. Furthermore, the problem is made all the more difficult whenever there is a partial appropriation of the landowner's property or whenever the prevailing land in the vicinity of the condemned parcel is undergoing change—something which may be affected by the condemnor's plan of land acquisition. The question of whether the taking has been for a public use is also a much litigated issue. The question arises and will continue to arise whenever the public purpose is accomplished only by resale to private parties. For example, can a community, in need of a tax base and jobs, condemn land for resale to industry on favorable terms? Any time land is appropriated by government from one private party and turned over to another, it is inevitable that whether the purpose served is public is a question which will be raised. In addition, there is, of course, the issue of whether public use means ongoing public ownership.

22. These assertions must be qualified on two counts. First, the taking question may arise under the guise of just compensation in an eminent domain proceeding instituted by the government. This is especially true when the claim of the landowner is based upon a taking which exceeds that which has actually been physically appropriated by the condemnor. Government may take a portion of a landowner's property, and yet the landowner may claim that the land which has been unappropriated has been taken just the same either because of the total loss occasioned by the public acquisition or because of the use to which the appropriate land is put. Secondly, not all condemnation proceedings are initiated by the government. Typically, a landowner will protest the application of a regulation in exercise of the police power by opposing its enforcement on the ground that it is unconstitutional. He may also proceed under the theory of inverse condemnation, suing the government for just compensation and claiming that though the regulation exceeds the police power, his land has been taken pursuant to a valid exercise of the power of eminent domain. *See* Beuscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain by the Courts: So-Called Inverse or Reverse Condemnation*, 1968 URBAN LAW ANNUAL 1. It is under these circumstances that the taking question may arise within the context of an eminent domain proceeding.

to those landowners within the district?[23] Because this paper is concerned with the use of large lot zoning, a regulatory device, hereafter whenever the fifth amendment or its state counterparts is under consideration it is the taking question which is being raised and not the public use or just compensation issues. Furthermore, in an effort to eliminate some of the confusion which has arisen from the indiscriminate use of the word "taking" by courts, when the matter of a "taking" or the taking question is under consideration in this paper, what is being asked is not simply whether the regulation is unlawful for any of the three reasons commonly assigned as a basis for finding an ordinance illegal, but whether it is unconstitutional because of the third reason only. Does the land use control present a question of whether *too much has been taken* even if it satisfies our notions of what are appropriate objectives of the police power, and even if it presents no problems of fairness to the particular landowner? When this is the issue, courts frequently focus on the express constitutional provision which forbids a taking without just compensation. Furthermore, if an ordinance violates this constitutional provision because it is a taking, it cannot be sustained by awarding just compensation unless it also satisfies the requirement of public use. That which cannot be accomplished by regulation—because to do so would take too much—cannot necessarily be accomplished by condemnation. Though courts have, in recent times, tended to regard as congruent the objectives for which the police power may be exercised and the reasons for which land may be condemned, many courts have been unwilling to fully equate these two concepts.[24] Not until the "public use" concept

23 *See* Gruber v. Mayor and Township Committee of the Township of Raritan, 68 N.J. Super. 118, 172 A.2d 47 (1961) in which a court upheld an ordinance which rezoned land originally zoned for residential use and for which there was a market. The rezoning was exclusively for light industrial use—for which there was evidence of no demand, presently or in the foreseeable future. The change had been made to solve problems created by rapid urbanization, extraordinary increases in population, inadequate school facilities, and financial crises precipitated by inordinate demand for expanded municipal services. This case was reversed by the Superior Court, Appellate Division, 73 N.J. Super. 120, 179 A.2d 145 (1962). The Supreme Court then affirmed the decision of the Appellate Division, 39 N.J. 1, 186 A.2d 489 (1962) and in so doing noted that zoning for exclusive industrial use might be confiscatory and therefore invalid if the demand for light industrial use was negligible or unlikely.

24 For cases which tend to equate the public use requirement with a test of public benefit, purpose or welfare, *see* Berman v. Parker, 348 U.S. 26 (1954); Gohld Realty Co. v. City of Hartford, 141 Conn. 135, 104 A.2d 365 (1954); State *ex rel.* Bruestle v. Rich, 159 Ohio St. 13, 110 N.E.2d 778 (1953); Belvosky v. Redevelopment Authority, 357 Pa. 329, 54 A.2d 601 (1949).

For cases which give the public use requirement a narrow construction—tending toward actual public use, if not ownership—*see* Adams v. Housing Authority of Daytona, 60 So.2d 663 (Fla.

on which the eminent domain power hinges is fully and under all circumstances equated with the "public benefit" concept which supports the police power, will a community have free choice to accomplish its objectives by condemnation each time its effort to do so under the police power is frustrated.

When discussing the problem of whether *too much has been taken,* courts, and accordingly this paper, most often focus on the express constitutional provision which forbids a *taking* without compensation—the fifth amendment and its state counterparts. However, when concern is with the first of the specific reasons courts give for finding an ordinance unlawful—is its objective one for which the police power may be exercised—one finds courts addressing themselves instead to other expressed and unexpressed constitutional limitations upon the exercise of the police power despite their proclivity to characterize the ordinance as a "taking" if unlawful. Hardly a case which has undertaken a consideration of the legality of a public land use control, that diminishes without compensation the totality of options that would otherwise accrue to the landowner, has failed to point out that an exercise of the police power may be justified only if it furthers the "public health, safety, morals and general welfare."[25]

1952); Housing Authority of City of Atlanta v. Johnson, 209 Ga. 560, 74 S.E.2d 891 (1953); Opinion of the Justices, 152 Me. 440, 131 A.2d 904 (1957); Foeller v. Housing Authority of Portland, 198 Ore. 205, 256 P.2d 752 (1953); Edens v. City of Columbia, 228 S.E. 563, 91 S.E.2d 280 (1956); Hogue v. Port of Seattle, 54 Wash. 2d 799, 341 P.2d 171, (1959). The court in the Georgia case expressly rejected the public benefit test. Though the Georgia constitution was subsequently amended to allow for slum clearance and redevelopment, one may assume that condemnation for other purposes must still meet the test of public use.

25. *See* 1 A. RATHKOPF, ZONING AND PLANNING 2-1 to 2-25 (3rd ed. 1956) and the cases quoted therein. This limitation upon the exercise of the police power—a judicial statement of the basic objectives and limits to governmental power—also appears in those state statutes which enable local communities to zone. The Standard State Zoning Enabling Act, recommended by the United States Department of Commerce in 1926, which serves as the model for many state enabling acts, begins "For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate . . .", and continues "Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers; to promote health and the general welfare; . . ." The Act, as revised in 1926, can be found in 3 A. RATHKOPF, ZONING AND PLANNING 100-1 to 100-6 (3rd ed. 1956).

This is the commonly accepted statement of the purposes for which the police power may be exercised. Neither this definition of the police power, nor any other, appears in the written constitutions of either the United States or of any of the states. Because it is an inherent attribute of government, one can assume that there was no occasion to authorize it specifically, and therefore none to define it. Nevertheless, concern with the scope of that power is not wholly absent in written constitutions, for each time a constituion imposes express limitations on the exercise of governmental power it in reality identifies limitations upon the police power. When courts focus on a consideration of objectives appropriate to an exercise of governmental power they invariably resort to the standard definition of the police power both to justify and to circumscribe. And when courts find that the reasons for a specific exercise of the police power are not comprehended by this unexpressed definition they conclude that the regulation is unconstitutional. What should become clear, then, is that this definition is nothing more than an attempt by the courts to focus and articulate society's concern about governmental exercise of power; a concern which is only partly expressed in other provisions of the written constitution. It is this concern about the kinds of goals that government may accomplish by regulation which culminates in judicial attempts to give meaning to the "public health, safety, morals and general welfare." And when that concern causes a halt to governmental intrusions on the rights of landowners, the objections are inevitably cast in terms of this definition, though often with an eye towards other safeguards expressed in the constitution.

What follows first is a consideration of those factors and their interrelationships which courts have found relevant to a determination of whether an exercise of the police power is appropriate.

I. The Matter of Goals

A. Some Observations

Before attempting to enumerate the specific kinds of goals which courts have ratified or found objectionable, several important preliminary observations must be made. To begin with, these goals do not exist in the abstract and any attempt to evaluate specific objectives in the light of broad definitional limitations upon the police power is necessarily misleading. The reason for this is simple enough: these are evaluations which must be made within the context of a specific

exercise of the police power embodied in a specific ordinance. To be sure, one can discuss the appropriateness of making a community a safe place in which to live, but a conclusion that in general a community ought to be able to circumscribe the rights of landowners in the interest of public safety without affording compensation is not particularly instructive in resolving problems which arise in the context of a particular exercise of the police power. The regulation itself, the instrument by which the public interest is promoted, cannot escape becoming the focal point of any meaningful inquiry into what is properly within the ambit of the police power. There are three related reasons for this: (1) goals most often can only be identified by drawing inferences from the instrument by which they are accomplished; (2) the full impact and effectiveness of the method adopted to accomplish certain objectives cannot help but be relevant in determining not only what those objectives actually are, but also whether they are appropriate; and (3) because an ordinance seldom accomplishes a single objective or has a single effect, it is always necessary to take account of all that an ordinance does as well as all it is intended to do. What is always and ultimately at issue is the ordinance itself, not in the abstract, but as it affects particular people in specific ways.

Ordinances do not ordinarily bear labels which clearly identify them as health measures, safety measures, or measures intended to promote the general welfare. Ordinances deal with particular problems and regulate in terms of specific directives or prohibitions: land within a given zone may be used for residential purposes only for single family dwellings; each home must be on a lot not less than one acre in area. An ordinance may be intended to accomplish specific goals, but those goals are not always clear from a reading of the ordinance or its legislative history. For example, why the imposition of minimum lot requirements for homes? Most often, then, the objectives of an ordinance can be identified only by examining what its authors purport to achieve and by taking a hard look at the actual or probable effects of the ordinance. Implementation of the regulation may produce a variety of results or effects. These results may be nothing more than a reflection of the intended goals or of other expected consequences without which the basic goals cannot be accomplished. Nevertheless, the ordinance may also produce results which in no way, or only incidentally, reflect the intended goals. Furthermore, these incidental effects may be regarded by society as neutral, as desirable, or as undesirable. For example, an ordinance

intended to prevent intensive urban development may incidentally segregate residents on the basis of income or race.[26] And whenever these incidental results become prevalent or pronounced they ought to obscure the intended or announced objectives or at least raise doubts about whether these results are really "incidental"—doubts which sometimes question the credibility of the promulgators of the regulations. In many instances, it is only these results which afford us any real insight into the objectives of the regulation against which the appropriateness of the exercise of the police power must be tested. For example, a community may create a district in which land is restricted to agricultural uses, ostensibly for the purpose of preserving a vital natural resource. This legislation will also incidentally prohibit urban uses. It may be inappropriate to evalute the ordinance simply in terms

26 Communities frequently elect to prevent intensive urban development by imposing large minimum lot or house size requirements. Large lot and house size requirements eventually translate into expensive housing occupied by those able to afford it. Invariably this precludes the Black homeowner. It should be noted, however, that zoning always evokes some kind of segregation whether it be on the basis of land use, building type or size or otherwise. For a discussion of this, *see* text accompanying notes 78 to 80 *infra*. To some extent the very acceptance of zoning principles dulls our sensitivity to the issue of land use segregation and its various justifications. This is all the more reason to safeguard, by carefully scrutinizing legislative impact, against that kind of segregation which does not square with our constitution nor with the principles and freedoms central to our society. Yet does segregation of housing on the basis of cost, and therefore income, offend these principles? Why regard it as an undesirable consequence of some kinds of zoning? Property values, which reflect the subjective judgment of buyers, do suffer because of proximate heterogeneous development. People who plan to build or buy $100,000 homes dislike having a high-rise apartment for a neighbor or perhaps even a $20,000 home. People will not generally pay $100,000 unless neighboring homes are within the same price range. Ideally society ought to protect, if not effectuate, these preferences and, while making certain that within each community land is allocated for divergent uses, assure that within each district development is essentially homogeneous. The fact remains, however, that absent substantial regional control over the allocation of land uses, or absent a constitutional requirement that the land use plan of each community must satisfy regional needs, land has been commonly allocated for expensive homes on large lots not only without provision of an adequate mix of housing types within the community, but also without regard to the actual regional needs for expensive and inexpensive housing. Minimum lot and house size requirements have been adopted nearly always in the light of an increasing and immediate need for moderately priced housing; a need which surpasses the demand for expensive housing, and a need for which there is seldom adequate provision. *See, e.g.*, Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959); notes 110-111 *infra*. That until effective regional controls which serve these needs are imposed, experience has taught us that communities, if left to their own devices, will not allocate sufficient land to satisfy the demand for inexpensive housing. This problem can only become worse if communities are permitted to continue their exclusion of low-cost residential development. Only by finding these measures unlawful can one expect to reach regional solutions. For a discussion of some of the problems raised by exclusionary zoning, see Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection & The Indigent*, 21 STAN. L. REV. 767 (1969).

of the explicit goal. This is especially true when the prevailing market for agricultural use is slight and the ordinance is not accompanied by incentives to encourage agricultural uses.[27] When these circumstances obtain, goals associated with the prevention of urban development should become both visible and primary: it is against these goals that the police power must be measured. Furthermore, even when an ordinance makes abundantly clear the purpose for which the police power is being exercised, in assaying its goals there is substantial reason for relying as heavily upon the results and the effects of the regulation as on its stated purposes or legislative history. To take the extreme case, suppose a legislative body avowedly sets out to regulate the use of specific building materials in the interest of public safety. Suppose, however, that the requirements imposed by the ordinance bear no reasonable relation to the public safety and that they add significantly to the costs of construction. Should not control of minimum housing costs be recognized as the objective of the ordinance and should not the propriety of the ordinance be adjudged on this basis? What is now suggested is that an exercise of the police power should be judged on the basis of all that it does and not simply on the basis of its purported objectives. As the ultimate arbiter—and therefore explicator—of legislative goals, courts must consider the full impact of an ordinance in accomplishing what it purports to do. Indeed, when measuring the appropriateness of regulatory objectives against definitional limitations of the police power, consequences should be of primary concern.

That a single regulation may produce a variety of effects, some or all of which the legislative body may have intended to accomplish, is

27. Ordinances which zone for agricultural uses cannot of course compel the landowner to devote his land to agricultural purposes. The landowner may always elect not to use his land, or if other related uses are allowed, such as low density residential housing, to develop his land for these other purposes. If the end sought is actual agricultural use, incentives as well as prohibitions are usually required. On occasion states have been able to accomplish this without the use of extensive restriction but rather by the use of incentives which encourage the landowner to commit voluntarily his land to agricultural use. Frequently this is achieved by procuring the consent of property owners to submit their land to agricultural regulation in return for stabilized assessed valuations. Though these measures do not prevent the landowner who has not greenbelted his property, by voluntarily restricting it to agricultural uses, from subdividing his land or selling it to commercial users, they have achieved some success because they have been largely able to immunize the greenbelted land from increased tax assessments based upon speculative developmental values often precipitated by nearby residential or industrial development. *See* Wershow, *Agricultural Zoning in Florida—Its Implications and Problems*, 13 U. FLA. L. REV. 479 (1960); Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning*, 12 STAN. L. REV. 638 (1960).

a reality that must be reckoned with. This is obvious unless we are willing to concede that the presence of a single goal, acknowledged to be generally within the ambit of the police power, is all that is needed to justify a specific exercise of the police power. The fact is that some courts have been, and all courts ought to be, aroused by the presence of those concomitant effects which conflict with our notions of what regulation ought to be accomplishing. The specific land use control under consideration in this article, minimum lot size zoning, aptly illustrates the multi-goal, multi-effect phenomenon.

Minimum lot size requirements have been adopted for many reasons, at least if we accept what courts say they are intended to do and what planners say they actually accomplish. Lot size requirements have been generally described as density controls.[28] These requirements do affect population density, but this seldom is an end in itself. Density control is most often the method by which many related zoning objectives may be accomplished. For example, the very first minimum lot size ordinance which was approved was upheld as an exercise of the police power in promoting public health and safety;[29] and even today courts

---

28 Though minimum lot size requirements do in fact induce low density development, in theory they provide no assurance that this will be so. These requirements do not prohibit people from building enormous homes which occupy nearly all of the lot nor in occupying the homes that are built with large families. Only regulations which control the bulk of homes in relation to lot size or set minimum requirements in terms of living space per person guarantee that development will be low density.

29 *See* Simon v. Needham, 311 Mass. 560, 563-64, 42 N.E.2d 516, 518 (1942).

> The advantages enjoyed by those living in one-family dwellings located upon an acre lot might be thought to exceed those possessed by persons living upon a lot of ten thousand square feet. More freedom from noise and traffic might result. The danger from fire from outside sources might be reduced. A better opportunity for rest and relaxation might be afforded. Greater facilities for children to play on the premises and not in the streets would be available. . . . There may be a difference of opinion as to the real advantages that will accrue from the larger lots and whether they are such as to lead one to the conclusion that the adoption of the acre area will result in a real and genuine enhancement of the public interests. It seems to us that a belief that such a result may be realized in this instance is not unreasonable. . . . If the question is fairly debatable we cannot substitute our judgment for that of the citizens who voted in favor of the amendment, and, whatever our personal opinions may be as the wisdom of the amendment, we cannot pronounce the measure invalid.

These, then, were the reasons the court gave in upholding the lot size requirement; reasons having to do with health and safety. However, it appeared that these were not the reasons behind the planning board's recommendation that the ordinance be adopted. The board warned the town meeting that tax rates would go up if low cost housing was allowed, principally because such housing requires greater and therefore more costly municipal services. The court agreed with the landowner that the restriction - a minimum lot size requirement of one acre—could not be

uphold lot size requirements on this same basis.[30] It is, of course, true that this measure does operate "to lessen congestion in the streets; to secure safety from fire, panic and other dangers; . . . to provide adequate light and air; to prevent the overcrowding of land; to avoid the undue concentration of population."[31] More specifically, the capacity of a community to cope with problems of topography, conditions of the soil, sewage disposal, water supply, adequacy of existing and planned recreational facilities, and police and fire protection, all bearing some relation to the public health and safety, may be affected by population density.[32] Lots of people may mean lots of problems. Minimum lot size requirements, especially the very largest, do diminish population density and, because of this, many communities have looked to this particular kind of control as a solution to these problems.

Most minimum lot size ordinances have as their ultimate objective the temporary or permanent exclusion of intensive residential

---

justified on this basis. Though it may be a factor incidentally involved in the adoption of a zoning ordinance, it may not serve as its principal justification.

> A zoning by-law cannot be adopted for the purpose of setting up a barrier against the influx of thrifty and respectable citizens who desire to live there and who are able and willing to erect homes upon lots upon which fair and reasonable restrictions have been imposed nor for the purpose of protecting the large estates that are already located in the district. . . . We assume in favor of the petitioner that a zoning by-law cannot be used primarily as a device, to maintain a low tax rate.

Id. at 565-66, 42 N.E.2d at 519.

In spite of the board's recommendation—that one-acre lot requirements were needed to avert low-cost housing development and increased tax rates—and in spite of the court's rejection of this reason as a proper objective of zoning, the court upheld the ordinance.

> It cannot be assumed that the voters in following the recommendations of the board were activated by the reasons mentioned by the board. . . . These reasons dealt with merely one phase of a subject under discussion at the town meeting. We do not know what other considerations were advanced for the passage of the amendment. The citizens of the town were undoubtedly familiar with the locality and with all the material factors involved in the necessity, character and degree of regulation that should be adopted in the public interest. The action of the voters is not to be invalidated simply because someone presented a reason that was unsound or insufficient in law to support the conclusion for which it was urged.

Id. at 519.

30. *See* Demars v. Zoning Commission, 142 Conn. 580, 115 A.2d 653 (1955); Padover v. Township of Farmington, 374 Mich. 622, 132 N.W.2d 687 (1965); Clary v. Borough of Eatontown, 41 N.J. Super. 47, 124 A.2d 54 (1956).

31. *See* Standard State Zoning Enabling Act, § 3, *supra* note 25.

32. More people living in modest homes on small lots generate more traffic than would a less densely populated area. Increased traffic frequently requires wider if not new streets. More people increases the likelihood of crime and fire and this requires greater police and fire protection. High density residential development in a community with on-site water supply and sewage disposal systems requires installation of public facilities if the public health and safety is to be preserved.

development[33] but for reasons difficult to justify as a public health or safety measure.[34] Though it is exceedingly difficult in practice to discern the erection of temporary barriers from permanent ones,[35] the two will be discussed separately simply because their underlying reasons may be quite different.

The legislative abolition of intensive urban development—the attempt to cast an immutable mold or image for community growth reflecting its values and ideals by holding down population density—has been motivated by several distinct but definitely related objectives. To begin with, a community may wish to create a place to live in which the individual home owner's desire for space and privacy is satisfied: a homesite surrounded by trees which affords space sufficient to engage in a wide range of activities. It may also wish to retain its physical or aesthetic character which is most often rural or small town in appearance. Very large lot requirements may accomplish this either by effectively closing the community's doors and sending new development elsewhere or by affording the community a bargaining position which allows it to accept newcomers on terms it

33 *See* AM. SOC'Y OF PLANNING OFFICIALS, NEW DIRECTIONS IN CONNECTICUT PLANNING LEGISLATION: A STUDY OF CONNECTICUT PLANNING, ZONING & RELATED STATUTES, 195-99 (1967). *See also* Schmandt, *Municipal Control of Urban Expansion*, 29 FORDHAM L. REV. 637, 651-656 (1961).

34. *See* text accompanying notes 53 to 58 and 79 to 86, *infra*. For a discussion of minimum house size requirements and their relation to the public health and safety, *see* Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1060-62 (1953); Haar, *Wayne Township Zoning for Whom?—In Brief Reply*, 67 HARV. L. REV. 986, 987-90 (1954).

35 *See* AM. SOC'Y OF PLANNING OFFICIALS, *supra* note 33 at 196. In only one instance, did the authors of this report encounter a situation in which it was clear that the exclusion of high density housing was only temporary. In that case, one-acre lot requirements were imposed until the community extended its sewer and water lines across a river to the area subject to the regulation. Extension of these utilities was to be completed within five years. Upon completion there was a definite plan to rezone for higher density residential development. Such a plan is not common. Unless an ordinance expressly provides for relaxation of its minimum requirements under specific circumstances, one can only assume that the barrier is permanent or at least long range. If a community zones substantial areas, not as yet developed, for uses for which there is no current or foreseeable market, one can only conjecture but never be certain that the community will rezone at some later date if the pressure for other uses becomes great enough. For examples of ordinances which appear to create temporary barriers only—or perhaps no barriers at all—by the use of expressly built-in procedures for change, such as amendments, variances, and special exceptions, *see* Kotrich v. County of DuPage, 19 Ill.2d 181, 166 N.E.2d 601 (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 DuPage v. Henderson, 402 Ill. 179, 83 N.E.2d 720 (1949); Josephs v. Town Bd. of Clarkstown, 24 Misc.2d 366, 198 N.Y.S.2d 695 (Sup. Ct. 1960). *See also* Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370, 396.

chooses for itself.[36] This latter practice is achieved by imposing lot requirements large enough to make development uneconomical and by offering to reduce these requirements in return for a developer's agreement to build according to community specifications. This, however, is not the only kind of homogeneity which a community may wish to preserve or create. Low density zoning, for whatever purpose, means more land, higher costs, and more expensive homes inhabited by people who can afford to buy them. Whether intended or not—and indeed if it is intended it is seldom articulated or acknowledged—large minimum lot size requirements produce a community which has a homogeneous economic character or which segregates and stratifies new development on the basis of housing costs and, therefore, along economic lines.[37] Though wealth and skin color do not bear a one to one relationship, there is a clear correlation. Ultimately, therefore, this commonly translates into an effective exclusion of Negroes, or, at least, into racial segregation within the community.[38]

A community may also wish to prevent high density urban development permanently for economic reasons, principally the savings of taxes and the preservation or enhancement of existing property values. By setting lot size requirements high enough, a community may be able to avoid completely, or at least minimize, the capital outlay for public facilities and services required for urban living. Low density regulation means fewer people who require fewer schools, parks, and police. Lot sizes sufficient to support private on-site sanitation and water facilities obviate the need for public sanitation and water supply. Minimal public facilities and services require less in taxes, which often means higher property values.

The economic reasoning most frequently advanced in support of low density zoning is often described as the "cost-revenue" argument.[39]

36. AM. SOC'Y OF PLANNING OFFICIALS, *supra* note 33, at 198.

37. "The present Ordinance (which sets minimum lot size requirements) is obviously and intentionally intended to exclude from this area the poor and medium-income people." Dissent of Justice Bell, *supra* note 12, at 95. *See* note 26, *supra.*

38. Racial homogeneity may be accomplished not only by pricing the product beyond the range of the Black, but also by setting obstacles which allow the community to select only the "safe developer." *See* AM. SOC'Y OF PLANNING OFFICIALS, *supra* note 33, at 198.

39. Indeed, this argument served as the basis for the planning board's recommendation to the Town of Needham, *supra* note 29. *See* Barnes & Raymond, *The Fiscal Approach to Land Use Planning*, 20-21; J. AM. INST. PLANNERS 71 (1954-1955). For a discussion of the cost-revenue approach to zoning, examples of its use in planning community development and citations to studies which analyze its use, efficacy and validity, *see* Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507, 514-18 (1964).

That argument assumes that one can isolate the costs of public services attributable to every land use. It also assumes that this same kind of analysis can be made of the public revenue generated by each land use. Assuming that the level of services a particular landowner receives is not absolutely governed by the amount of taxes he pays, a comparison of the costs and revenues attributable to any tract of land would suggest that some kinds of development cost more to serve than is received in real property taxes[40] while others cost less. For example, it is said that industrial and commercial uses contribute more than they require while the opposite is true of most single family residential development.[41] The consequence of high density, single family residential development is either the imposition of a greater tax burden on the already established community or the lowering of the quality of existing public services such as schools. In either case deficit development causes a reduction in the value of pre-existent homes. Accordingly, a community which wishes to preserve its tax rate, quality of services, and property values commonly incorporates predetermined cost-revenue priorities into its land use plan. And so long as the community does not wish to remain exclusively a bedroom suburb, commercial and light industrial uses will appear at the top of the scale, while high density single family residential uses will appear at the bottom. Large lot requirements are used, then, to effectuate these priorities either by effectively preventing any new residential development when there is no market for expensive homes or by only allowing that kind of residential development which supposedly incurs the fewest costs and returns the greatest revenue.

The reasons for creating temporary obstacles to high density residential development are in the main related to the same economic factors which underlie the erection of permanent barriers. Large lot zoning has been used to check the haphazard development of subdivisions which impose unusually high costs on the community and to control carefully the timing and location of high density residential development consistent with the community's capacity to provide

40 These cost-revenue studies usually limit their consideration of revenue to taxes derived from real property. See Barnes & Raymond, *supra* note 39, at 73 and *Snob Zoning*, *supra* note 39, at 515-18. Herein lies one of the major flaws of this argument. *See* text accompanying notes 99 to 105, *infra*.

41 See Schmandt, *supra* note 33, at 651. Also Barnes & Raymond, *supra* note 39, and *Snob Zoning*, *supra* note 39. For a study which seriously questions this conclusion, *see* MACE & WICKER, DO SINGLE-FAMILY HOMES PAY THEIR WAY? (Urban Land Institute Research Monograph No. 15 1968).

public facilities and services at a reasonable tax rate.[42] Though the general impact of the regulation is exclusion, its objective is one of location and timing. This is accomplished by prohibiting particular kinds of development at specific locations for a period of time. Prevention is achieved in each instance by setting the size requirement in excess of the demand for residential land use in the area.

The most obvious consequence of indiscriminate urbanization is developmental sprawl and leapfrogging, a recurring phenomenon which squanders away limited land resources, inflates the costs of supplying public services and facilities to new development and furthers land speculation.[43] Development costs are a function of the price of raw land

---

42. For examples of situations in which zoning has been used for this purpose, *see* Josephs v. Town Bd. of Clarkstown, 24 Misc. 2d 366, 198 N.Y.S.2d 695 (Sup. Ct. 1960); Board of Supervisors v. Caper, 200 Va. 653, 107 S.E.2d 390 (1959). Though much has been written about this practice—*see, e.g.*, Schmandt, *supra* note 33, and Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298 (1955)—there is scant evidence of its popular use by local communities. In the main, this is because of the problem of distinguishing between permanent and temporary barriers. *See* note 35, *supra*. Therefore, it is difficult to determine the frequency in which communities engage in this practice.

The use of large lot requirements is not the only method for preventing excessive sprawl and premature subdivision and for controlling the timing and location of new development.

> This objective . . . has been sought in various ways, most of them designed to encourage growth around existing settlements before opening additional land to intensive use. These methods include: (1) public purchase of outlying land (or development rights thereto) to be placed on the market as needs dictate; (2) limiting the number of building permits that are issued each year; (3) demarcation of an urban service district and zoning of all land 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, *supra* note 33, at 652

43. Urban sprawl is a term widely used these days to describe the expansion of cities out and out and out. Typically this outward growth has radiated along major transportation routes, with the interstitial areas filling in after the land near highways and suburban railways has been developed. But in 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 service 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 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

and the cost of land is usually a function of its proximity to the foci of the urban area. The lure of cheaper land and larger profits drives new development farther and farther away from the urban core. The market is generally such that the concentration of subdivisions is discouraged; competition for vacant land adjacent or proximate to new development is avoided. Rather than capitulate to the demands of the owner of neighboring vacant land which might very well be exorbitant—an amount which one author has described as a counterfeit element[44]—the builder must search for attractive tracts elsewhere while leapfrogging over existing development. Though leapfrogging would appear to have merit in that the builder avoids paying an inflated price for land which would otherwise increase the ultimate cost of housing, the saving is misleading, for in fact the long-range and social cost of sprawl is extraordinary. Vacant land which has been bypassed is often so irregular in shape and terrain or is of such a size that it is not conducive to productive residential development. It may remain undeveloped for some time. As a result the durability and flexibility of a community's land use plan is often strained by repeated proposals by landowners for changes to other kinds of urban uses because the tracts can no longer economically be devoted to the permitted single family residential use. Most important of all, however, it costs a community much more to service development which is not concentrated.[45] The objectives then of the temporary use of minimum

---

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 should 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.

This basic problem of coping with scattered metropolitan growth is commonplace in the United States. . . . [O]ne basic cure . . . is this: All development should be directed into logical service areas and should be prohibited from scattering haphazardly.

Hallman, *Growth Control: A Proposal for Handling Scattered Metropolitan Development*, 33 LAND ECONOMICS 80, 81 (1957).

44. RAWSON, PROPERTY TAXATION AND URBAN DEVELOPMENT 27 (Urban Land Institute, Research Monograph No. 4 1961).

45 A builder's reason for leap-frogging is usually to avoid paying an inflated price for close-in land, and insofar as the cost of land affects the price of housing, this practice would have merit. However, the cost of extending utilities to the outlying development—which must include sewers, water lines, and streets large enough to serve the intervening area when that develops—increases the public costs enormously, an increase that must be reflected in taxes. A most important public cost is for schools. Unless the project is large enough to support its own school facilities, the isolated outlying subdivision

lot size requirements are to eliminate sprawl by directing development elsewhere and to postpone high density development in the area zoned for low density until it can accommodate it. In short, it controls the timing and location of high density development to minimize community costs, maximize community revenue and avoid tax increases.[46]

The diverse uses of a single land use control are thus evident. Though a specific minimum lot size requirement may be used to accomplish many of the foregoing goals, it cannot be utilized to achieve all of them simultaneously.[47] This complicates the problem of assaying the legiti-

---

creates a difficult and costly situation for the local school system. Even more important from the viewpoint of the moderate-income family is the added locational cost that results in a "leap-frog" subdivision.

AM. SOC'Y OF PLANNING OFFICIALS, *supra* note 33, at 196.

46. Schmandt, *supra* note 33, at 651-53, gives two related reasons for controlling the timing and location of new development:

> These efforts, while differing from community to community, seek to accomplish essentially two objectives in addition to the over-all goal of providing a pleasant and livable environment: the prevention of excessive sprawl and premature land subdivision, and the assurance of a balanced economic base that will permit the effective operation of local government at a reasonable tax rate. . . .
>
> All of these devices, by establishing a pattern of orderly progression outward from the service area of the city, represent efforts to prevent scattered leapfrog subdividing. Such a pattern minimizes sprawl, places less strain upon community facilities and services, and permits a more economical and efficient extension of streets and utilities, thereby reducing long-term municipal expenses.
>
> The second and closely related objective—a balanced economic base—also contemplates use of the above controls. Communities seeking this objective usually rest their plan of development on three major premises: (1) necessity of maintaining a practical balance between the residential and nonresidential elements of the community composition; (2) responsibility to provide for various densities in residential districts so that no economic class will be excluded because of uniformly high zoning restrictions; and (3) importance of preventing disproportionate low-cost residential expansion beyond the reasonable capacity of the supporting tax base.

47. All of these objectives are predicated on the exclusion—at least for a time—of intensive residential development. If this is achieved, each of the enumerated objectives is in some sense accomplished. Nevertheless, it should be observed that the fact of exclusion satisfies these objectives differently and in varying degrees. If the legislative objection is the preservation of a homogeneous community—the preservation of property values, community appearance and life-style, as well as the avoidance of urban utilities and services—its goals are satisfied by allowing only that development which is consistent with that which is already there. If the legislative objective has something to do with timing and location—the prevention of developmental sprawl, conservation of resources, and the orderly provision of public facilities and services—its goals are best achieved when all development is effectively prevented in the area zoned for low density. Sporadic development, even if low density, makes it more difficult to relax low density requirements when the time comes in which the community can conveniently service high density development at this location. Consequently, some communities zone for low density to allow and encourage within them only that development which can support on-site sewage disposal and

macy of its objectives. It also places an even greater premium on the importance of examining the effects of the legislation, against which the propriety of the exercise of the police power must be judged.

B. What Kinds of Objectives Have Courts Found to be Within the Scope of the Police Power?

At this point, it becomes necessary to summarize briefly the kinds of criteria courts have established in evaluating the appropriateness of the goals of specific legislation as well as the kinds of objectives courts have found comprehended by the police power. The definitional limitation that the police power may be exercised on behalf of the public health, safety, morals or general welfare has served as the focal point of most judicial inquiry. It is in terms of this definition that the following summary will be made.

To begin with, the goal must be "public," that is, it must reasonably advance the interests and welfare of society. For example, the police power ought not be exercised for the exclusive personal benefit of a mayor or his city council. Surely, an ordinance would be unconstitutional which zones an area proximate to the mayor's home for non-developmental use or imposes extraordinarily large minimum lot size requirements in order to preserve the rural appearamce and value of the mayor's home. That all would agree that the goal must be "public" can hardly be debated, but it is difficult in many instances to find a consensus about whether the objectives of specific legislation are public. Once one admits that an ordinance may benefit only a segment of society, the issue of whether the measure may be regarded as public is inescapable. Perhaps this explains why many courts and commentators have been troubled by legislation which has as its principal purpose the regulation of aesthetics or the preservation or enhancement of property values. The question they must find perplexing is whose aesthetics, whose property values? Indeed this is the context in which the public benefit question is apt to arise today. Seldom are the lines drawn as clearly as they were in the example involving the mayor's home.

Originally, all regulation of land use was intended primarily to serve the public health and safety.[48] Even today legislative bodies and courts

water supply, while other communities may use this same device to produce a heterogeneous community serviced entirely by public facilities but at a reasonable tax rate.

48. For a discussion of the history of land use regulation in the United States, with particular emphasis on zoning, and its development from the common law doctrine of private and public

make some attempt at justifying land use controls on the basis of public health or safety.[49] This legislation may promote the public health and safety in two related ways: by protecting the public from dangers which may arise because of the way in which a landowner uses his land; and by the imposition of internal standards intended to protect occupants of land against the dangers which may arise from their use of their own land.[50] For example, the public health and safety has been protected by segregating development which may present special hazards as to fire, noise, disease, smoke, fumes, rodents, insects, traffic and other kinds of tangible or physical interference.[51] It has also been promoted by the use of building codes, sanitation codes, setback yard, and area regulations intended to guarantee to the user of land minimum safeguards against the same and other health and safety hazards.[52] At one time or another bulk and density restrictions as well as regulation which excludes non-residential development, have been upheld because they protect either the health and safety of the neighboring public or the users of land which is subject to the restriction.[53]

Most recent zoning ordinances still purport to protect the neighboring public or the user of the land himself. Nevertheless, many specific regulations cannot be justified solely in terms of public health and safety.[54] This is true either because the legislative purpose bears no reasonable relation to the public health and safety, or because the standard of health and safety promoted exceeds what reasonable men would agree is essential, or exceeds what is regarded as satisfactory in other parts of the community. To be sure it is possible to argue that to treat all notions of health and safety in terms of accepted standards is foolishness. There are many modes of life and some are more healthful than others, at least in the sense that certain kinds of hazards

nuisance, *see* B. POOLEY, PLANNING AND ZONING IN THE UNITED STATES, 40-50 (1961). *See also* 1 J. METZENBAUM, LAW OF ZONING 1-68 (2d ed. 1955).

49. See note 30, *supra*. *See also* Lionshead Lake, Inc. v. Township of Wayne, 10 N.J. 165, 89 A.2d 693 (1952), *appeal dismissed*, 344 U.S. 919 (1953) and the discussion of this case by Haar, *supra* note 34.

50. *See* Note, *Zoning: Permissible Purposes*, 50 COLUM. L. REV. 202, 211 (1950).

51. *Id.* at 212, for selected cases upholding ordinances on these bases.

52. *Id.* at 214-215.

53. See cases cited, *id.*, at 202-211.

54. *See* Haar, *supra* note 34. See also Dissent of Justice Bell, *supra* note 12; Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954); B. POOLEY, PLANNING AND ZONING IN THE UNITED STATES 82-100 (1961); Cunningham, *Land Use Control—The State and Local Programs*, 50 IOWA L. REV. 367, 385-390 (1965).

to life are diminished or eliminated by particular styles of living. The dangers presented by city smog and traffic do not generally prevail in rural communities. Residential living in homes on spacious lots provides advantages and obviates hazards associated with apartment living. Nevertheless, society does not forbid urban and apartment living. Any attempt to establish minimum standards of health and safety must necessarily reflect community values regarding the kind of existence it wishes to achieve. To say that a community which zones itself exclusively for single family residential uses has adopted a regulation which is not predicated upon matters of health and safety really says nothing more than that the values embodied in the standards adopted by the community are at variance with those values embraced by other communities or the person making such comment; that is, that there are those who would argue that the kind of healthful existence achieved by single family residences is one to which society ought not to commit itself by prohibiting all the other kinds of development.

What should be clear is that this argument says and ignores too much. Quite apart from problems of equal protection which are apt to arise anytime a community permits more than one kind of residential development which achieve varying degrees of health and safety protection,[55] this argument fails to recognize that land resources do not

55. Surely the most obvious and frequent argument to be made by a property owner whose land is prohibited from uses allowed elsewhere -if not nearby—in the community, is that the ordinance is arbitrary and discriminatory, that there is no reasonable basis for classifying his land differently from that of his neighbor This is especially true of the cases which have litigated the legality of low density regulation promulgated by communities which simultaneously allow higher density development at other locations. *See* Bilbar Const. Co. v. Easttown Twp. Board of Adj., 393 Pa 62, 141 A.2d 851 (1958). The use of multiple standards governing the construction of single family homes within the same community--absent special conditions, such as topography, which raise peculiar problems of health and safety—is bound to produce attacks based upon unfairness and denial of equal protection. At least one court, however, has gone further and concluded that the presence of multiple standards may make it impossible to justify the ordinance on the basis of health and safety. In Appeal of Medinger, 377 Pa. 217, 104 A.2d 118 (1954), the court refused to uphold an ordinance which required 1800 feet of minimum habitable floor area in one district but allowed as little as 1000 feet in two other districts, and directed the issuance of a building permit allowing the petitioners to erect a residence of 1125 square feet in the first district.

> It does not follow that a minimum scale of habitable floor space in a home may not have a reasonable, direct and proper relation to the health and morals, and possibly, to the safety of the occupants of the house or of the community in general, because it is well known that an overcrowding of persons or of members of a large family in a tiny house or in a small room or rooms might undoubtedly have a direct effect on their health and morals But if a 1000-minimum habitable square feet is reasonable and proper for every

exist in an unlimited supply. Each time a community insists upon a single rather than a multiple family dwelling, or each time it insists upon a minimum lot size of one acre rather than 10,000 square feet, it affects the rate at which the supply of land resources is exhausted by limiting the number of people who can occupy a given area. Furthermore, each time a community lowers its density it raises the cost of housing within the community or at least within the region in which the community is located. What must be recognized is that the consumption of land resources and housing costs are greatly affected by health and safety standards. And that these standards, these statements of community values and aspirations, cannot or should not be adopted without regard to how many need housing today, or within the reasonably near future, and what can they afford to pay. In short, there is no justification for legislating utopian standards of health and safety when it is apparent that these are standards which cannot be made available to most of society.[56] The adoption of excessive standards today may make it nearly impossible to achieve far less desirable standards tomorrow. Health and safety standards must be based upon a realistic appraisal of what is possible for all or at least most of us, and each time these standards are not, we must look for other explanations. Additionally, but just as important, is that somehow there must be a point beyond which society ought not to tell us how to live. Ideally, we should work only a certain number of hours a week, obtain a certain number of hours of rest per night, subscribe

---

home in one district and does not adversely affect the health, morals or safety of the occupants of such a house, 1125 square feet of habitable floor area in a nearby house cannot adversely affect the health, morals or safety of that home or of that community.

Id. at 225, 104 A.2d at 122.

56. One commentator has concluded: "Rising land, labor, and materials costs are pricing home ownership out of the view of most Americans." C. NOREN, ARGUMENTS FOR SMALLER LOT ZONING 2 (1968). He attributes these increased costs in part to zoning trends which have occurred over the past 20 years; trends which require "ever-higher minimum local standards for lot width, lot area per dwelling, and increased construction specifications for roads and other subdivision facilities." *Id.* at 1.

For whatever reasons, the private housing industry has not and is not satisfying the nationwide need for low cost housing.

> This disparity between actual housing production and recognizing total needs reflects primarily the fact that new housing construction costs plus related costs for improved land can be absorbed at market financing rates only by the upper half of the income ranges of the national population. Thus, the lower income range of the population, where housing needs are the most acute, is generally outside the market which can be served by the private housing industry in so far as new dwellings are concerned.

Keith, *An Assessment of National Housing Needs*, 32 LAW & CONTEMP. PROB. 209, 212 (1967).

to a balanced diet, and obtain medical check-ups periodically. Yet with respect to these matters society has hesitated to legislate its ideals. It has gone so far as to make much of this possible to those who cannot afford it, but it has done little by way of coercion.[57] Surely, then if the great bulk of our population finds urban life tolerable if not desirable, which inevitably means a willingness to live upward and in close, there is good reason to be suspicious of legislation which requires one to live downward and out for reasons of health and safety. The aversion is not simply to a curtailment of land use options but to life style options as well. And finally, is there any case for health and safety when a community zones for low density yet sanctions intensive residential development elsewhere within its borders—development which may present greater hazards to life? How can a community justify, on health and safety grounds, an ordinance which segregates apartment houses from other kinds of residences, provides for a district to include single family residences only, or imposes minimum lot size requirements as great as five acres? As long as multi-family dwellings are sanctioned at some location within the community, it would seem that their segregation from single family residences must be primarily for purposes other than health and safety unless it is assumed that people who reside in multi-family dwellings lead a life which is substandard as to health and safety. Surely the police power goes no further than to authorize a single minimum standard.

In spite of all that has just been said, courts have continued to appraise much of the new land use regulation in terms of health and safety criteria, probably because of the virtually unbroken precedent of judicial approbation in cases in which land use controls are found to serve in some way the public health and safety. Nevertheless, these ordinances ought properly to be considered in the light of whatever meaning is to be given to the last and broadest of the definitional goals of the police power, the "general welfare." The line between excessive and appropriate standards of health and safety is a fine one. When land use controls begin to pervade the entire fabric of taste and discretion, when they begin to allocate and regulate vital resources without regard to community, regional or societal needs, surely then the legislative

57 Though society has restricted the number of hours that children may work, has prevented employers from insisting that their employees work seven days a week, has required innoculation of school children against highly communicable diseases, and has flouridated public water, it has not compelled us to make use of public hospitals or medical facilities, nor to take chest X-rays though they are free, nor to make use of school lunch programs though they are subsidized.

objective has departed the arena of health and safety and shaded into the domain of general welfare. It is, then, within the crucible of the general welfare that we must ultimately test our notions of what goals, what values, what ideals should society be permitted to accomplish.

Specifically, what kinds of ordinances have at best an uneasy basis in the public health and safety and must, therefore, find other grounds for their support? Indeed what justification is there for ordinances which: condition the issuance of a building permit upon a finding of fact by a local building board that "the exterior architectural appeal and functional plan of the proposed structure will, when erected, not be so at variance with either the exterior architectural appeal and functional plan of the structures already constructed or in the course of construction in the immediate neighborhood of the character of the applicable district established by [the] ordinance . . . as to cause a substantial depreciation in the property values of said neighborhood within said applicable district;"[58] prohibit flat roofs, or prohibit clotheslines in front and side yards;[59] exclude garden apartments, or even two-family detached houses, by authorizing only single-family housing in the district;[60] require housing to be built on a lot of one-half acre or more;[61] require that buildings constructed exceed a certain cost;[62] impose minimum requirements as to the height or number of stories of new buildings;[63] prescribe minimum floor area requirements, particularly with respect to one-story homes;[64] or which provide that "in every new instance the completed appearance of every new building or structure must substantially equal that of the adjacent buildings or structures in said subdivision in appearance, square foot area and height?"[65] What all of these ordinances have in common is that each is intended to prevent that use of land which neighboring

58. *See* State *ex rel.* Saveland Park Holding Corp. v. Wieland, 269 Wis. 262, 265, 69 N.W.2d 217 (1955) (ordinance upheld).

59. *See* Hankins v. Borough of Rockleigh, 55 N.J. Super. 132, 150 A.2d 63 (App. Div. 1959) (prohibiting flat roofs—invalid); People v. Stover, 12 N.Y.S.2d 462, 191 N.E.2d 272, *appeal dismissed*, 375 U.S. 42 (1963) (prohibiting clotheslines in yards—upheld).

60. *See Zoning: Permissible Purposes*, *supra* note 50 at 209-11. *See also* Cunningham, *supra* note 54 at 385.

61. *See* Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942). *See also* Cunningham, *supra* note 54 at 388-90 and cases cited therein—particularly those cited at 389, n. 110.

62. *See Zoning: Permissible Purposes*, *supra* note 50 at 204-07, and in particular, cases cited at 205, n. 33.

63. *See Zoning: Permissible Purposes*, *supra*, note 50 at 205.

64. *See* Appeal of Medinger, *supra* note 54. *See also Zoning: Permissible Purposes*, *supra* note 50 at 205-06.

65. *See* West Palm Beach v. State *ex rel.* Duffey, 158 Fla. 863, 864, 30 So.2d 491, 492 (1947).

landowners—or perhaps the entire community—might find burdensome or offensive. In a sense, the owners of all land, developed and undeveloped, within the restricted area achieve substantially the same benefits from the regulation. If a two-acre minimum lot requirement is intended to hold down property taxes, this restriction will inure to the benefit of the prospective home buyer just as it does to his established neighbors. On occasion the prospective landowner will achieve benefits specially intended for his protection, for example, where the community does not as yet have public sewerage and water facilities. Nevertheless, many of the minimum lot size requirements which have been upheld exceed those recognized as essential to the use of safe on-site water and sewerage facilities.[66]

The specific burdens which these ordinances are intended to check are interferences not nearly as physical or clearly grounded in the public health and safety as the hazards comprehended by early zoning. Industry was kept out of the backyards of homes because of the noise, traffic, congestion, soot and smoke which are so often associated with industrial uses, while garden apartments are today kept out of the backyards of single-family dwellings probably for other kinds of reasons, principally because of the costs these apartments are thought to impose on the surrounding community. These ordinances are concerned with problems of aesthetics, property values, community stability, adequate municipal facilities and services, a balanced tax base, community fiscal policy, and racial and economic homogeneity, nearly all of which have been the object at one time or another of minimum lot size requirements. They attempt to resolve these problems by regulation of new development reflective of community values and aspirations. They achieve their objectives by inducing conformity in

66. In communities which lack a public sewer system—and often lack a public water system as well—it is clear that relatively large lots may be necessary in order to provide a greater area for on-site disposal of sewage by use of septic tanks and to protect the ground water supply from contamination. But such a justification will hardly support lot minimums beyond one acre, even where soil conditions are not conducive to good drainage.

Cunningham, *supra* note 54 at 389. For selected cases upholding lot sizes in excess of one acre, see cases cited *id* at 389, n. 110. *See also* Noren's discussion of minimum standards for any methods of sewage disposal and their relation to lot size, *supra* note 56 at 10-19.

The number of cases upholding lot size requirements in excess of one acre does not provide really any indication of the amount of land which has actually been zoned for this use in comparison to the amount of land zoned for less than one acre. In Connecticut, for example, 60% of all undeveloped land which is zoned for minimum lot sizes is zoned for lot sizes between 40,000 and 80,000 square feet, roughly between one and two acres. *See* AM. SOC'Y OF PLANNING OFFICIALS, *supra* note 33 at 186-87.

land use, building design and appearance, house size, lot size, and cost. Though there are differences which can be drawn among these problems and solutions, what is common to all of them is the preservation of property values within the district or within the community. What is at stake is a community's life style, something which is ultimately reflected in the value of its homes. That which it regards as burdensome or offensive, whether it be the intrusion of blue collar workers, Negroes, homes costing under $20,000 or designed by Frank Lloyd Wright, becomes a real threat to its way of life, crystallizing itself in a loss of property values which its residents have labored so long to create. In a sense this is true even of legislation which is intended to control new development consistent with a community's existing public facilities and services or with its ability to supply new facilities and increased services. When a community regulates the location or tempo of new high density residential development and gives as its reason for doing so that its existing schools, fire department, police department or public sewerage and water facilities are incapable of serving that new development, especially at a particular location, it has elected to regulate not because it is physically impossible to satisfy the needs of new development but because that development cannot by itself support the new or increased facilities and services it incurs at existing tax rates and the community is unwilling to impose upon its residents a higher tax rate to accomplish it. Accordingly, it defers that new development until, if ever, its tax base is large enough to support new deficit development at a satisfactory rate of taxation. Underscoring its decision, then, are the matters of tax base and tax rates, both of which are wedded to property values. Though we may react quite differently and be more receptive to ordinances which set aside land for development which produces more in tax revenue than it adds to public costs, or which regulate the timing and location of deficit development consistent with a plan for balanced community development and efficient and economic expansion of public facilities and services than to ordinances which preclude all development and all people who do not conform to a community's values and goals, one cannot in the final analysis fail to realize that the considerations which underlie both kinds of legislation are remarkably similar.

The Standard State Zoning Enabling Act provides that: "Such regulations shall be made . . . with a view to conserving the value of

buildings . . .,"[67] a provision which appears in most state enabling acts.[68] However, many courts have refused to acknowledge the preservation of property values as a justification for the exercise of the police power, especially if it appears that the conservation of property values is the only reason for its exercise.[69] To be sure, it is possible to relate most of these ordinances to the general welfare in a way which makes them more palatable by underplaying the significance of conserving property values: "[T]hey contribute to the general welfare by promoting a reasonable balance, among economic groups in the community, placing a reasonable limit on the total population which the community must accommodate and enabling the community to expand the necessary public services in an orderly and efficient manner."[70] Nevertheless, one should expect that the judicial uncertainty

67 See Standard State Zoning Enabling Act, § 3, *supra* note 25.

68 Cunningham, *supra* note 54 at 369-72, observes that several states have limited their stated objectives to promoting the public health, safety, morals and general welfare. Though some states have omitted some of the purposes specified in the Standard Act, while others have added to them, few have eliminated the goal which allows the conservation of property values. *See Id.* at 371-72 nn 14-15.

69 *See, e.g.*, Appeal of Medinger, *supra* note 54; Elizabeth Lake Estates v. Township of Waterford, 317 Mich. 359, 26 N.W.2d 788 (1947); Frischkorm Constr. Co. v. Lambert, 315 Mich. 556, 24 N.W.2d 209 (1946); Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387 (1943). *See also* dissent of Justice Bell, *supra* note 12 at 94-96, in which he warns of the dangers of a broad concept of "general welfare" and suggests that the "general welfare" must be considered with and have a substantial relation to the health, safety or morals of the community.

There are many cases which have discussed the legitimacy of an exercise of the police power which has as its primary purposes the saving of community costs and the stabilization of tax rates. Because increases in public costs are reflected in local tax rates and ultimately in decreased property values, the problems of community economics and the preservation of property values are related if not identical. Therefore, cases which appraise the legislative objective of community economics are also relevant to a consideration of the conservation of property values. For a selection of cases which discuss the legitimacy of community economics as a basis for exercise of the police power, see 1 A. RATHKOPF, ZONING AND PLANNING 10-1 to 10-13 (3rd ed. 1969). *See also* National Land and Invest. Co. v. Easttown Twp. Board of Adj., 419 Pa. 504, 215 A.2d 597 (1965), Board of Supervisors v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959); Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516 (1942).

70 Cunningham, *supra* note 54 at 389; *cf.* National Land and Investment Co. v. Easttown Twp. Board of Adj., 419 Pa. 504, 532, 215 A.2d 597, 612 (1965):

> The Township's brief raises . . . the interesting issue of the township's responsibility to those who do not yet live in the township but who are a part, or may become part, of the population expansion of the suburbs. Four-acre zoning represents Easttown's position that it does not desire to accommodate those who are pressing for admittance to the township unless such admittance will not create any additional burdens upon governmental functions and services. The question posed is whether the township can stand in the way of the natural forces which send our growing population into the hitherto undeveloped areas in search of a comfortable place to live. We have concluded not. A zoning ordinance whose primary purpose is to prevent the entrance of newcomers in order to avoid future burdens,

about what is meant by the general welfare[71]—uncertainty as to the kinds of goals other than the public health and safety for which the police power may be exercised—will remain unabated for some time to come, if it is ever resolved. Extensive litigation of the meaning to be attributed to the "general welfare" is inevitable. There is good reason for this. Judicial uncertainty simply reflects popular uneasiness about the kinds of things these exercises of the police power do or are intended to do. There are several reasons why this is so. In most cases neither the ordinance itself, nor even its legislative history, clearly demonstrates, nor does it sometime suggest, that it is intended to strike a balance among economic groups in the community or to enable the community to preserve itself as a pleasant place in which to live by achieving ordered rather than haphazard growth. Often, all that the court has before it is an ordinance which excludes particular kinds of development without any indication that the community is accommodating that kind of development elsewhere, or has made plans to accommodate it in the future. Providing adequate housing for the poor is a most pressing problem today, and clearly the need for low cost housing—specifically and to a large extent deficit high density single-family dwellings—is probably greater than for any other kind of residential development.[72] Not everyone can afford to buy a $40,000 home. The great bulk of our expanding population is entitled to and must find a decent place to live.[73] The core city has proved inadequate. Indeed, every time a community excludes low-cost development, it has resolved its problems of taxes, schools, police protection and the like by shifting them to some other community. And even if the exclusion is temporary, so long as such development must be accommodated somewhere, the community has bought time at the expense of others. True enough, the community which regulates in this fashion has promoted its economic well-being and, indeed, its own general welfare.

---

economic and otherwise, upon the administration of public services and facilities cannot be held valid. Of course, we do not mean to imply that a governmental body may not utilize its zoning power in order to insure that municipal services which the community requires are provided in an orderly and rational manner.

71. "But 'the general welfare,' after five decades, remains intensely undefined as it relates to zoning." Cunningham, *supra*, note 54, at 385.

72. *See* Keith, *An Assessment of National Housing Needs*, 32 LAW AND CONTEMP. PROB. 209 (1967).

73. "[S]ince 1949 it has been the official policy of the United States to achieve eventually a 'decent home and suitable living environment for every American family.' This policy was established by the preamble of the Housing Act of 1949 and has remained the official national goal through succeeding Congresses and presidential administrations." *Id.* at 209.

However, there should be concern anytime the public interest is viewed so parochially. The police power is to be exercised on behalf of the *public* health, safety, morals and general welfare. It is hard to accept that the public which must be served lies only within the geographical boundaries of the governmental body which has chosen to legislate. Additionally, so long as this kind of legislation is apt to stratify residents on the basis of income, and sometimes indirectly race, it must necessarily tempt the line of what society regards as improper.[74] So long as these kinds of undesirable consequences are unavoidable by-products of exclusionary legislation, continued judicial uncertainty is to be expected. Finally, when legislation is not clearly related to accepted norms of health and safety, one can expect our aversion to governmental intrusions—governmental mandates as to how life should be lived—to make itself felt each time a community acts to promote what it has decided is the general welfare. As these intrusions become more and more pervasive, it is inevitable that doubts will be raised about the appropriateness of the basis for the interference—the community statement about what life should be like.

II. THE MATTER OF METHODOLOGY

Section I, *The Matter of Goals*, concentrated on the problems of identifying and evaluating legislative objectives. Though these are problems susceptible to isolated analysis, they are not totally separable from the matter of means or methodology: a study of the impact and efficacy of an exercise of the police power. Section II examines two problem areas: relating the efficacy of legislation in achieving its goals to an evaluation of its legality; and relating the matter of legislative impact to the issue of taking or governmental overreach. Though both areas, especially the first, are difficult to distinguish from many of the matters discussed in Section I, the emphasis in Section II is sufficiently different to warrant independent treatment. Indeed, it would be superficial at best, deceptive at worst, to suggest that the problems of means or method can be fully isolated from the problems of goals. Both are concerned with the matter of legislative impact. Nevertheless, in scrutinizing the methodology of ordinances which cause these effects, every effort will be made to isolate factors which are both distinctive and relevant.[75]

74 *See* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN L REV 767 (1969).

75 For example, are there any special limitations on the use of a particular legislative device

A. Methodology and Goals

Two important propositions about the appropriateness of legislative goals have been set forth and discussed in Section I: that a specific exercise of the police power may have as its purpose, and may accomplish, many objectives; and that these goals are best discerned by studying the impact and effect of specific legislation. What should be clear is that a meaningful analysis of goals cannot be made without regard to the ordinances by which these goals are sought. It is the ordinance itself which provides our greatest insight into all the things that it is intended, to accomplish. This sub-section, *Methodology and Goals*, carries this analysis further. The focus is still on legislative impact, yet this concentration on mechanics and effects comprehends much more than a determination of legislative intent. Ordinances frequently accomplish very little of what they are intended to do. Just as often they produce varied consequences, the appropriateness of which we may reject, or at least question. By examining what an ordinance actually does, we may perceive that it does not accomplish certain objectives and that it accomplishes others, some of which may raise important constitutional questions.[76] Our evaluation of the issue of constitutionality may depend largely upon the appropriateness

to achieve what, in the abstract, may be a perfectly acceptable goal? Surely there ought to be problems with an ordinance intended to prevent horse-stealing which requires the on-sight killing of every horse in the county.

76. Suppose a residential community zones most of its remaining undeveloped land for industrial use only and it does this in order to preserve its current level of public services without having to raise appreciably its tax rates. It hopes to accomplish this by allowing only that new development which produces the largest tax surplus. The community lies directly in the path of urban growth which consists primarily of low and medium cost residential development. This development is unwanted by our hypothetical community because it requires additional schools and greater police and fire protection without creating a tax base large enough to pay for these new facilities and services. This, however, is not true of industrial development. Accordingly, this community amends its zoning ordinance so as to shut off new residential development and to allow for new industry. Unless there is already an existing market for industrial development in the community or unless this zoning is accompanied by other incentives, such as preferential tax treatment or public plant construction with favorable leases to new industry, setting aside land for exclusive industrial use is not apt to attract that development sought by the community. It will, however, succeed in excluding residential development. Apart from the question of the propriety of the goal of municipal economics, *see* note 68 *supra*, the imposition of a zone for exclusive industrial use under these circumstances will at least raise the "taking" question. It may also violate both federal and state constitutions because it discriminates on the basis of race or otherwise denies equal protection of the law, especially if low density residential development is allowed elsewhere in the community. *See* Gruber v. Mayor and Township Comm. of the Township of Raritan, 18 N.J. Super, 118, 172 A.2d 47 (1961), *rev'd*, 73 N.J. Super. 120, 179 A.2d 145, *aff'g reversal*, 39 N.J. 1, 186 A.2d 489 (1962).

of those goals that are attempted, *but it should also depend on how effective the ordinance is in promoting these objectives*. For example, should a court sanction an exercise of the police power intended to accomplish what all would agree is a perfectly acceptable goal, when all indications are that the ordinance is completely ineffective in accomplishing that goal? To be sure it is possible to say that this question is nothing more than an artful restatement of the problems discussed in Section I where it is suggested that an ordinance evokes certain consequences or effects and that these effects are its goals regardless of what the ordinance purports to achieve. It is against these consequences that we must test our notions of what ends the police power may achieve. Accordingly, it can be argued that Section I already accounts for the factor of efficacy. That which is not accomplished should not be regarded as a goal for which the police power has been exercised. Only its real consequences—that which has been accomplished—are objectives which must be tested. However, this argument is much to simplistic. It fails to recognize that the matter of legislative effect is pluralistic and that legislative accomplishment cannot readily be categorized as completely ineffective or effective. Frequently, then, our study of legislative impact does not reveal a predominant objective but a variety of consequences reaching out at different ends. If any of these goals fall within the penumbra of the "public health, safety, morals and general welfare," the question that must always be raised is how effective is the regulation in accomplishing its goals, a question which is especially relevant when an ordinance produces other consequences which we might regard as socially undesirable or perhaps unlawful. The problem raised in this sub-section is not simply with goal identification and evaluation, but with appraising the efficacy and therefore the legitimacy of specific legislation in promoting the public interest. It would seem that this inquiry is warranted every time an exercise of the police power is tested. It is especially appropriate in the case of zoning.

There are undesirable consequences associated with every zoning ordinance. The value of some land is inevitably diminished because the array of options formerly available has been reduced.[77] Because zoning

77 However, this does not mean that the value of all land affected by the ordinance is diminished. Indeed the ordinance may enhance the value of land, especially that land whose use options have already been limited, by development or private agreement, consistent with the restrictions imposed by the public regulation. For example, though a developer of a residential subdivision in an unincorporated and unzoned portion of a county may by private agreement,

classifications are usually drawn along geographical lines, there is always the occasion for unequal treatment of neighbors. The application of different regulations to similarly situated parcels very often evokes a disparity in the value of these parcels. Additionally, whether a zoning ordinance requires off-street parking or a building code requires that certain heating, electrical wiring, or building materials standards be met—all for reasons of health and safety—the cost of the final product, a cost ultimately borne by the consumer in the form of rent or purchase price, is necessarily increased. And finally the very essence of all zoning has been to segregate.[78]

Historically, the comprehensive plan was a reflection of rules of good housekeeping applied to the community. Incompatible or discordant land uses were kept separate, industrial uses in one place, commerical in another, residential in a third. Furthermore, multiple-family dwellings were isolated from single-family dwellings. The segregative effect of these classifications which expressly separated various land uses and kinds of housing was further amplified by the notion that there was a hierarchy of uses: inferior uses such as industrial; superior uses such as single family dwellings; and others in between. Superior uses were permitted in any district which allowed an inferior use, but, of course, not vice versa. In the end this meant that low cost housing was nearly always found as a neighbor to an inferior use.[79] In a certain

---

assure home-buyers that all lots within the subdivision will be devoted to residential use only, he cannot guarantee that land without the subdivision will not be developed for commercial or industrial use. Surely the market for homes in this subdivision will be enhanced, and thereby its value increased, by a zoning ordinance which restricts neighboring properties to the same use or at least prohibits uses which might adversely affect the value of the subdivision.

78. *See* Babcock, *Classification and Segregation Among Zoning Districts*, 1954 U. ILL. L.F. 186, 201-04.

79. The early champions of zoning acted on the assumption that owners and occupiers of urban land should be protected from the injurious effects of discordant land uses by segregating different types of use in separate zones or districts. They also aimed to prevent the worst effects of uncontrolled urban growth by establishing reasonable standards of population density, light, air, and open space. The ideal city was viewed as a great patchwork of contrasting zones rigidly segregating incompatible land uses, each zone furnished with appropriate density, light, and air, and open-space regulations, all 'in accordance with a comprehensive plan.'

Cunningham, *supra* note 54 at 382.

The ordinances of the 1920's, and indeed most zoning ordinances prior to the 1950's, adopted the 'cumulative'-use zoning technique sustained in the Euclid case. These ordinances excluded so-called 'lower' uses—*e.g.*, commercial and industrial uses—from 'higher'-use zones—*e.g.*, single-family, two-family, and general residence zones—but did

sense, then, the proliferation of residential zones for the single-family residence, which has occurred in recent times, can be regarded as a logical extension of the good housekeeping rules instituted many years ago—that the kitchen be kept out of the living room, that the bedroom be kept out of the kitchen or, in the language of the planner, that dissimilar uses be kept separate. The segregative effect of zoning is especially illustrated by low density regulation, which promotes by area, if not by an entire community, economic and, sometimes, indirectly racial segregation. Even if racial or economic homogeneity is not the primary reason for large lot or house size requirements, it certainly is not too subtle a consequence. Indeed, the very success of zoning objectives predicated upon the cost-revenue thesis necessarily depends on obtaining uniform housing costs. Thus, the effectiveness of that zoning is a function of the homogeneity ordained and obtained by the ordinance.

In the abstract, we might be expected to react to any regulation which, even indirectly, produces consequences which offend our sensibilities, if not our constitution. Nevertheless, up to a point these undesirable by-products of zoning have been tolerated. Whether they should be is less clear. It would seem that our inquiry must always take account of the full impact of such legislation. At the very least, only by examining what an ordinance actually does can we properly test it against our notions of what a community ought to be achieving by exercise of the police power. Furthermore, and beyond the matter of identifying and evaluating legislative goals, we must also examine how well such legislation accomplishes any of its intended objectives. We must determine whether the measure of success obtained in achieving appropriate goals justifies an ordinance in spite of those natural by-products we may regard as undesirable. When minimum lot size zoning

---

not exclude the so-called 'higher' uses from the 'lower' use zones. Yet, it was obvious that if commercial and industrial uses have an adverse effect on residential neighborhoods—as all the early advocates of zoning asserted and the Supreme Court recognized in Euclid—the same adverse effects upon residential land uses would result from the admixture of residential uses in commercial and industrial zones. Thus, considerations of health and safety would seem to have required adoption of an 'exclusive' zoning scheme, by which residential uses, at least, would be excluded from 'lower'-use zones. But it was apparently assumed that self-interest would preclude residential uses in commercial—and industrial—use zones except where individuals lacked the intelligence or the economic wherewithal to live in exclusively residential districts. Under the individualistic ethic of the 1920's, such persons would simply get what they deserved if they 'chose' to live in commercial or industrial zones.

Cunningham, *supra* note 54 at 382.

is put to this analysis, many questions are raised about its legality. This can be illustrated.

1. Promoting the Public Health and Safety

For good reason, we must first explore the efficacy of lot size requirements in promoting the public health and safety. So long as a regulation serves accepted minimum standards of health and safety, courts have, and perhaps rightfully so, gone a long way in tolerating the less desirable concomitant effects of zoning. For example, hazardous terrain or soil conditions in a particular area have justified legislation which regulates the design, materials and density of residential development even when that legislation raises the cost of housing and thereby prevents some who could otherwise have purchased homes from living in the area. However, the tendency of courts to overlook these undesirable consequences has been and perhaps should be less when this same legislation must be justified on a basis other than health and safety. The social priority for health and safety may be high; the priorities against tax increases and wasteful developmental sprawl may not be nearly as lofty.

There are relatively few instances in which a minimum lot size requirement can or ought to be justified simply on the basis of health and safety. This is true sometimes because it bears no reasonable relation to matters of health and safety, sometimes because it serves the public health and safety only indirectly, incidentally or fortuitously, and sometimes because it does not serve health and safety norms which are realistic in terms of what society ought to observe and can observe for all.[80] For example, if the objective of a minimum lot size requirement is minimum living space, space essential to the health of residents, only an ordinance which sets requirements in terms of living space per person guarantees the success of this goal. If its objective is the avoidance of congestion and the assurance of adequate light, air and open space, this can only be guaranteed by ordinances which regulate house size in relation to lot size, that is, by the imposition of maximum house size requirements for certain size lots. Though lot size requirements may not reduce the number of people per living unit,[81]

80. *See* notes 54 to 58 *supra*, and accompanying text.

81. Though large lot requirements will directly limit population density, they have little if any bearing upon the size of the families which occupy homes built on large lot developments. Indeed there is some evidence that these families are larger than those which occupy modest homes and that anticipated savings in educational costs accomplished by low density zoning are not as great

they have indirectly affected the bulk of permitted structures and the density of population.[82] Whenever development in lots zoned for minimum requirements has afforded adequate living space, light, air and open space, it is not because this legislation has guaranteed it, but because people who buy large lots don't ordinarily build tiny homes on the one hand or, on the other, homes which occupy substantially all of a large lot. Nevertheless, in spite of the indirect success of these requirements in achieving spatial goals it must be reiterated that the good life—the uncongested existence—which is sought is one which is beyond the reach of the major part of our population. Accordingly, whenever the interest promoted is drawn so narrowly that it is difficult to regard the benefit as public, the regulation ought not to fall within the purview of the police power simply because it bears some relation to health and safety.

Minimum lot requirements sometimes reflect special conditions which exist in the area with respect to landscape or public facilities, conditions which can in some way be related to the public health and safety. Excessive bulldozer reformation of a rough terrain can create

---

as was once thought. To be sure, population density is reduced by allowing only one family per acre rather than four. However, "contrary to suburban expectations, new 'estate district' housing in today's limited housing market does not necessarily mean families will have fewer children. The child ratio in such housing may be larger than the experience has been from other more modest existing housing. The ratio of older children in grade groups which are more expensive to maintain is also likely to be higher." *See* Noren, *supra* note 56 at 5. However, Rathkopf concludes that the conflicting conclusions of studies which have been made in this area, make it difficult to correlate lot size and school children. *See* I. A RATHKOPF, ZONING AND PLANNING 193 (3rd ed 1969).

82 One commentator has suggested that this is the reason why courts have had less difficulty upholding minimum lot size requirements than minimum dwelling size requirements, planning techniques which are remarkably similar in purpose.

> The greater reluctance of the courts to sustain a minimum dwelling-size regulation has its justification, though it is not indicated in the opinions, in the different functions served by the regulations. Prescribing minimum standards for size of land parcel will indirectly but effectively control bulk and the density of population, thus securing light, air, and open space. In addition to preventing overcrowding of land and undue concentrations of people, the minimum land requirement secures safety from fire, panic, contagions, and other dangers. And further, the maintenance of large and open areas free from noise and bustle and the preservation of natural surroundings may be legitimate planning purposes in themselves. Minimum requirements as to dwelling size, however, accomplish none of the traditional purposes of the zoning power. Where the problem is size of the building occupying the land, the goals of physical planning can be achieved only in terms of maximums. Thus building bulk regulations are almost invariably formulated in such terms (height, cubage, percentage of lot coverage, floor area ratio).

Haar, *Zoning for Minimum Standards The Wayne Township Case*, 66 HARV. L. REV. 1051, 1060-61 (1953).

significant conservation and water problems, something which is more apt to occur when high density single family development is allowed. Lots of less than a half-acre are considered incapable of supporting both a septic tank and a water well.[83] Therefore, the use of private on-site sewage disposal systems, especially when a public water supply is absent, requires at least half-acre lots, perhaps much larger ones if the soil consists of clay. Adequate sewage disposal and water supply are clearly related to public health and, in the absence of public facilities, are directly affected by the size of residential lots. Surely, lot size requirements in an area without a public sewerage system must exceed those with one. Surely, the exercise of the police power in control of land use ought to reflect the presence or absence of public facilities. Nevertheless, there is great doubt whether the large lot requirements which have been imposed in the absence of public facilities can be justified simply on the basis of health and safety. There are two principal reasons for this concern: 1) The lot size requirements which have been popularized and upheld commonly exceed that which is regarded as essential for health and safety;[84] 2) Public facilities and services can always be provided, at least in time, and so the danger to health and safety is short-term at best. Furthermore, because these problems are often temporary and often soluble by other means which, unlike lot size requirements, do not exclude low cost housing,[85] there is good reason to question whether problems of sewage disposal, water supply, and adequacy of public facilities ought to affect any long range effort to shape the scope and substance of a community's new development. Most communities constantly face the problem of funding the cost of new or better facilities and services. Neither inertia

83. *See* note 66 *supra*. *See also* AM. SOC'Y OF PLANNING OFFICIALS, *supra* note 33 at 193-94.

84. *See* note 66 *supra*.

85. One observer has seriously questioned the need for large lot requirements in order to preserve health and safety in the absence of a public water supply or sewerage system. Noren concludes: "Recent technical advances have shown the way to provide acceptable, permanent sewage disposal within subdivisions platted in smaller lot areas." *Supra* note 56 at 4. He suggests three solutions which allow for small lot development without need of public facilities, yet with complete safety: community package plants (at 14-15); an integrated septic system (at 15-16); and an integrated pond system (at 17-19). To illustrate, Noren points out that a 50-home subdivision, with 6,000 square foot lots on 14.5 acres of land including 5.5 acres for recreation and disposal pond use, could be developed safely. Furthermore such a plan affords considerable development cost savings over a plan for development of the same number of homes on the same tract with 10,000 square foot lots (at 20-23). In short, neither the absence of public sewerage and water facilities nor a community desire to avoid the costs of their installation justifies the requirement of large lot developments and in turn the exclusion of comparatively inexpensive homes.

nor a reluctance to assume these added obligations should serve as a basis for avoiding them. Present capacity does not necessarily justify decisions which ought to be predicated upon future capacity. This much is clear—if the problem is one of timing rather than absolute inability to service over the long run, the regulation cannot be supported simply as an exercise of the police power on behalf of the public health and safety.

If not the public health and safety, what then does a minimum lot size requirement accomplish? Just how successful is it in achieving ends we may regard to be within the ambit of the general welfare? How strongly we may react to its sometime by-products of racial and economic homogeneity may depend upon its success in accomplishing other objectives. What follows is not an exhaustive survey of data produced with respect to the effectiveness of minimum lot requirements. It is intended only to suggest that low density regulation may not always achieve those objectives which have purported to justify its adoption.

2. Preserving Community Character and Appearance

A small or rural community may wish to preserve its physical or aesthetic character, including its appearance. A study of the relation between large lot zoning and rural appearance published in 1958 suggested that the desired appearance will not necessarily follow the enactment of low density regulation.[86] Though rural appearance can be identified by lot area or density groupings, the most significant rural appearance factors are not a function of lot size. The most important elements of visual character are: spacing, which is affected more by lot frontage than area requirements; the presence or absence of urban-type improvements; landscaping, whether natural or finished; and the architectural design of buildings. Where growth is inevitable, though large lot regulations may indirectly secure desired open space, they give no assurance that the design of future homes and landscapes will conform to the community ideal except when enormously large requirements, subject to reduction in the course of bargaining with developers, afford a basis for legislative blackmail—a practice which ought to be questioned.[87] Furthermore, rural and small town character

86 See MASSACHUSETTS DEPARTMENT OF COMMERCE & THE URBAN AND REGIONAL STUDIES SECTION OF THE MASSACHUSETTS INSTITUTE OF TECHNOLOGY, THE EFFECTS OF LARGE LOT SIZE ON RESIDENTIAL DEVELOPMENT 10, (Urban Land Institute Technical Bulletin No. 32 1958).

87 See note 36 *supra* and text accompanying notes 36 to 37 *supra*. The legality of this practice

are not necessarily synonymous. Indeed, large lot requirements may indirectly generate an open and underdeveloped appearance, something associated with the rural character. However, '[S]mall towns have traditionally exhibited a compactness, a differentiation from surrounding undeveloped areas, and a quality favoring pedestrian internal communication . . .'[88] Large lot requirements do not promote these characteristics, if anything, they inhibit them. Finally, unless lot sizes of five to ten acres are enacted over a large area to prevent development totally, these minimum requirements do not even afford a guarantee of permanent open space. If growth is imminent, the effect is merely to disperse new development haphazardly farther and farther away from the core of the metropolitan area. Indeed, one commentator has concluded: "If what is needed is extensive and permanently preserved open space to serve as breaks in the cityscape, to give identity and individuality to peripheral communities, and also to set aside areas of natural scenic beauty for the enjoyment and use of metropolitan populations, large lot zoning will of itself not satisfy these objectives."[89]

3. *Enhancing and Stabilizing a Community's Economic Position*

The reasons which most frequently underlie both temporary and permanent barriers to intensive residential development are economic in nature, a kind of calculus of fiscal policy, community costs, community revenues, tax rates, and property values. Central to these reasons is the cost-revenue thesis. Whatever deficiencies can be observed in the actual application of this thesis should bear directly on our appraisal of the success of low density zoning in achieving its apparent goals. First, translation of the cost-revenue thesis into public

ought to raise considerable doubt. At least three kinds of questions are apparent. First, the community will be unable to achieve its superior bargaining position unless the lot size requirement is excessive. Only by making compliance with the regulation, as written, impractical and uneconomic will the community be able to exact desired concessions from the developer. Requirements, large enough to obtain submission, must necessarily skirt the line of confiscation and therefore a "taking." Secondly, should a community be able to procure from agreement that which may not properly be procured by regulation? If a state court has cautioned against zoning for aesthetics or preservation of property values, should a community be permitted to accomplish these same goals by forceful persuasion? Finally, whatever the substance of the bargain, unless the terms are always the same it is subject to the challenge of discrimination and unequal treatment just the same as spot zoning. In short, because it is public regulation which initiates and occasions the agreement, both the regulation and agreement should be regarded as community action and must therefore satisfy all of our constitutional safeguards.

88. *See* ULI Bulletin, No. 32, *supra* note 86.

89. *Id.*

policy tends to solve problems only by shifting them to others. Though one community's fiscal problems may be alleviated by its use of lot size requirements, the problems of the area, state and even the region may be aggravated especially if the burden is shifted to communities which are less able to absorb new high density development—often because their fiscal problems are more serious. The scale of cost-revenue priorities which serve as the basis for allocating the use of land is founded on a policy which seldom reflects the current housing market and rarely satisfies an overwhelming local or regional need to provide relatively inexpensive housing for the bulk of the burgeoning population. Any large scale acceptance of a policy, as an exclusive basis for planning undeveloped suburbia, which forbids all deficit development in order to preserve existing tax rates and property values, only compounds the problem of venting the pressure for urban growth. The public has an interest in finding places to live for people of all economic groups. The bulk of the population can only afford modest homes. A fiscal policy grounded upon cost-revenue criteria ignores all other considerations and inevitably runs headlong into what ought to be a primary goal of planning—locating the mainstream of urban growth.[90]

Second, it is far from clear whether minimum lot requirements do effectively carry out cost-revenue policy: produce housing which pays more in taxes and costs less to serve than intensive single family residential development. The doubt raised here is not so much with the policy itself as with the effectiveness of the method used to implement the policy. To begin with, large lot requirements do not necessarily generate residential development which is less expensive to service. Some of the studies which have pointed to these problems have concluded that the difference in the cost of servicing low and high density development is not as great as one might have expected; that there is no significant difference in total maintenance and operating costs with respect to major municipal services; and that the per capita capital outlay, though slightly less for lots of 40,000 square feet than

90 Even if a community does not preclude all deficit development but rather adopts a zoning plan which reflects a mix of commercial, apartment, and high and low density single-family residential development, there is no reason to believe that this constitutes anything more than a token attempt to accommodate the demand for inexpensive housing so long as the number and size of these zones are determined with an exclusive eye to preserving existing tax rates and property values. These policies, housing and community economics, though not necessarily opposite goals, are hardly synonymous and exclusive dedication to one or the other is apt to evoke widely divergent allocations of land use.

for 10,000, was the same if not greater for lots in excess of 80,000 square feet.[91] Though lots of larger sizes frequently require less in the

91. Lot Development Costs Need Not Rise With Lot Size. Comparisons of the capital outlay necessary to develop residential lots of different sizes, considering all improvements except actual buildings, indicate that lot area is not a very significant factor in determining overall costs. Much more important, costwise, are the frontage requirements, the number of improvements, and the character standard or level of those improvements. In other words, an increase in frontage, or the number or standard of improvements to be installed in the street right-of-way, or both, obviously involves a greater development outlay than an increase in depth of lot.

While minimum lot area and frontage requirements are a function of zoning, regulations governing the improvements to be installed in new developments or the standard or capacity level of those improvements, come under subdivision control. The study suggests that substantial economies can be achieved for the developer and home owner in large lot districts if the requirements for certain improvements are waived, and the standard of certain others adjusted with lot size in a manner appropriate to lower densities. For instance, sanitary sewers, storm sewers, sidewalks, curbing and grass strips are improvements that might safely be eliminated in low density districts. Also, certain adjustments in standards, such as narrower street pavements, fewer applications of asphalt, or reduction in the number of catch basins, manholes, or drains, might also be made. . . .

In practice many such improvements are waived or modified at low densities and in given instances for technical reasons (*e.g.*, the topography might make it physically impossible to install a sewer). But no Massachusetts community is known to have correlated its standards of improvement design and capacity under subdivision control with the appropriate lot area and frontage districts under zoning although at least one planning board has it under consideration. Such correlation of standards with density pattern might produce substantial economies to communities, developers and home owners. . . .

Community Costs Do Not Necessarily Rise With Lot Size. In establishing certain minimum lot size requirements many communities have apparently assumed that they would thereby automatically curtail future municipal expenditures in new schools and other public services. While such requirements obviously do limit ultimate population and thus the ultimate quantity of schools, parks, playgrounds, streets, sewers, fire stations and the like, there is no evidence that the community would achieve any *per capita or per dwelling* economies thereby. Indeed it was found that capital outlay costs for the four municipal services most affected by density showed a slight rise with lot size increase, particularly in the largest sizes. However, this rise was not really a significant amount compared with the considerable cost variations that actually exist between communities resulting from level of service and complement of services provided, or location with respect to the urban center.

. . . Thus it appears that density alone, when divorced from other variables, has relatively little effect on overall municipal costs, assuming that the town-wide level of services is generally unchanged. Only the largest sizes, *i.e.*, above two acres, show an appreciable additional cost.

It is obviously not possible to select any one lot size that is optimum in terms of community costs. But there seems to be a middle range of lot sizes—greater than those for which public sewerage is needed, but below the point where the cost curve commences, it's a more noticeable rise—which represents the most lot area for the least cost to the community. This range approximately corresponds to the range of most lot area for the least outlay to the developer or home owner previously mentioned. But in the case of

way of services, for example, lots beyond a certain size may alleviate the need for public sewerage facilities, quite often it costs more to provide the services which they do require.[92] The most significant doubt raised by the selection of large lot requirements to implement cost-revenue priorities lies in the assumption that large lot regulations induce construction of expensive homes. If the economies achieved by large lot development are not very great, it would seem that if tax rates and property values are to be stabilized by large lot zoning, it must be because the community tax revenues per dwelling increase as the density is lowered. To be sure these requirements may prevent the construction of low cost or even modestly priced housing. Yet it is always unclear just how successful large lot requirements will be in inducing a tax base large enough to justify the exclusion of housing which costs less. A survey of assessed valuations in relation to lot size has revealed that the average valuation of homes does rise as the lot size is increased.[93] However, the survey also found that the range of valuations within a given lot size was considerable and greater than the variation in average valuations among different lot size brackets. Inexpensive homes were found in substantial proportions on lot sizes of 10,000 and 80,000 square feet. Furthermore, average valuations taken of homes on the same size lots in different communities bore marked differences. It was suggested that the kinds and costs of homes constructed in a particular area depends just as much on community prestige and popularity as upon lot size. Consequently, the assumption that low density requirements will induce construction of expensive homes is open to serious question. Even though this assumption is demonstrable on a large scale sampling of average valuations, it is at best tenuous when it underlies a plan for a single community or a portion of it. And it should be emphasized that this is always the context in which the land use decision is made: will the regulation achieve desired results for this area at this time?[94]

---

municipal costs, the variation due to density is so slight as to be relatively meaningless in the overall cost picture.

U I I Bulletin, No. 32, *supra* note 86, at 8-9. *See also* Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507, 516 (1964).

92 This is often true simply because it may cost more to provide the remaining services, such as police and fire protection, highway maintenance and improvement, school transportation, to development dispersed over a large area to development which is concentrated in a small area. *See* note 43, *supra*.

93 *See* U I I Bulletin No. 32, *supra* note 86, at 9.

94 *See* Margolis, *On Municipal Land Policy for Fiscal Gains*, 9 NAT'L TAX J. 247, 252 (1956) in which he explains the dangers of basing land policy on average relationships:

The allocation of government expenditures and government tax receipts is based on

Third, the cost-revenue thesis assumes that with respect to every parcel of land, one can isolate the costs which it incurs and the revenue which it produces. What this analysis tends to do is to attribute certain costs exclusively to particular kinds of land uses and also to restrict its consideration of revenue to income received from real property taxes.[95] The single highest community cost precipitated by new

---

average relationships. The use of averages exposes the studies to error in two ways. First, what may be true for the average use in the city may not be true for that type of use by a *new* unit in a specific site. Gross analysis based upon average behavior may do a disservice to the city which often must decide on a particular use in a given neighborhood. The probable fallaciousness of averages is increased when we recognize that building technology, styles of marketing and living, and patterns of plant layout have changed over the years with the result that a new use may have implications for public finance quite different from the older use.

Second, and equally important, is the point that the relevant comparison should not be concerned with averages but with marginals. The policy question is not what are the average situations but what are the consequences of a change in land use. . . .

95. Two studies, in examining the validity and success of fiscal zoning, have rejected this method of allocating costs and revenues and, further, have concluded that high and medium density development is not a tax liability and may pay for itself. *See* G. ESSER, ARE NEW RESIDENTIAL AREAS A TAX LIABILITY? 1, 8 (1956); MACE & WICKER, *supra* note 41.

In the latter study, the authors applied a cost-revenue analysis to low medium priced (under $20,000) hypothetical single-family house subdivisions in three states, California, New Jersey and North Carolina. The Urban Land Institute, in reporting on the Mace and Wicker study, said:

For each of the three hypothetical subdivisions, local public costs and anticipated public revenues were computed as realistically as possible and then compared. The three major Study highlights from all three localities were:

(1) Virtually all initial public improvement costs are paid by the developer (and so ultimately by the home buyer) in conformance with local subdivision requirements.

(2) The estimated non-educational public revenues cover, and in some cases substantially exceed, the estimated continuing annual costs of non-educational services.

(3) Except in New Jersey (where property tax revenues meet about 85% of local public education costs), the subdivisions pay their way over a period of time including grade and high school education system costs.

Do Single Family Homes Pay Their Way?. URBAN LAND (Sept. 1968) at 5.

Based on the U.L.I. study, however, probably the most nearly correct answer would be, *'It all depends.'* It depends on such factors as: what type of residential development one is talking about; on the nature of the state revenue procedures; on the local fiscal structure where the development takes place; on local development requirements and financing policies; and, finally, on which costs and to what degree they can be properly allocated to residential use. . . .

The findings in this Study indicate that it is not always true that moderately-priced single-family homes contribute more to local costs than they contribute to local revenues. In fact, it may be the exception more often than the rule.

While not conclusively established by this Study, one clear inference may be drawn, namely those states with heavier reliance on state-administered income and sales taxes, rather than on the local property tax, are in a better position to meet increasing public service costs.

In the long run, the Study suggests that community leaders may find positive efforts

residential development is that for schools, an item which the cost-revenue thesis apportions to the residential development served by such schools. This practice has been challenged.[96] Central to any criticism of the cost-revenue thesis is that land uses are not independent.[97] The value of any use is a function of the use to which other land is put. If this proposition is sound, so is its corollary that land use costs are mutually dependent. In short, people costs should not be attributed solely to people.[98] Certainly the retail store, the medical clinic and the light industrial factory do not directly precipitate the need for new schools. They seem, therefore, to constitute a tax bonanza, contributing far more in revenue than in costs of services they require. Yet these land uses cannot exist, let alone thrive in a vacuum. They rely on the proximity of customers, patients, and employees, skilled or unskilled. They rely on the presence of families whose children must be educated. They rely, then, on the presence of nearby residential development,

---

aimed at fiscal modification and reform (at both state and local levels) more productive than restrictive zoning in meeting the 'tax burdens' of new residential development where it is needed

Id at 3, 8

96 In one community, 5% of the school cost was allocated to non-residential uses on the ground that "schools especially prepare a substantial number of students to enter local employment." Why 5%? Besides, if this approach is correct, should not all municipal expenditures in residential areas be partly charged to non-residential uses, since probably, without such services as are provided, clerks and storekeepers and factory managers would move themselves and their establishments elsewhere?

Barnes & Raymond, *The Fiscal Approach to Land Use Planning*, 20-21 J. AM. INST. PLANNERS 71, 72 (1954-1955). *See also* MACE & WICKER, DO SINGLE-FAMILY HOMES PAY THEIR WAY? (Urban Land Institute Research Monograph No. 15, 1968).

The conclusion as to the "liability status" of residential property is based upon the assumption that is is appropriate to charge education costs (the predominant liability resulting from residential development) back to property—primarily residential. This assumption is open to question on at least two counts. First, public education as a governmental function is not essential to the basic utilization of urban property. It is a benefit to the community as a whole. Secondly, the property tax is not imposed on the basis of benefits received, but rather on ability to pay. Thus, the cost-revenue estimate does not fix financial responsibility. As a result, services directly benefiting property are the only functions the cost of which can properly be measured in residential areas.

Snob Zoning, *supra* note 91 at 517.

97 *See* Margolis, *On Municipal Land Policy for Fiscal Gains*, 9 NAT'L TAX J. 247, 250-52 (1956).

98. *See* MACE & WICKER, DO SINGLE-FAMILY HOMES PAY THEIR WAY? (Urban Land Institute Research Monograph No. 15, 1968). "A major feature of the study is that it departs significantly from the more commonly used approach. It charges to each hypothetical subdivision only a portion of people generated service costs. The rationale here is that services to people in any specific locality are part of community-wide benefits and this relatively independent of specific locations within the community." 27 URBAN LAND 3, 8 (1968).

perhaps even high density residential development. The land use with the highest cost-revenue surplus is often vacant land.[99] But the value of vacant land, and accordingly its utility as a source of real property taxes, is a variant of the existence and kind of nearby development and the feasibility of converting vacant land into a compatible land use. The same holds true for the much preferred light industrial use, presumably a fiscal delight. Unless neighboring bedroom communities already exist,[100] or are guaranteed by regional land use plans,[101] exclusive devotion to the favored light industrial development to maximize a cost-revenue surplus will not be effective. Industry will not locate without a labor force. A labor force must reside somewhere, preferably close at hand.[102] It is hardly realistic then to assign the costs of

99. *See* Margolis, *supra* note 97, at 251.

100. Even if this were so, it would be foolish to rely on other communities to continue allowing deficit development which is needed to support fiscally productive development located in another community.

> Another level of irrationality is implicit in the policy of excluding some land uses and encouraging others in order to realize the low property tax target. The success of the land policy is dependent upon the assumption that the surrounding cities will not adopt the same policy. If a city decides that low-rental, multifamily dwelling units are costly and bans them, but that it desires the industry requiring workers who must live in these homes, the city must rely on an adjoining city permitting these workers to live there. If all cities sought to ban these workers, the industry would never locate in any of them. The success of the program is therefore based on the illusion that other cities would not act competitively.

Margolis, *supra* note 97, at 250.

101. This is something which regional land use plans have not yet accomplished. In the main, regional planning commissions have had little, if any, control over local allocation of land use. *See* Becker, *Municipal Boundaries and Zoning: Controlling Regional Land Development*, 1966 WASH. U.L.Q. 1, 19-23.

102. Even if industry and commerce make direct property tax payments greater than the expenditures the city must undertake to service them, they require both customers and workers in order to survive. The customers and workers may occupy low-valued properties which make direct property tax payments less than the expenditures of the city necessary to service them. The combination of the two, industry and its workers or stores and their customers, may be financially feasible. A city may hope to separate the two and claim the stores and industries without the workers. The neighboring cities may absorb the workers and customers for awhile, but this solution is self-defeating once the neighboring cities employ the same planning consultants for advice. . . .

> Once it is recognized that industrial or commercial uses require a labor force and a supply of customers, the necessary analysis becomes more complex. Many dormitory cities are attempting to attract clean light industry. The low public costs per acre and their attractive appearance have combined to make them the preferred land use. The layout of these plants involves an extensive use of space and a low investment per worker and per acre. Often these firms use low skilled and white collar workers with relatively low wages. To properly analyze the public cost and revenue assignable to this industrial site, we would find it necessary to assign to it the costs and revenues to the city of the attached labor force. It is possible that the light industry because of its low assessment per worker may

education to land which houses the labor force and not to assign some portion of it to the land use which relies so heavily upon the presence of the labor force. Finally, although the cost-revenue thesis ascribes the sum total of added public costs to each new kind of development, it virtually ignores the impact of land use decisions upon non-real property tax revenues, a growing portion of local revenues.[103] Industry does not provide much of a base, if any at all, for a sales tax or a personal income tax. These are taxes geared to people and people mean residential development. If this is true, and the cost-revenue analysis were revised to reflect a more inclusive definition of revenue, the scale of land use priorities would probably be altered.[104] Cost-revenue analysis should, but does not, sufficiently reflect either the mutual dependence of land uses or the relation between land use and *all* governmental revenues. Large lot requirements cannot be very effective in solving a community's fiscal problems if they are predicated upon a theory which is faulty. Indeed there is good reason to question whether conventional cost-revenue theory should, by large lot size requirements or otherwise, be reflected in the ultimate land use prerogatives of a community.

In view of doubts which have been raised about the efficacy of low density zoning, what then must a court consider in passing upon the legality of land use controls and in particular the use of minimum lot size requirements? Should it not concern itself with what the regulation is able to accomplish? If a court is asked to judge the appropriateness of certain legislative goals, should it not inquire whether these goals are achieved by the legislation in issue? Only by examining what legislation actually does can a court expect to focus carefully on those objectives

be 'unprofitable' to the city and heavy industry even if it had an unskilled labor force may be more 'profitable' to the city.

Margolis, *supra* note 97, at 251

103 The indifference to revenues other than taxes introduces a major error in the analysis. In the long run this error will be compounded since property taxes are a shrinking per cent of local revenues. Industry which usually shows up favorably does not provide a sales tax base, while densely settled, low income families may prove a fiscal bonanza to a city with a sales tax. Similarly, subventions from a central government are more frequently a function of population rather than industrial or commercial use. Therefore, a more inclusive definition of the fiscal base of a city may result in a shift in the advantages to the city of the different uses

Margolis, *supra* note 97, at 250-51

104 *See* MACE & WICKER, *supra* note 98. They conclude that whether a subdivision containing homes under $20,000 is a tax liability with respect to public educational costs depends, in no small part, on whether these costs are met solely by local property tax revenues or by state-administered tax revenues (such as income and sales tax revenues) as well.

which are to be tested against our notions of what kinds of governmental intrusions ought to be tolerated. Furthermore, even if the test of legislative objective is positive, is in the interest of the public health, safety, morals or general welfare, should there not be some further assurance of legislative efficacy before the police power is allowed to circumscribe free choice, especially when such challenge bears questionable offspring? Is it not foolish to rest an exercise of the police power on the public health and safety, when a careful analysis reveals that in operation the legislation promotes objectives which bear no relation to feasible standards of health and safety? Shouldn't a court when asked to approve a measure intended to increase the local tax base have some basis for knowing whether the legislation does exactly that? Should not it also inquire what the other ramifications of the legislation are? Should not a court, when asked to justify legislation which often leaves in its wake economic and racial segregation have before it what ends such legislation does in fact serve? Assessments of the propriety and success of legislative goals must be grounded on reality and this requires an examination of what legislation actually does and not simply what the legislature says it is intended to do. Police power goals do not exist in the abstract. They exist in and because of legislation which does or does not in some degree carry out these goals. It is indeed foolish to approve of certain objectives without scrutinizing the probable success of legislation which implements these objectives. To be sure, courts have been chary in their review of matters of legislative discretion, particularly in the area of land use control where all is not black and white and there may be many ways to skin the same cat. Indeed, courts have on occasion gone so far as to rest their decisions solely on the presumption of constitutionality inherent in all legislative acts.[105] The choice of a land use policy and the method by which it is to be implemented is a matter which should be within the province of the legislature. However, judicial circumspection should not be confused with judicial abdication. The fact remains that whenever the police power is exercised in the control of land use it is denying rights—it is curtailing significant private options. The occasion for legislative indiscretion is great. The judiciary ought not to surrender its right of review. One should not regard a review of the efficacy of legislation as a usurpation of the legislative function when the legislation under scrutiny is fraught with ramifications which go to the core of our freedoms.

105. *See, e.g.*, Repp v. Shahadi, 132 N.J.L. 24, 38 A.2d 284 (1944).

B. Methodology and Governmental Overreach

Finally, the method adopted to achieve a legislative goal must be examined in a somewhat different context. Inevitably there will be some cases in which we may wish to say that however appropriate the legislative goal may be and however successful the legislation has been in accomplishing it, it has been achieved by means which deny too much. And because the ordinance reaches so far, we may at least be inclined to say that if society wishes to achieve that end it must compensate for so extensive an intrustion—"nor shall private property be taken for a public use without just compensation."[106] This question and this reaction is latent in every instance in which the police power is exercised with respect to land. For so long as the impact of regulation is apt to diminish the full array of private options, so long as it denies something, the taking problem is there and must be reviewed whenever raised, however laudable the legislative purpose may be.[107] This suggestion, that the impact of specific legislation is always relevant to the question of taking, should never be regarded as an effort to second guess legislative bodies, even though one may believe otherwise about the review of legislative efficacy discussed in section A. The constitution forbids a "taking", something which is potentially present each time the police power is used. Though the absence or presence of other legislative alternatives may affect a court's determination of whether there was a taking, it is nevertheless incumbent upon it to review carefully the problem of methodology and overreach whenever raised by a landowner. Furthermore, these are

106 U.S. CONST. amend. V. *See* text accompanying notes 18-24 *supra*.

107 It is for this reason that the subject of methodology is examined in terms of the taking problem a question of governmental overreach. This is not, however, the only constitutional issue which may be raised by means selected to accomplish a legislative objective. Section IA suggests that in evaluating an exercise of the police power, a court ought to consider the effectiveness of the regulation in achieving its goals. Section 1B suggests that in accomplishing appropriate objectives, an ordinance may raise a variety of constitutional questions. Although it may succeed in solving problems of community health and safety, or in stabilizing property values and tax rates, it may do this by denying equal protection or freedom of speech, or by discriminating on the basis of race or religion. For example, suppose a community, faced with the prospect of a demand for more schools and teachers, and therefore increased rates, because it was situated in the direct path of residential growth, resolved its problem by allowing only Catholics to occupy new homes because it expected their educational needs would be served almost entirely by Catholic schools. Surely such an ordinance raises important constitutional issues. Accordingly, though Section 1B concentrates on a particular problem, because it is a potential problem in every exercise of the police power which controls the use of land, it is not the only constitutional issue which may be examined by the application of this portion of the schemata which focuses on the consequences of legislative methodology.

problems which should arise with increasing frequency as the police power is utilized to accomplish more and more. The more that we wish to achieve, the broader our statement of land use policy, and the more extensive the public elaboration of what serves the general welfare, then the greater is the occasion for governmental intrusion and overreach. Once again the use of minimum lot size zoning ordinances serves as an apt illustration. One of the objectives of low density zoning is to curb the wastefulness and costliness of urban sprawl by controlling the timing of intensive single family residential development. More specifically, sizeable minimum lot requirements have been imposed throughout a community to delay high density development until it can conveniently accommodate such development. These requirements have also been used to control the location of intensive single family residential development within a community. This has been accomplished by prohibiting—setting large minimum lot sizes—such development at some locations and allowing it at others, thereby deflecting it to areas in which it can be serviced economically. What should be clear is that even though an ordinance allows for some kind of residential development its objective is in theory never really fully attained unless development of all kind has been forestalled. Whether the objective is timing or location, delay or deflection, any appreciable development of the area covered by the low density requirement tends to encourage or fix developmental patterns which may prove costly to the community either in the immediate or distant future. At the very least, it may make it more difficult for the community to convert the area to other uses, for example high density residential development, at a later date. Accordingly, that development which is allowed in the area zoned for low density frequently is of a kind for which there may be no current market. This land use policy, then, is best achieved by the practical preclusion of developmental rights—by the denial of very substantial options. In short, this legislative goal can only be accomplished by skirting the line of governmental overreach.[108] This,

108. *See* Aronson v. Town of Sharon, 346 Mass. 598, 195 N.E.2d 341 (1964), in which the court found a minimum requirement of 100,000 square feet constituted a "taking". *See also* National Land and Invest. Co. v. Easttown Twp. Bd. of Adj., 419 Pa. 504, 215 A.2d 597 (1965). There the court concluded that there was no readily available market for four-acre lots and that zoning requirement of four acres had substantially reduced the value of land affected by it. *Id.* at 524-25, 215 A.2d at 608. This was denied by the Township. In response to the Township's contention that the requirement was lawfully imposed to maintain Easttown's character by creating a greenbelt and preserving open space, the court observed: "By suggesting that the creation of a greenbelt is a purpose behind this zoning, appellants betray their argument that there

then, is a problem which should be anticipated each time the public elects to deny substantially all right of developmental use, something which may become apparent only after an examination has been made of the market for allowable uses. It is a problem which can arise whenever the police power is used to create a zone exclusively for low density residential, agricultural, recreational, or industrial uses.[109]

That this is a problem—that land has been frequently set aside for low density residential development without regard to the demand for such housing, thereby tempting the line of governmental overreach—is more than theoretical conjecture. Surveys of the lot size requirements applicable to undeveloped land in two states have suggested that the amount of land zoned for low density may exceed the preferences of prospective buyers and accordingly the market for that kind of use.[110] Attitudinal surveys of families have demonstrated a marked preference for lot sizes of around a half-acre and certainly not more than an acre.[111] The reason for this is simple enough. Lots larger than a half-acre seldom achieve more in terms of privacy or space required for family recreation while at the same time they impose added and undesired maintenance costs. Nevertheless, lot size requirements in excess of a half-acre or even an acre are not uncommon. Furthermore, the decision to impose low density requirements appears nearly always to have been made in the light of a growing market for less rather than more expensive homes. In short, this means that the bulk of our population has been restricted in choosing a place to live by the devotion of large areas to residential uses without regard to their needs and ability to pay. It also means that many landowners and speculators must often find it difficult to market and develop the land which they own. It is to be expected that their economic loss may be substantial.

---

is a ready market for four-acre plots. Only if there is no market for four-acre lots will the land continue to be open and undeveloped and a greenbelt created. This, however, would amount to confiscation of the property of Easttown landowners for which they must be compensated." *Id.* at 529, 215 A.2d at 610-11.

109 Two cases which consider ordinances which abolish virtually all private development by the creation of an open-space, recreational, or conservation district are: Morris County Land Improvement Co. v. Township of Parsippany—Troy Hills, 40 N.J. 539, 193 A.2d 232 (1963); Greenhills Homeowners Corp. v. Village of Greenhills, 202 N.E.2d 192 (Ohio Ct. App. 1964), *rev'd*, 215 N.E.2d 403 (1966), *cert denied*, 385 U.S. 836 (1966).

110 *See* AM. SOC'Y OF PLANNING OFFICIALS 185-89, 194-95. Although the survey of buyer preferences in Connecticut indicated a greater desire for large lots than did a similar survey conducted in Michigan, there is still evidence that the amount of land subject to lot requirements above one acre in Connecticut exceeds the buyer preference for such density.

111 *Id.* at 194-95.

It should also be expected that the imposition of lot size requirements which do not reflect the market for those size lots will bring into sharp focus the taking problem.

Though much has been written about the taking question,[112] there is little agreement about what constitutes a taking. To be sure, a physical appropriation of land is a taking. However, problems arise and disagreement occurs when the interference has been accomplished by denial of use options and not by physical appropriation of land to governmental use. Various rationales have been suggested and applied. They have focused upon: the character of the use subjected to regulation—that harmful and noxious uses could be curtailed without compensation;[113] the extent to which the value of the land has been diminished—how much has been taken and how much is left and that an ordinance which denies all economic use is just as much a taking as if the land had been confiscated;[114] whether the regulation compels the landowner to confer a benefit upon the public without regard to whether the use denied imposes a burden on his neighbors—it is one thing to deny industrial use because of the dangers imposed upon neighboring residents, it is quite another matter to compel a landowner to use his land as a parking lot to satisfy a community's need for parking facilities;[115] and finally whether economic loss has been occasioned as a result of governmental enhancement of its resource position in its enterprise capacity—that compensation is not to be awarded if all that government is doing is improving the public condition by mediating conflicts between competing private economic claims without producing benefits to any government enterprise.[116]

It should be expected that the taking question will remain difficult to resolve despite efforts to give order and meaning to the decisions which speak to this problem. One should wonder if it were otherwise. There are several reasons why this should be so. First, the taking problem cannot be divorced from the matter of legislative goals.

112. *See, e.g.*, Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958); Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964).

113. For an explanation of the "noxious use" theory and discussion of its judicial history and commentary, *see* Sax, *supra* note 112, at 39-40, 48-50.

114. For an explanation of the "diminution of value" theory and discussion of its judicial history and commentary *see* Sax, *supra* note 112, at 40-46, 50-60.

115. *See* Dunham, *supra* note 112, at 664-69, for an explanation of his "benefit-burden" theory.

116. *See* Sax, *supra* note 112, at 61-76, for an explanation and application of his "governmental enterprise" theory.

Though land may have been especially suited to a particular use, courts have not hesitated to deny that use where it has presented a real threat to the public health and safety. Indeed, courts have sometimes upheld regulations which deprive a landowner of all or substantially all economic value.[117] These decisions would seem to suggest that the kind and extent of the denials and intrusions which society will tolerate without compensation are a function of those goals which are to be achieved. The social priorities which we attach to various objectives may well be decisive of the taking question, and so long as these priorities are apt to undergo any kind of change, there will be disagreement about whether there has been governmental overreach. And surely change is inevitable. As the world about us becomes more and more complex, these priorities must inevitably reflect the ever increasing problems which confront our urban society. Second, though the problem of judging the propriety and efficacy of goals may be dealt with largely in generalities, at least in terms of legislative method, this is not true of the taking question. If land is regarded as unique, it is to be expected that a regulation intended to take effect over a broad geographical area will affect each landowner differently. The impact—the kind and magnitude of legislative encroachment—of each ordinance upon each landowner is in a sense unique. To the extent, then, that the taking problem is particularized and accordingly the occasion for litigation proliferated, the likelihood of judicial inconsistency is greatly enhanced. Third and finally, the legislative and judicial history of the United States has been marked by an ever increasing tolerance for governmental pervasiveness. Our lives are today affected more by governmental activities and controls than they were fifty years ago, thirty years ago or even five years ago. Government does more for us—and, perhaps, to us—today than yesterday. Medicare is new, but so are the taxes which pay for it. Some time ago we were forbidden from employing children in certain jobs or for more than a specified number of hours per week. More recently we

117 *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (prohibition of industrial development—loss of 75% of value); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (prohibition of brickyard—loss of over 90% of value); Consolidated Rock Products Co. v. Los Angeles, 57 Cal.2d 515, 370 P.2d 342, 20 Cal. Rptr. 368 (1962), *appeal dismissed*, 371 U.S. 36 (1962); (prohibition of rock and gravel operation—loss of all value). All of these ordinances had some relation to preserving the public health and safety. *Cf.* National Land and Invest. Co. v. Easttown Twp. Bd of Adj., 419 Pa. 504, 215 A.2d 597 (1965) (prohibition of all development other than single-family residential on lots of four acres—loss of 33% of value).

have been told that we must sell our homes and must open our schools and places of public accommodation without regard to race. We have become immunized in time to the ever increasing presence of government in our daily lives. Its acceptance has not come easily. The dialogue has been a rich and sometimes bitter one. It is to be expected that this dialogue will continue. The question of governmental domination and pervasiveness is far from resolved: perhaps it will never be settled.

CONCLUSION

The purpose of Part I has been to develop a schemata of the police power and related concepts; to develop an analytic structure against which exercises of governmental power may be tested. Before proceeding to the application of this schemata, which is the purpose of Part II, some basic observations and conclusions should be drawn. First, the crucible in which this analysis has been developed, illustrated and will be applied, is the minimum lot size requirement. However,this particular land use control has been and will be used only as a model for theorizing and testing. All that is said in Part I about a method for judging the propriety of an ordinance which imposes minimum lot size requirements is fully applicable to other exercises of the police power which control the use of land, especially those which set out to achieve any or all of the objectives which lot size requirements are expected to accomplish. On occasion, regulations have zoned exclusively for industrial or agricultural use; have imposed minimum floor area requirements; or have imposed minimum cost requirements. Each of these regulations may have as its primary objective the exclusion of low cost single family homes, something which is especially evident when there is no significant market for the uses which are allowed. Surely all that has been said about evaluating the legality of lot size requirements is relevant to an examination of these other controls. Secondly, the schemata is not a litmus which can be tested against an ordinance or a decision and tell us when the legislation is unlawful or when the court is wrong. It is an approach, a guide to understanding the problems raised in the control of land use. Because the matter of governmental function and power does not lend itself to absolute truths, a schemata devoted to its analysis must avoid a commitment to inflexibility. The tensions of society caused by endless changes in the world about us dictate nothing less. The solutions to new problems may well require a greater and continuing tolerance for

governmental power and intrusion upon free choice. Finally, an analysis of a specific exercise of the police power can be and should be accomplished in fairly systematic fashion. Even though the police power concept is never static and is always undergoing some kind of change, even though its exercise is always limited by a public sense of fairness and necessity, the use of basic standards for judicial inquiry is both feasible and appropriate. What consequences, intended or otherwise, is a regulation apt to produce? What is it that the regulation accomplishes? How well do these results square with our notions of what government ought to be doing? How effective is it in achieving its objectives? How substantial is its intrusion into private choice? Only by raising these questions and attempting their answer, can courts begin to focus on the problem which is central: has the legislation exceeded our current notions of the fundamental limits of governmental power? To be sure, the big questions—such as how provincial the public health or how expansive the "general welfare"—are inescapable, and perhaps the schemata does nothing more than to rush courts headlong into a consideration of these problems. Perhaps because these questions are always there and must always be confronted, how one gets there—by this schemata or otherwise—is irrelevant. Yet surely it is not superfluous to know when the big question is one of methodology or is one of goals. And surely it is not irrelevant for courts to concentrate straightaway on how public the goal, how general the public welfare or how tolerable the intrusion without a cop-out in favor of health and safety or legislative discretion. The stakes are high and time is running out. The ghetto is restless; its victims wish to move out and share in the good life. The supply of available land is not endless, the chain of urban development is nearly complete, especially along the Atlantic coast. Courts must be persuaded to ask the right questions at the right time in meeting their obligation to safeguard against misguided and excessive exercise of governmental power.