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PLANNING THE FREEWAY: INTERIM CONTROLS IN HIGHWAY PROGRAMS

DANIEL R. MANDELKER*

GOOD PLANNING always means delay. Three to seven years may elapse in the Interstate and National Defense Highway System from the first preliminary steps to final construction, yet serious problems of land use control are presented during this interim period. Often the mere announcement of highway plans will trigger a wave of speculative buying which will inflate land values. Costs will also be increased if private development occurs across the right-of-way, and less tangible but equally harmful effects may be felt if development along the highway takes place which will generate either too much traffic at critical points or traffic of the wrong kind.

The vulnerability of the highway during the time preceding land acquisition has stimulated a variety of statutory controls which are aimed at reserving future rights-of-way against impairment. Few of these statutes confer protective authority on the state highway agency, however, and most are directed to the municipal and county level. The municipal or county official map is the most explicit reservation device. An official map reserves land for street and road purposes, and the enabling legislation prohibits any improvements

* B.A. 1947, LL.B. 1949, University of Wisconsin; J.S.D. 1956, Yale University. Author, GREEN BELTS AND URBAN GROWTH: ENGLISH TOWN AND COUNTRY PLANNING IN ACTION (1962); Professor of Law, Washington University. This article is an adaptation of Part I of a report prepared for the Bureau of Public Roads, United States Department of Commerce, under Contract No. CPR 11-8006 with the University of Wisconsin School of Law. The report, entitled "A Study of Future Acquisition and Reservation of Highway Rights-of-Way," was prepared under the supervision of Professor J. H. Beuscher of the University of Wisconsin School of Law. Part II, dealing with acquisition of rights-of-way in advance of need, was written by Professor G. Graham Waite of the University of Maine School of Law.

in the street bed, subject to the grant of a variance in hardship cases. More indirect controls may also be used. Subdividers seeking public approval of their subdivision plats may be required to make an outright dedication which allows for future widening or to reserve street frontage pending future acquisition. Building setbacks[1] may be enacted which legislate front yards, to be kept free of structures, and which thereby incidentally reserve land for street widening purposes.

Underlying all of these techniques for interim control are common problems of administration. The underlying constitutional issue is also the same—whether an uncompensated prohibition upon the development of privately held land can be imposed prior to acquisition. While the problems of administration and constitutionality may be similar, however, each of these controls has had a different history, which in turn has affected its judicial reception and method of application. This article will review the existing techniques for interim regulation, outline their derivation and contemporary basis in statute, and examine the constitutional questions involved. On the basis of firsthand observations in several areas, an assessment will be made of the problems in administration.[2] Deficiencies in existing controls will be assessed, and a method of regulation will be proposed which can be used more effectively in the building of interstate and other modern highway systems.

I

SETBACKS UNDER THE POLICE POWER

A. The Constitutional Issues

Front yards have been typical of American residential development; and municipal ordinances, even before the advent of zoning,[3]

[1] Nomenclature here, as in other areas of planning law, may be confusing. The American Society of Planning Officials applies the term "setback" to "any requirement that buildings be set back" and gives the setback as described in the text the name "front yard requirement." ASPO PLANNING ADVISORY SERVICE, INFORMATION REP'T NO. 119, PROTECTING FUTURE STREETS: OFFICIAL MAPS, SETBACKS AND SUCH 5 (1959). However, the more generic term "setback" will be used in this article to denote the usual police power light and air requirements because it is more in accord with conventional use in the statutes and cases.

[2] The appraisal of the regulatory programs is based upon data gathered from discussions with highway officials and from visits with planning commissions and state highway agencies in Maryland, Michigan, North Carolina, and Wisconsin.

[3] McCavic v. DeLuca, 233 Minn. 372, 46 N.W.2d 873 (1951); Kipp v. Incorporated Village of Ardsley, 13 App. Div. 2d 1012, 216 N.Y.S.2d 893 (1961); Fisher v. City of

often established a building line, measured from the edge or centerline of a street, which reserved a front yard against improvements. No compensation is ordinarily required for the front yard reservation, and this technique will prove useful in keeping down acquisition costs should the street ultimately be widened. Setback requirements are now commonly a part of municipal or county zoning ordinances.

Early cases, impressed because the use of property was totally restricted, held the front yard setback unconstitutional. Beginning with the favorable United States Supreme Court decision in *Gorieb v. Fox*,[4] however, the state decisions began to reach an opposite result,[5] and the setback now appears constitutionally secure. Its rationale nevertheless remains problematic. *Gorieb* rejected a supposed contrast with zoning and upheld the setback as a density control which prevented encroachment on light and air. This approach emphasizes the urban aspects of setbacks and focuses upon their aesthetic benefits. Because state courts may balk at a favorable ruling when forced to rely upon an aesthetic justification, the state decisions have avoided this problem by relating the setback to safety considerations, which are easier to justify. For example, a case may suggest that a setback advances traffic safety by preserving the line of sight, or (dubiously) that it assists fire protection by making space available for firefighting equipment. A more adequate defense would focus upon other factors related to traffic safety, applicable in rural as well as urban areas. For example, setbacks may be

Irving, 345 S.W.2d 547 (Tex. Civ. App. 1961) (under home rule power). For selected laws authorizing setback ordinances independent of planning and zoning enabling acts, see ILL. REV. STAT. ANN. ch. 24, §§ 11-14-1 to -4 (1962) (municipalities); ILL. REV. STAT. ANN. ch. 34, §§ 3201-04 (1960) (counties); IOWA CODE ANN. § 368.10 (Supp. 1962) (municipalities); MISS. CODE ANN. § 8038(n) (Supp. 1962) (state highway commission); N.Y. TOWN LAW § 130(25); N.Y. VILLAGE LAW § 89(30); ORE. REV. STAT. § 227.290 (cities); PA. STAT. ANN. tit. 53, §§ 39103 (i), 46225, 56521, 65753 (1957) (selected municipalities); W. VA. CODE ANN. § 1448(12) (1961) (state highway commission).

[4] 274 U.S. 603 (1927).

[5] The cases prior to 1935 are reviewed in BLACK, BUILDING LINES AND RESERVATIONS FOR FUTURE STREETS 118-34 (1935), which is the classic work. For cases since then which have held setbacks constitutional, see Town of Atherton v. Templeton, 198 Cal. App. 2d 146, 17 Cal. Rptr. 680 (1961); Flinn v. Treadwell, 120 Colo. 117, 207 P.2d 967 (1949); Papioanu v. Commissioners of Rehoboth, 25 Del. Ch. 327, 20 A.2d 447 (1941); Board of Zoning Appeals v. Decatur, Ind. Co. of Jehovah's Witnesses, 233 Ind. 83, 117 N.E.2d 115 (1954); Boardman v. Davis, 231 Iowa 1227, 3 N.W.2d 608 (1942); Moore v. City of Pratt, 148 Kan. 53, 79 P.2d 871 (1938); City of Beatrice v. Williams, 172 Neb. 889, 112 N.W.2d 16 (1961); Matter of Richards v. Zoning Bd. of Appeal, 285 App. Div. 287, 137 N.Y.S.2d 603 (1955). See also Kratovil & Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596, 636 (1954).

used to eliminate billboards, plantings, and other attention-detractors from the roadside. Better design of access can be afforded if the setback is used to provide a frontage road. More recently the cases have omitted discussion of these questions and have accepted the setback under familiar presumption of constitutionality rules.[6]

In his classic treatise on the subject of building lines and street reservations, Russell Van Nest Black intimated that setbacks could protect future street widenings as well as accomplish the traditional health and welfare objectives,[7] an expectation which has been disappointed. When Black wrote, many municipalities did use setback ordinances to safegnard street widenings, a practice which is still common. But courts have objected to the explicit use of a police power ordinance to hold down the price of property destined for ultimate acquisition.[8] While the purpose of a restriction arguably is unimportant if its effect is the same, the setback required for street widening is usually wider than the setback which would normally be imposed. Consequently, the affected owner can successfully contend that the ordinance has been applied to him in a discriminatory manner.[9] An instructive example is *Mayer v. Dade County*,[10] a Florida case. There the landowners expected to build a hospital. Their south property line fronted on the centerline of a proposed street; and in order to protect the street, the county required an

[6] Town of Atherton v. Templeton, *supra* note 5; Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959). For one of several cases which accepts aesthetic considerations as a factor which bears on the general welfare, see Kerr's Appeal, 294 Pa. 246, 144 Atl. 81 (1928).

[7] BLACK, *op. cit. supra* note 5, at 116.

[8] Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950); City of Miami v. Romer, 73 So. 2d 285 (Fla. 1954) (second appeal). *Cf.* Arkansas State Highway Comm'n v. Anderson, 184 Ark. 763, 43 S.W.2d 356 (1931) (town ordinance held invalid which prohibited new building within extended boundaries of a highway); Householder v. Town of Grand Island, 114 N.Y.S.2d 852 (Sup. Ct. 1951), *aff'd*, 305 N.Y. 805, 113 N.E.2d 555 (1953). On this point, the *Romer* litigation is instructive. On the first appeal, the setback was upheld under the police power, even though the court noted that the city may have contemplated a street widening. City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952). On the second appeal, the case was sent back for trial on the basis of an amended complaint which alleged that the real purpose of the restriction was to prevent the building of improvements in order to hold down the ultimate cost of acquisition.

[9] See Galt v. Cook County, *supra* note 8 (setback twice as wide as was customary). A possible exception is Highway 100 Auto Wreckers, Inc. v. City of West Allis, 6 Wis. 2d 637, 96 N.W.2d 85 (1959), in which a 210 foot setback from the highway was imposed under the power to license junk yards. The court found support from a statute which imposed a 750 foot setback on similar uses in open areas. *Cf.* Fisher v. City of Irving, 345 S.W.2d 547 (Tex. Civ. App. 1961).

[10] 82 So. 2d 513 (Fla. 1955).

additional fifteen foot setback. This requirement was successfully challenged, the court pointing out that the hospital had been "singled out" for an "unusual" application of the setback ordinance.

B. Inadequancies of the Setback as a Reservation Device[11]

When the setback is used to plan ahead for street widening in developed areas; difficulties may be encountered which are an extension of the "unusual" application of the ordinance in the *Mayer* case. A good example is *Zampieri v. Township of River Vale*,[12] a New Jersey Supreme Court decision. River Vale, a township on the developing urban fringe, had changed its setback requirement at a busy intersection to sixty instead of forty feet. Street widening was one of the purposes of the change. Without deciding that the use of the setback power for widening purposes was necessarily unconstitutional, the court held the ordinance invalid as applied in these circumstances. Existing nonconformities had established a pattern which the ordinance was not allowed to change. A substantial number of buildings had been constructed at the intersection, almost half of which were nonconforming to the amended setback line and some of which were new. Vacant parcels were also present in the immediate area, and new buildings on these parcels would have been required to recede some twenty feet from existing properties in order to conform to the amended building line. At other locations the amended setback, in conjunction with rear yard requirements, made it impossible to build on vacant land.

[11] Fisher v. City of Irving, 345 S.W.2d 547 (Tex. Civ. App. 1961), might be read as approving the establishment of a setback in order to reserve frontage sufficient for a service road. The owner of lots along a highway protested an eighty foot setback. Adjoining owners on each side had arranged with the city for a service road adjoining the highway; and for this reason, they were given a thirty foot setback measured apparently from the property line abutting on the service road. The lotowner in this case was denied a thirty foot setback solely because he had not provided the service road, and the denial was affirmed by the board of adjustment.

The court sustained the board on the usual grounds that it found no abuse of discretion. Part of the problem lay in the manner in which the lotowner presented his case. "Ironically, appellants' complaint is not to the 80-foot setback . . . but relates to the failure of the City to purchase (or condemn) their 50-foot frontage and thus place them on a parity with others so treated . . . ." Fisher v. City of Irving, *supra* at 549. The court was able to find that a failure to condemn was well within the discretionary power of the city. In addition, eighty feet was found to be a reasonable setback under the circumstances. Moreover, the adjoining service roads had already established the pattern in the area, and to permit the lotowner in this case to build an additional fifty feet forward might well have been discriminatory to the other owners.

[12] 29 N.J. 599, 152 A.2d 28 (1959).

Difficulties have also arisen with widening setbacks in rural areas. In *Schmalz v. Buckingham Township Zoning Bd.*,[13] the Pennsylvania Supreme Court invalidated a fifty foot highway setback which had been applied to open and undeveloped land in a rural township. The court referred to the usual objectives of the setback—lessening of congestion, provision of light and air, and protection of the public safety. That a setback line would accomplish these objects in populous areas, it held, did not justify its use in sparsely populated rural sections. The lower court had sustained the ordinance in part because the area might be urbanized in the near future, but this justification was not accepted on appeal.

Read together, the *Zampieri* and *Schmalz* cases throw some doubt on the use of the setback to reserve future rights-of-way and raise questions about its effectiveness in rural areas. But can either case be accepted as a proper reading of the police power? The *Schmalz* opinion is unnecessarily narrow, although understandable in light of the customary reasons which have been advanced in support of setback controls. *Zampieri* ignored the possible use as a planning tool of highway reservations, which can be helpful even in areas which have been substantially developed. In defense of the *Zampieri* court, however, the ordinance there was clearly *ad hoc,* and the failure to provide an underlying plan emphasized the discriminatory nature of the widening amendment. A better factual record in the *Schmalz* case and a better overall community planning record in the *Zampieri* case might have led to different results.

Judicial reaction to hardship cases under setback ordinances further underlines their limitations. The ordinance will be invalidated if the setback does not leave a buildable area on the lot; and if a hardship variance is available under the ordinance, it is always granted in cases like this.[14] A good recent example is a Cali-

[13] 389 Pa. 295, 132 A.2d 233 (1957). *Cf.* Householder v. Town of Grand Island, 114 N.Y.S.2d 852 (Sup. Ct. 1951), *aff'd,* 305 N.Y. 805, 113 N.E.2d 555 (1953) (ninety foot widening line applied to property on a sparsely settled island held unconstitutional).

[14] *Compare* Kerr's Appeal, 294 Pa. 246, 144 Atl. 81 (1928) (37% buildable area sufficient in residential but perhaps insufficient in commercial area), *with* Kipp v. Incorporated Village of Ardsley, 205 N.Y.S.2d 917 (Sup. Ct. 1960), *aff'd on other grounds,* 13 App. Div. 2d 1012, 216 N.Y.S.2d 893 (1961) (setback unconstitutional if 50% or 70% of property restricted from building). The lower court opinion in the *Kipp* case had suggested that the ordinance would be unconstitutional if it did not provide a variance procedure because the owner would then have no way to test the reasonableness of the ordinance as applied to his property. *Cf.* Young v. Town of West Hartford, 111 Conn. 27, 149 Atl. 205 (1930).

fornia decision in which setbacks applied to both sides of a triangular lot reduced the buildable area to ten square feet.[15] The most common cases are corner lots to which setbacks are applied on both frontages.[16] If the escape provision is written as an exception rather than as a variance, hardship need not be proved, and administrative relief is even easier to obtain.[17]

While the need for relief in cases like these is understandable, the difficulty is that the critical points for the application of widening proposals are at intersections. Proposals for new highways create similar problems. They may cut irregularly through an established lot pattern, creating innumerable hardship cases which will also weaken the effectiveness of the scheme. As an additional complicating factor, setback ordinances are not drawn with highway needs in mind, and they do not authorize the granting of variances under conditions which can limit the impact of the nonconforming use upon the highway improvement.[18]

C. An Evaluation of Setbacks

Setbacks can make an incidental but important contribution to highway programs, especially when the front yard which has been reserved is sufficient in depth for widening purposes. The comparative simplicity of setbacks and the fact that they are well-established under the police power contribute to their continued use at the municipal and county level. However, substantial difficulties limit

[15] Hoshour v. County of Contra Costa, 203 Cal. App. 2d 602, 21 Cal. Rptr. 714 (1962).

[16] Faucher v. Sherwood, 321 Mich. 193, 32 N.W.2d 440 (1948); Federal Realty Research Corp. v. Zoning Bd. of Appeal, 7 App. Div. 2d 651, 180 N.Y.S.2d 241 (1958); Richards v. Zoning Bd. of Appeals, 285 App. Div. 287, 137 N.Y.S.2d 603 (1955); Goldberg v. Mackreth, 142 N.Y.S.2d 281 (Sup. Ct. 1955).

The court may also be sympathetic to the variance when a setback has been imposed for a highway rather than for street widening purposes. In Stout v. Jenkins, 268 S.W.2d 643 (Ky. 1954), an additional thirty foot setback was established to allow room for the proposed widening of a highway right-of-way. The court affirmed a variance which allowed the owner to build fourteen feet closer, finding without discussion that the board had not abused its discretion. See also Appeal of Siddall, 44 Del. County 293 (Pa. C.P.), *appeal dismissed,* 45 Del. County 38 (Pa. C.P. 1957) (aesthetic reasons may not be used to object to a variance). *But cf.* Garden View Homes, Inc. v. Board of Adjustment, 137 N.J.L. 44, 57 A.2d 677 (Sup. Ct. 1948) (variance cannot be granted simply to permit more profitable use of the property).

[17] See Goldberg v. Mackreth, *supra* note 16; Root v. City of Erie Zoning Bd. of Appeals, 180 Pa. Super. 38, 118 A.2d 297 (1955).

[18] *But cf.* Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765 (1960) (condition may be attached to use variance requiring dedication of additional right-of-way for street widening).

the use of the setback as a highway reservation device. Hardship problems have already been discussed. Because the setback is most easily applied to existing streets and highways, its usefulness for new rights-of-way is limited. Finally, a front yard which is used for highway widening will be reduced in size and will be nonconforming to the zoning ordinance. For this reason, setbacks established ostensibly for density control but actually for street-widening purposes may be deeper than usual, allowing the courts to detect the ultra vires application.

II

SUBDIVISION CONTROLS

A. Constitutionality of Dedications and Reservations

Planning enabling acts typically authorize municipal and county review of new subdivisions. In practice, if not by law, enforcement is usually limited to residential development. Conformance to the comprehensive plan for streets is a common requirement, and access and safety requirements are usually imposed. The developer is required also to provide streets, and dedication of rights-of-way without compensation has been judicially accepted for both new streets[19] and the widening of streets adjacent to the subdivision.[20] Street construction is contemporaneous with development, however, so that dedication has little utility as an interim protection device except as dedications are required for adjacent thoroughfares to take account of future traffic needs.

Lack of clarity in the street dedication cases complicates the task of ascertaining judicial reaction to dedications in contemplation of future needs, but a clue is provided by the leading California decision of *Ayres v. City Council*.[21] There a subdivider was required to dedicate widening strips for an existing street, and the court upheld the dedication in the following language:

> In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed in a subdivision

[19] Town of Windsor v. Whitney, 95 Conn. 357, 111 Atl. 354 (1920); Blevens v. City of Manchester, 103 N.H. 284, 170 A.2d 121 (1961).

[20] Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928). *Cf.* Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (curb and gutter requirement).

[21] 34 Cal. 2d 31, 207 P.2d 1 (1949).

map proceeding that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs.[22]

The *Ayres* opinion suggests that street dedications will be sustained so long as they are proportionate to the highway demand which the subdivision creates, either presently or in the future, a point which is underlined by a pair of Illinois cases.[23] Special assessments for street improvements, which are measured by the extent of the benefit conferred, provide a close analogy. These considerations indicate that outright dedication is of limited use in highway programs. Substantial dedications will be required if the subdivision adjoins a throughway, but they will be hard to justify unless the subdivision is a large one. Difficult problems of administration will also arise if, as may be the case, a projected expressway is bordered by several subdivisions of small or moderate size. The *Ayres* language is helpful, but that case involved a collector street.

An alternative technique[24] which has a more explicit interim function is the reservation of rights-of-way under the subdivision ordinance. For example, the enabling law for the Maryland-Nation-

[22] *Id.* at 41, 207 P.2d at 7. The opinion points to special assessment as a useful analogy. Under special assessment techniques, abutting land is assessed to the extent that street improvement confers a benefit upon the land affected.

[23] Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); Rosen v. Village of Downers Grove, 19 Ill. 2d. 448, 167 N.E.2d 230 (1960). These cases invalidated lot fees and land dedications for school purposes, noting that the need for schools was generated by the entire community and was not attributable solely to the subdivision. *But cf.* Blevens v. City of Manchester, 103 N.H. 284, 170 A.2d 121 (1961), upholding regulations which also benefited landowners outside the subdivision to which they were applied. The court suggested that the subdivider might be eligible for hardship relief in this instance.

[24] Of course, any change in land use may generate new traffic, and to this extent the dedication requirement should not be confined to new subdivisions. To this effect, see Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765 (1960), requiring a street dedication as a condition for a variance permit granted for excavating. One instructive lesson would seem to be that it is easier to make exactions for streets when the developer is required to apply for a permit, as is the case under subdivision and variance provisions. In theory, however, there should be no real difference between these cases and those in which a change of use occurs as of right under the zoning ordinance. See Tooke, *Methods of Protecting the City Plan in Outlying Districts,* 15 GEO. L.J. 127 (1927).

In comparison with setbacks, which may be imposed *ad hoc,* subdivision controls also gain strength because they are imposed under a comprehensive plan. The cases have emphasized this point, Krieger v. Planning Comm'n, 224 Md. 320, 167 A.2d 885 (1961); Blevens v. City of Manchester, *supra* note 23, and they have not enforced a street dedication if a plan has not been adopted. Lordship Park Ass'n v. Board of Zoning Appeals, 137 Conn. 84, 75 A.2d 379 (1950). *But cf.* Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (subdivision design for district constitutes "practical adoption" of master plan).

al Capital Park and Planning Commission authorizes three year reservations for roads and other public purposes,[25] during which time the land is exempt from taxation. The reserved land is neither dedicated to nor immediately acquired by the highway authority; and even though the lot owner is compensated when the land is taken for highway purposes, he suffers an uncompensated delay during the interim. Because the reserved portion is not counted toward the lot area requirements of the zoning or subdivision ordinance, the reservation also amounts to a taking from the developer. Nevertheless, the few cases on point have upheld street reservations under subdivision regulation as an aid to planning.[26] This experience presents a strong contrast to the official map, whose judicial acceptance has come much harder.

B. Application in Highway Programs

Several states and communities have carried out an effective program of interim highway control under subdivision regulations. One successful agency is the Maryland-National Park and Planning Commission, with jurisdiction over the two counties on the Maryland side of the Washington metropolitan area. Working closely with the Maryland state highway agency, the commission has mapped rights-of-way for major highways, many of which run through undeveloped land which is controllable under the subdivision ordinance.[27] No development is allowed in the bed of the highway, and

[25] Md. Laws 1959, ch. 780, § 71 (a) (4), as amended, Md. Laws 1963, ch. 815, § 1. The reservation may be extended beyond the initial three year period with the written consent of the owner of the property. For the reservation provisions applicable in Montgomery County, see *Subdivision Regulations for the Maryland-Washington Regional District Within Montgomery County* § 101-13 (Oct. 17, 1961).

[26] Krieger v. Planning Comm'n, 224 Md. 320, 167 A.2d 885 (1961). The subdivision fronted on a state highway sixty feet wide. On the county highway plan, an ultimate minimum width of one hundred feet was shown. A plat was rejected because it did not reserve the extra depth necessary to provide for the widening. The court sustained the planning commission, pointing out that the purpose of the reservation was to prevent subdivision in the path of a projected or widened highway and that planning for future needs would be frustrated if compliance with the reservation could not be enforced. To the court, the basic constitutional issue had been decided adversely to the subdivider with the earliest cases upholding the constitutionality of zoning. *Accord,* Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928); *cf.* Clarks Lane Garden Apartments, Inc. v. Schloss, 197 Md. 457, 79 A.2d 538 (1951).

[27] The Montgomery County subdivision ordinance defines "subdivision" quite tightly as "the division of a lot, tract, or parcel of land into two or more lots, plots, sites, tracts, parcels or other divisions." *Subdivision Regulations for the Maryland-Washington Regional District Within Montgomery County* § 101-2 (r) (Oct. 17, 1961).

subdivision developers are asked to dedicate the necessary land for rights-of-way, although dedication may be combined with reservation if the exaction is excessive. The property may also be bought or taken under an option, which freezes acquisition costs as of the option date. Problems have arisen with the use of reservations because the enabling act has a three year limit. This period is not sufficient, and voluntary extensions have been only partially successful. Hardship cases also create difficulties; and while many properties have been purchased, the absence of a statutory escape only heightens the danger of a successful challenge. Greensboro, North Carolina, pursues an equally vigorous program of subdivision control, again with state cooperation.[28] Dedications which are twice the width of city streets are required there for highways, the city arguing that the subdivision's need for access justifies the more extensive exaction.

The programs in Greensboro and Maryland are imaginative in their adaptation of enabling laws which contemplate minimum land exactions and which are not geared to the more expansive scale of highway development.[29] They are typical, however, in that they are applied at the local level. Only two states, Wisconsin and Michigan,[30] have conferred comprehensive subdivision control authority upon their state highway agencies. The Wisconsin state highway

In addition, § 101-3 (b) provides that no building permit may be approved for a structure "unless said structure is to be located on a lot or parcel of land which is shown on a plot recorded in the Plat Books of the county."

[28] This state stands alone in requiring by statute the preparation of local highway plans in cooperation with the state highway commission. N.C. GEN. STAT. § 136-66.2 (Supp. 1963).

[29] Compare New York's county official map enabling act. It controls subdivisions along proposed county roads under standards which regulate traffic generating capacities. N.Y. MUNIC. LAW §§ 239-g to -k. This law apparently has not been implemented to control the quality of land use along proposed highways. Part of the problem is a lack of interest on the part of the state highway department. In Westchester County, traffic and safety requirements have been imposed under the law by rules and regulations which went into effect in 1958. See Schulman, *The County Official Map Act—A New Tool for County Planning*, New York State Planning News, Nov.-Dec. 1958, p. 1. Mr. Schulman is Commissioner of Planning for Westchester County. *Cf.* Westchester County Administrative Code, N.Y. Laws 1948, ch. 852, as amended, N.Y. Laws 1961, ch. 822, § 451 (subdivision plat containing new street connecting with state or county highway to be referred to county planning board).

[30] MICH. STAT. ANN. §§ 26.451, .458, .461, .465-.467 (1) (1953) & 26.459 (Supp. 1963); WIS. STAT. ANN. §§ 236.12 (2) (a) (Supp. 1963), 236.13 (1) (e) (1957). See also W. VA. CODE ANN. § 1474 (31) (Supp. 1963), authorizing the state highway commission to regulate access to subdivisions abutting state highways. For a Canadian statute authorizing the provincial minister in charge of local government to require dedication of widening strips, see ONTARIO REV. STAT. c. 296, § 28 (5) (c) (1960).

commission is one of three state agencies to which local authorities must refer subdivision plats, and the commission's jurisdiction extends to any subdivision which "abuts or adjoins a state trunk highway."[31] The statute restricts commission review to existing highways and makes enforcement dependent upon local cooperation, which may not be forthcoming. However, the statute confers broad powers within these limits, authorizing the adoption of rules and regulations for the control of safety and access, and more broadly, "for the preservation of the public interest and investment in such highways."[32] Extensive regulations[33] implement access and related controls[34] and take account of future right-of-way needs. Frontage roads may be required, and the commission may insist "that a frontage road be set back from the present highway to allow for future highway improvement."[35] While dedication appears to be authorized by the statute and regulations, the commission has not required dedication without the owner's consent on the ground that to do so would be unconstitutional.

State highway agency review in Michigan is reinforced by the requirement that all subdivisions must have the approval of the state auditor general's office as a prerequisite to recording. If the subdivision includes or affects state or federal aid roads, the auditor general forwards the plat to the state highway commissioner's office,[36] which examines it to determine whether it conforms to plans on file for highways and whether it makes adequate provision for traffic safety.[37] While the plans[38] show relocated highways as well as widen-

[31] WIS. STAT. ANN. § 236.12(2)(a) (Supp. 1963).

[32] WIS. STAT. ANN. § 236.13(1)(e) (1957).

[33] WIS. ADM. CODE (H'ways) §§ 33.01-.12.

[34] WIS. ADM. CODE (H'ways) § 33.05 (2). The minimum setback is 110 feet, with the proviso that a local setback ordinance may be substituted if it is equally as restrictive.

[35] WIS. ADM. CODE (H'ways) § 33.08(3).

[36] MICH. STAT. ANN. § 26.465 (1953). The auditor general forwards the plat if it "appears to include lands on state trunkline or federal aid roads, or have endorsed on same the certificate of the county plat board that the plat affects such roads . . . ." For the section authorizing county plat board endorsement, see MICH. STAT. ANN. § 26.459 (Supp. 1963). The county plat boards, organized for every county, are outside the framework of planning law administration. The existence of plat boards in each county and of equivalent municipal approving agencies is another factor which contributes to the effectiveness of state review in Michigan.

[37] MICH. STAT. ANN. § 26.466 (1953). In addition, all connecting streets and highways must be graded and surfaced in accordance with state highway agency specifications. MICH. STAT. ANN. § 26.467(1) (1953). The commissioner's office estimates that it receives for review about ten per cent of all plats which are processed through the auditor general.

The Michigan statute also permits county review to determine whether the plat

ing proposals, they are applied in practice only to existing locations for which widening is contemplated. The explanation lies in differences in width. Highways are seldom widened to more than 150 feet, while newly located limited access expressways are at least double this size. For widenings, dedication of the widening strip will be required as a condition of plat approval.[39]

C. An Evaluation of Subdivision Controls

The use of subdivision controls for the advance protection of highway rights-of-way has both strengths and weaknesses.[40] Since the imposition of these controls depends on the developer's initiative in seeking approval, regulation will not be effective if subdivision activity is low or nonexistent. Moreover, subdivision controls can be most effective in undeveloped rural areas, and it is in these areas that subdivision regulations are least likely to have been

conforms to any plan for county roads which has been placed on file locally. See Lefevre v. Houseman-Spitzley Corp., 246 Mich. 383, 224 N.W. 659 (1929) (conformance to county plan does not violate constitutional provision giving control of streets to townships; control of streets is distinct from control of highways). Earlier experience under the Wisconsin and Michigan laws is analyzed in Beuscher, *Protection of Highways and Feeder Streets Through Subdivision Controls*, in HIGHWAY RESEARCH BD. BULL. NO. 101, TRENDS IN LAND ACQUISITION (1955). See also Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389.

[38] At one point the statute appears to require local recording of the highway plan. MICH. STAT. ANN. § 26.459 (Supp. 1963). However, this requirement has not been observed in practice.

[39] Proposed highway widenings are limited to 150 feet in rural areas, 120 feet in suburban areas, and 100 feet in urban areas. The order of progression appears reversed, since highways should increase in width as they approach urban areas to take care of the heavier traffic, but the reason behind the order of progression lies in the higher cost of acquisition in urban areas. Dedication burdens are somewhat lessened along section-line roads, which have a required width of sixty-six feet. Many local authorities also impose a seventy-five foot setback from the centerline.

The highway department has also implemented the safety requirement. Points of access may be changed or reduced in number or a service road may be required.

[40] In some instances, the lack of formal policy may injure the administration of the program. In Michigan, for example, subdividers escape regulation by platting land in back of that part of the property which abuts on the highway. They then sell off the abutting lots a few at a time, thus evading the subdivision law, which defines a subdivision as any tract of five or more lots. However, the Wisconsin regulations define a "subdivision abutting on a state highway" in fairly broad fashion to include an area separated from the highway by abutting unplatted lands which are owned by or under option, contract, or lease to the subdivider. WIS. ADM. CODE (H'ways) § 33.03(3). The discipline of having to establish formal guides for administration should contribute to the elimination of loopholes of this type. Under its regulations, the Wisconsin highway commission may also consider the relationship of the subdivision to adjacent and contiguous land, and it may apply its subdivision control policies to any contiguous land which is owned by, or under option, contract, or lease to the subdivider.

adopted. Even where subdivision controls have been put into effect, opportunities for evasion through metes and bounds subdividing and other techniques are always present; and the success of programs in cities such as Greensboro should not be allowed to hide the wholesale evasions which occur elsewhere.

Subdivision controls can still be most useful as a means of compelling highway dedications and reservations, partly because judicial resistance has been easy to overcome. Analytically, no real difference exists between a street reservation under an official map ordinance and a street reservation under a subdivision regulation. Nor is the act of subdivision the only critical time at which dedication or reservation should be required. But courts in subdivision cases are impressed with the argument, erroneous though it may be, that the subdivider seeking approval is asking for a privilege. This attitude suggests that the use of a permit requirement in other areas of land use regulation may facilitate dedications and reservations outside the context of subdivision control.

III

The Official Map

A. The Statutory Pattern

The mapping of planned municipal streets is an American practice which dates from colonial days, when a colonial proprietor owned all of the land on which a town was to be built and simply reserved land for street purposes as he sold off individual plots. As the growth of cities made proprietary methods too cumbersome, city streets were mapped under fairly primitive official map statutes adopted at the beginning of the nineteenth century. These laws contained nothing in the way of enforcement clauses; they did not authorize variances; and they relied for their effectiveness upon a provision which denied compensation for any building which was erected so as to encroach upon the projected street bed. These early statutes were judicially sustained, and some of the official map laws still in force in Pennsylvania are modeled on this early legislation. But changing judicial attitudes led to the invalidation of some of these laws toward the close of the nineteenth century, and the change in judicial climate together with the growth of the city plan-

ning movement led to substantial alteration in the pattern of official map legislation.[41]

In the 1920's and 1930's, official map acts were substantially revised under the influence of model planning laws based on two basic prototypes which were made available during this period.[42] One model derived from the Standard City Planning Enabling Act, which along with a Standard Zoning Enabling Act was developed by the United States Department of Commerce. The standard planning act rests its official map sections upon the eminent domain power. Under this act, compensation is payable to landowners affected by the street reservation, although the standards to be applied in determining compensation are not indicated. While this act contains no enforcement powers and any use can be made of land placed within the reservation line, no compensation is payable for any building or structure built within the reserved area.

Although the standard act has been adopted in a few states, local authorities have either been reluctant or unable to devote public funds to street reservations and have seldom used it.[43] A majority of the official map acts have followed one of two models of the second prototype, acts based on the use of the police power rather than the eminent domain power. These two models were contained in a 1935 Harvard planning publication.[44] These statutes were drafted by early leaders in the planning movement. One model, prepared by Edward Bassett and Frank Williams, was derived from a similar statute they had drafted for enactment in New York in 1926. The other statute was prepared by Alfred Bettman. While substantially alike in principle, the Bassett-Williams and Bettman

[41] The classic treatment of official map laws in Kucirek & Beuscher, *Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Platting*, 1957 WIS. L. REV. 176. It should be consulted for a thorough treatment of the development of the mapping device and the early cases on the constitutionality of official map statutes.

[42] The model legislation is reproduced in BLACK, *op. cit. supra* note 5, at 177-86.

[43] This conclusion was reached in a recent survey of the use of official map enabling legislation in the United States. Davis, Official Maps and Mapped Streets in the United States, July, 1960 (unpublished thesis in Georgia Institute of Technology Library).

[44] BASSETT, WILLIAMS, BETTMAN & WHITTEN, MODEL LAWS FOR PLANNING CITIES, COUNTIES, AND STATES (1935). Whitten contributed to the discussion but did not append a model law. Bettman, and also Bassett and Williams, drafted enabling laws for both counties and municipalities. The Bassett-Williams and Bettman models are compared in greater detail in BLACK, *op. cit. supra* note 5, at 18-22.

models differ significantly in detail, and the state enabling acts show the influence of one or the other.

Both the standard planning act and the Bettman police power model require a comprehensive street plan as a prerequisite to an official map, while the plan requirement is not explicit in the Bassett-Williams model. The standard act contemplates a series of individual street reservations to be shown on plats, while the police power models provide for a single map which is subject to periodic amendment.

Neither of the police power models denies compensation for buildings or structures built in the bed of a street, but they rely for enforcement on a permit procedure under which no permit is issued except in hardship cases. Hardship is defined differently in the two acts. Bettman requires that the property of which the mapped street forms a part be incapable of yielding a reasonable returu, or that, balancing the interests of the municipality against the interests of the owner, considerations of "justice and equity" dictate the grant of a permit. Bassett and Williams authorize a permit if the land "within" the mapped street is not earning a fair return. This test is acknowledged as more conservative than Bettman's; and it appears easy to satisfy, since no use may be made of the restricted portion and a fair return can never be earned if only that part of the parcel is considered. Both models authorize conditions on the grant of a variance. Bassett and Williams authorize "reasonable conditions" designed to promote the health, safety, and welfare of the community, while Bettman authorizes specific conditions covering both the character and the duration of the development. The discussion will concentrate on official map enabling laws modeled after the police power provisions of the Bassett-Williams and Bettman drafts,[45] which now have been adopted in more than half of the states.

[45] See also Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961). The court upheld the constitutionality of a Montgomery County, Maryland, zoning ordinance which had incorporated the Bettman official map permit and variance provisions. Montgomery County's authority to enact these provisions as part of its zoning ordinance was not challenged.

One defect in both the police power models is that the variance procedure applies only to new buildings proposed to be erected in the bed of a mapped street. Nothing is said about alterations to or reconstructions of existing buildings, an important problem in developed areas. The inference is that changes in existing buildings are either prohibited absolutely or are exempt from the permit provisions of the law.

B. The Constitutional Issues

Official map laws confer clear advantages on highway agencies. What are the disadvantages to the landowner? One problem is that the acquisition of his property will be delayed, yet no improvements will be permitted in the interim. Another is that the measure of compensation when his land is taken may be adversely affected by the highway reservation. How will these effects influence judicial reaction to official map laws?

1. *The Temporary Freeze*

An Arizona case suggests that the eminent domain power may not be manipulated to freeze the *status quo* of the condemnee's property for a substantial period of time pending condemnation. *State ex rel. Willey v. Griggs*[46] held unconstitutional an Arizona law which attempted to accomplish through eminent domain procedures what the official map law accomplishes under the police power. Under the Arizona law, the value of the affected property was fixed as of the filing of the highway department's resolution of necessity. The department had two years after this date to complete the taking, "and improvements placed upon such property subsequent to the date of such resolution . . . [were not to] be included in the assessment of compensation and damages."[47] What struck the court as objectionable was the fact that for two years after the filing of the resolution, the property owner acted at his peril, although the state was not required to proceed with the condemnation. If it dropped the proceedings, no compensation was allowed for the intervening inconvenience.[48] That the statute permitted the state to save money

[46] 89 Ariz. 70, 358 P.2d 174 (1960).

[47] Under Arizona procedure, the value of the property is fixed as of the date of the summons in the condemnation action. In this case, the property had increased in value by $5000 in the seven month period between the resolution of necessity and the summons date. Opening Brief for Appellant, p. 6, State *ex rel.* Willey v. Griggs, *supra* note 46. In its appellate brief, the highway department argued the case principally on the point that the purpose of the statute was to prevent the inflation in real estate values which usually results from the announcement of a highway project. The brief noted that a majority of decisions have "denied the owner the right to recover an increase or enhancement in the value of the land due to the proposed improvement." *Id.* at p. 8.

[48] In the converse situation, when entry precedes the taking, the state may be liable for temporary occupation if it abandons the proceeding without completing it. Andrews v. State, 19 Misc. 2d 217, 188 N.Y.S.2d 854 (Ct. Cl. 1959), *aff'd*, 9 N.Y.2d 606, 176 N.E.2d 42 (1961); Robert S. Smith Corp. v. State, 31 Misc. 2d 107, 49 N.Y.S.2d 579 (Ct. Cl. 1944).

did not convince the court that so drastic an interference with private rights in land was justified.

A similar statute has been upheld elsewhere,[49] and the *Griggs* rationale goes contrary to the usual rule that no liability attaches for the abandonment of condemnation proceedings or for a delay in prosecution, unless the delay is either unreasonable or a deliberate attempt to depreciate the value of the condemnee's property.[50] Even more in point are cases holding that damages cannot be recovered for depreciation in market value due to delay in filing condemnation proceedings which have been kept under consideration for some time.[51]

At first glance, what seems most important is the manipulation of labels. Ordinarily, no liability attaches for public inaction. If the property owner voluntarily complies with a state or municipal request to adjust his plans to a proposed highway or street project, the court will not find a taking.[52] But liability will attach if the public authority intentionally undertakes a course of action which will result in delay and injury to him and to which the landowner does not consent. This disability was found to be the vice of the statute which was held unconstitutional in the *Griggs* case, since it provided for a maximum planned delay of two years. Yet these distinctions may be illusory to the landowner. He may be as much affected by the mere announcement of a highway project as he is by the filing of condemnation proceedings, and the burden of litigation may effectively compel voluntary adjustments which are treated as noncompensatory.

The problems lie in the borderland between police power and eminent domain. Perhaps the *Griggs* statute was found objection-

[49] Drainage Dist. v. Chicago B. & Q. R.R., 96 Neb. 1, 146 N.W. 1055 (1914) (statute permitted two year delay in completion of proceedings). *But cf.* Chelten Trust Co. v. Blankenburg, 241 Pa. 394, 88 Atl. 664 (1913).

[50] For a discussion of the problems of delay and abandonment in condemnation, see Lord Calvert Theatre v. Mayor and City Council, 208 Md. 606, 119 A.2d 415 (1956).

[51] United States v. Certain Lands in Town of Highlands, 47 F. Supp. 934 (S.D.N.Y. 1942); A. Gettelman Brewing Co. v. City of Milwaukee, 245 Wis. 9, 13 N.W.2d 541 (1944). The problem is discussed in Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958).

[52] Hamer v. State Highway Comm'n, 304 S.W.2d 869 (Mo. 1957). The state abandoned the project after the property owner had complied; a suit for damages was dismissed. *Cf.* State v. Hankins, 63 N.J. Super. 326, 164 A.2d 615 (App. Div. 1960) (gas pumps voluntarily set back from state highway); Devlin v. City of Philadelphia, 206 Pa. 518, 56 Atl. 21 (1903) (change of grade case); Widening of Venango Street, 9 Pa. Dist. 651 (Q.S. 1900) (street widening law did not compel setback).

able because it imposed an unreasonable limitation on land use. The zoning ordinance, and not the eminent domain proceeding, is the proper place to impose land use limitations; and zoning ordinances may well be drafted with delay in mind. A common example is an ordinance which limits fringe development by temporary residential zoning or by other means. Provided the time limit is reasonable, the courts will be favorably disposed toward delay.[53] *Griggs* may simply stand for the proposition that eminent domain cannot be used to accomplish what should be undertaken under the police power. But the reasoning can become circular. Equally well-established is the proposition that police power zoning cannot be used to accomplish what should be undertaken by way of eminent domain proceedings. For example, a municipality may zone a parcel located in a residential area for industrial purposes to prevent its development prior to the time it can be acquired for a park, but all courts, applying the *Griggs* rationale, would agree that a zoning ordinance may not be used to reduce acquisition costs by preventing the interim development of privately held land.[54]

The fate of zoning ordinances which forestall private development raises additional doubt about the constitutionality of official map laws. What really distinguishes the zoning cases, however, is not so much the abuse of the zoning power but the discriminatory treatment of individual property owners. This impression is reinforced by cases in which the dispensing power, in the form of a requested building permit or variance, is withheld solely because of an *ad hoc* decision to reserve land for a highway. In all of these cases, the municipal action has been reversed. A good example is *Grosso v. Board of Adjustment*,[55] in which an application had been

[53] See the important case of Metro Realty v. County of El Dorado, 35 Cal. Rptr. 480 (Dist. Ct. App. 1963), upholding a zoning ordinance imposing a three year reservation of private property which had been designated through advance planning for the acquisition of water reservoir sites. Compare Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 232, 15 N.E.2d 587, 592 (1938).

[54] 2700 Irving Park Bldg. Corp. v. City of Chicago, 395 Ill. 138, 69 N.E.2d 827 (1946) (property in industrial area zoned to apartment use to prevent development of park site); Grand Trunk Western Ry. v. City of Detroit, 326 Mich. 387, 40 N.W.2d 195 (1949) (similar facts); City of Plainfield v. Borough of Middlesex, 69 N.J. Super. 136, 173 A.2d 785 (L. 1961) (park site zoned for "school or park" purposes); Chase v. City of Glen Cove, 34 Misc. 2d 810, 227 N.Y.S.2d 131 (Sup. Ct. 1962) (privately owned tract rezoned for public housing development); State *ex rel.* Tingley v. Gurda, 209 Wis. 63, 243 N.W. 317 (1932) (land in industrial area, intended for boulevard, zoned residential). *Cf.* Hager v. Louisville and Jefferson County Planning and Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953).

[55] 137 N.J.L. 630, 61 A.2d 167 (Sup. Ct. 1948).

filed for a variance. Before a decision had been reached, the official map was amended to cover the applicant's property and the permit was then denied. On appeal, the denial was reversed. Similar results have been reached when the zoning power has been used retroactively in the same way.[56] Whether the result would be as unfavorable if the limitation on development had been imposed considerably in advance and in accordance with a comprehensive plan is surely open to question.

2. *The Measure of Compensation*

Equally as difficult is the problem of valuing land reserved for the highway when it is finally acquired for a right-of-way. Clearly the landowner will not be awarded a nominal or zero value for his property simply because under the official map the land is available only for public and not for private uses.[57] A milder form of the nominal value approach has also been rejected. In one case the condemning agency argued that the market value should reflect the limited time, prior to the taking, during which the land could be used for private development.[58] These decisions reflect the familiar rule that depreciation attributable to the project for which the land is taken may not be considered when compensation in awarded.[59] Enhancement in value which is traceable to the taking is also dis-

[56] State *ex rel.* Dille Labs. Corp. v. Woditsch, 106 Ohio App. 541, 156 N.E.2d 164 (1958) (refusal of building permit); Henle v. City of Euclid, 97 Ohio App. 258, 125 N.E.2d 355, *appeal dismissed,* 162 Ohio St. 280, 122 N.E.2d 792 (1954) (refusal of rezoning). *Cf.* Roer Constr. Corp. v. City of New Rochelle, 207 Misc. 46, 136 N.Y.S.2d 414 (Sup. Ct. 1954) (retroactive application of official map).

[57] Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958). South Twelfth Street, 217 Pa. 362, 66 Atl. 568 (1907); *Re* Gibson and City of Toronto, 28 Ont. L.R. 20, 11 D.L.R. 529 (C.A. 1913). Compare Rogers v. State Roads Comm'n, 227 Md. 560, 177 A.2d 850 (1962) (covenant limiting use reduces value of land).

[58] Congressional School of Aeronautics, Inc. v. State Roads Comm'n, *supra* note 57.

[59] The principle is well-established by a pair of contrasting United States Supreme Court cases. United States v. Virginia Elec. & Power Co., 365 U.S. 624 (1961) (depreciation); United States v. Miller, 317 U.S. 369 (1943) (enhancement). See also the cases collected in 4 NICHOLS, EMINENT DOMAIN § 12.3151 (4th ed. 1962); Annot., 147 A.L.R. 66 (1943). *Cf.* City of Dallas v. Shackelford, 200 S.W.2d 869 (Tex. Civ. App. 1946) (A.L.R. incorrect in suggesting that Texas follows minority view). Practically all of the state courts which have decided the question follow the federal rule. For particularly interesting recent applications, see Brubaker v. State, 27 Misc. 2d 458, 214 N.Y.S.2d 838 (Ct. Cl. 1961) (St. Lawrence River improvement projects); In the Matter of Addition to Lincoln Square Urban Renewal Project, 22 Misc. 2d 619, 198 N.Y.S.2d 248 (Sup. Ct.), *motion for reconsideration denied,* 23 Misc. 2d 690, 199 N.Y.S.2d 225 (Sup. Ct. 1960). For discussion of date of valuation problems in eminent domain, see Comment, 30 U. CHI. L. REV. 319 (1963).

regarded.[60] Official map legislation has avoided these problems by not dealing with them, and the pitfalls inherent in legislative treatment are illustrated by the statute held unconstitutional in the *Griggs* case. Under that law the landowner was deprived of all increment to the value of his land which accrued subsequent to the resolution of necessity. The courts allow the landowner to collect any increment in value due to general conditions not related to the project for which the property is acquired, even though governmental policies may affect those conditions;[61] and this increment was denied to the landowner under the *Griggs* statute.

During the interim period prior to acquisition, potential losses in the use and development of the restricted property must also be considered. If the land is undeveloped, the property owner will be prevented from developing it to a more profitable use; and he will lose any interim profits which might have been earned. In this situation the landowner suffers a loss on a use which is not in being at the time the property is restricted. The loss is not compensable because only vested rights[62] in land are protected from a retroactive application of the police power.[63]

[60] For cases applying the enhancement rule to highway takings, see Territory of Hawaii v. American Sec. Bank, 43 Hawaii 167 (1959); Cole v. Boston Edison Co., 338 Mass. 661, 157 N.E.2d 209 (1959); Benton v. Town of Brookline, 151 Mass. 250, 23 N.E. 846 (1890); In the Matter of Throgs Neck Expressway, 16 App. Div. 2d 570, 229 N.Y.S.2d 947 (1962). These and other cases indicate quite clearly that the date on which the official map is effective can be taken as the date after which enhancement due to the project can be disregarded. See also United States v. Miller, *supra* note 59 (dam project); May v. City of Boston, 158 Mass. 21, 32 N.E. 902 (1893) (park). In both cases, enhancement between the date of authorization and the time of taking was disallowed.

Most courts will discount enhancement (and depreciation) only after the project has been definitely located. Other cases, however, will go back to the beginning of the project, even though at this time there was only a general expectation that the project would be completed. Annot., 147 A.L.R. 66, 68 (1943). A Massachusetts statute which had been so interpreted may have been changed by a recent amendment. Connor v. Metropolitan Dist. Water Supply Comm'n, 314 Mass. 33, 49 N.E.2d 593 (1943); MASS. ANN. LAWS ch. 79, § 12 (Supp. 1962) (damages to be fixed at value "before the recording" of the order of taking).

[61] See, *e.g.*, Iriarte v. United States, 157 F.2d 105 (1st Cir. 1946) (general governmental policy to dredge harbors admissible to show that harbor tract could be used for industrial development). *Cf.* In the Matter of Widening of Wall-Street, 17 Barb. 617, 639 (N.Y. 1854).

[62] A good recent example is State *ex rel.* Mar-Well, Inc. v. Dodge, 113 Ohio App. 118, 177 N.E.2d 515 (1960), holding that the mere filing of a subdivision plat is not enough of a change in land use to confer a vested right. Otherwise, said the court, a claim of use could be based upon hope rather than occupancy and beneficial enjoyment.

[63] However, in State v. Corey, 59 Wash. 2d 98, 366 P.2d 185 (1961), the state stipulated to $4000 in damages alleged to have been caused by a highway reservation.

The highway reservation may likewise affect the rate of return on improved property located in the right-of-way which is nonconforming to the highway reservation. Repairs and alterations may be forbidden under the statute; but even if no such prohibition exists, the owner of the property may be reluctant to undertake improvements. Deterioration may then affect the rate of return. Nevertheless, under traditional rules a loss of business profits is not compensable when the property is acquired. Some courts, therefore, suggest that the highway reservation is invalid for this reason.[64] Statutory recognition of interim business losses might help avoid an unfavorable judicial decision, a point which contemporary official map legislation does not consider. The trouble is that business losses are highly speculative and may not be solely attributable to the highway reservation. Some formula must be found to isolate the loss which is attributable to the highway reservation.[65]

The facts of the case are not given in the opinion, but damages were based on loss of rental value from inability to develop the land to its highest use. Letter From Edward E. Level, Assistant Attorney General, State of Washington, July 30, 1962.

[64] In addition to State *ex rel.* Willey v. Griggs, 89 Ariz. 70, 358 P.2d 174 (1960), see Sansom Street, 293 Pa. 483, 143 Atl. 134 (1928). Compare Dong v. State *ex rel.* Willey, 90 Ariz. 148, 367 P.2d 202 (1961) (state not liable for intervening vandalism).

[65] Additional loss may occur if the highway reservation is terminated without completion of the project. The property owner may postpone development because of the anticipated highway, or he may voluntarily adjust his building plans, perhaps leaving part of his property unused in the expectation that it will be acquired. No right to compensation has accrued to the property owner in these cases, since he cannot acquire a vested right in an uncertainty. A landowner undertaking substantial improvements in reliance upon a zoning classification will be protected if the zoning ordinance is changed before his improvement has been completed. But in this case the landowner is merely trying to prevent the alteration of a public decision which has already been made. If the official map is changed, the landowner who claims reliance is attempting to force a public decision (to acquire) which has not yet been taken. Moreover, in the zoning example just given, he does not try to seek damages for injury arising out of the exercise of a governmental function.

A good analogy is Kirschke v. City of Houston, 330 S.W.2d 629 (Tex. Civ. App. 1959), *appeal dismissed,* 364 U.S. 474 (1960). The city refused to issue a building permit for construction on land which was needed for highway purposes. The property owner sued for damages, but his suit was dismissed. Since the refusal to issue a building permit was held to involve the exercise of a governmental function, the city incurred no liability.

An early case in which a change was made in a setback line after compliance by the property owner had been compelled lends strong support to this analysis. Nusbaum v. City of Norfolk, 151 Va. 801, 145 S.E. 257 (1928). After the city compelled the plaintiff to set his building back five feet, it repealed the building line and did not impose the same requirement on another building in the same block. An action to force the new building to build out to the repealed building line was dismissed. In one situation, however, a statutory adjustment might be required on equitable grounds. Interim losses from established businesses should be compensable if the official map is terminated, even though no constitutional claim to compensation exists in these cases.

C. The Constitutionality of Official Map Laws

While several cases decided in the latter part of the nineteenth century held the official map laws of that period unconstitutional, the changes made in adapting these statutes to modern planning legislation have led to a shift in judicial attitude. However, official map acts have not met the problems of delay and measure of compensation through explicit provision. Few of these laws contain absolute limits on the duration of the official map restriction, and none have attempted to resolve the compensation questions. Instead, they have met constitutional objections by utilizing the Bassett-Williams and Bettman hardship variances to make adjustments in burdensome cases. As a result, no court in the last fifty years has held an official map law unconstitutional when it has been applied to streets and highways.[66]

A good example is provided by the history of map legislation in New York. Following an early decision upholding the nineteenth century map law,[67] the Court of Appeals held the statute unconstitutional in *Forster v. Scott.*[68] There the official map covered all of the lot, a fact which heavily influenced the decision. The statute denied compensation for any building placed in the bed of a mapped street and contained no variance provision, a combination of restrictions which also contributed to the result. After the *Forster* decision, the Bassett-Williams version of the official map law was adopted; its variance provision was inserted; and the section denying compensation was removed. In *Headley v. City of Rochester,*[69] the new version of the act was sustained by the highest court, which found that the official map was necessary to protect the integrity of future streets. Hardship cases, it was noted, could be handled by the variance clause. In this case, no application for a variance had been

[66] Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961); Headley v. City of Rochester, 272 N.Y. 197, 5 N.E.2d 198 (1936); State *ex rel.* Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957). In Congressional School of Aeronautics, Inc. v. State Roads Comm'n, 218 Md. 236, 146 A.2d 558 (1958), the court did not decide the question, but it reviewed the *Manders* and *Headley* cases and suggested that the official map act would be held constitutional. In Pennsylvania, the constitutionality of the map device has long been established. See Hinaman v. Vandergrift, 197 Pa. Super. 140, 177 A.2d 174 (1962) (state highway reservation law); In the Matter of Pittsburgh, 2 W. & S. 320 (Pa. 1841).

[67] In the Matter of Furman Street, 17 Wend. 649 (N.Y. 1836).

[68] 136 N.Y. 577, 32 N.E. 976 (1893).

[69] 272 N.Y. 197, 5 N.E.2d 198 (1936).

made; and unlike *Forster,* the lot owner was left the major portion of his lot on which he could build.

While *Headley* may be explained on the narrow procedural ground that the landowner challenging the statute had not first applied for a variance,[70] the case stands for more than just that point. *State ex rel. Miller v. Manders,*[71] a case upholding the Wisconsin official map law, sharpens the issues considerably. In that case almost ninety per cent of the landowner's available frontage had been placed in the bed of a proposed street. The Wisconsin court first approved the planning objective of the statute, noting that "the constitution will accommodate a wide range of community-planning devices to meet the pressing problems of community growth, deterioration, and change."[72] *Ad hoc* approaches were distinguished.[73] The court then held that the correct procedure was to request a variance and, if denied, to seek court review by means of certiorari. What the *Headley* and *Manders* cases mean is that an official map act will be insulated from constitutional attack if the court insists upon the exhaustion doctrine. Following the trend set in zoning litigation, the courts approve the official map in principle, relegating allegations of substantial damage to administrative relief by way of the variance procedure. The *Manders* case took this approach[74] even though the court hinted there that the substantial restriction placed on the lot presented an appropriate case for administrative relief.[75]

[70] *Cf.* Petterson v. Redspi Realty & Coal Corp., 264 App. Div. 903, 35 N.Y.S.2d 797 (1942) (dissenting opinion).

[71] 2 Wis. 2d 365, 86 N.W.2d 469 (1957).

[72] *Id.* at 370-71, 86 N.W.2d at 472-73. See also the cases in which the municipality establishes a change in the grade of a street but delays making the actual change for several years. No compensation is payable to lotowners who, in the meantime, build to the old grade and are left sitting either high or low when the actual change is finally made. Kuhl v. City of Philadelphia, 15 Pa. D. & C. 617 (C.P. 1931); 2 NICHOLS, EMINENT DOMAIN § 6.13[3] (3d ed. 1950).

[73] The court dismissed an earlier Wisconsin decision which had overturned a zoning ordinance passed to depress property values in contemplation of a projected new boulevard. It found no "motive" to depress property values in the official map law and also noted that the zoning ordinance had contained no hardship variance provisions. 2 Wis. 2d 365, 376, 86 N.W.2d 469, 475 (1957).

[74] *Accord,* Vangellow v. City of Rochester, 190 Misc. 128, 71 N.Y.S.2d 672 (Sup. Ct. 1947).

[75] A final subsidiary point is left undecided by these opinions. Under the Bassett-Williams model of the official map act, adopted both in New York and Wisconsin, the statute does not deny compensation to buildings placed in the bed of an unopened street. A provision to this effect has been inserted in that part of the Wisconsin law which is applicable to extraterritorial extensions of the map, but it was not involved in the *Manders* decision. The problem is not a difficult one as a matter of statutory construction, since a building erected without a permit would appear to be

D. Problems of Administration

In spite of their long history, official maps are used infrequently even today. A recent nationwide survey found official maps in 170 communities in ten states, but practically all of these communities were concentrated in California, New Jersey, and Wisconsin.[76] In these communities, most of the administrative problems revolve around the issuance of hardship variances. All of the available evidence suggests that hardship variances are seldom granted. A survey of forty-one communities indicated that two thirds had given no variances at all,[77] and most of the variances which were granted were for temporary structures or minor improvements.

Cases on the administration of official map variances are scarce, however, and clues to possible judicial reaction must be derived largely from the law governing variances under analogous zoning and planning controls. An initial and primary question is whether the hardship required to be proved under an official map variance must be *unique*. Application of this rule would curtail hardship variances substantially because in most instances all properties are equally restricted by the official map.

While authority under related legislation indicates that a uniqueness requirement may not be applicable,[78] the zoning cases may be

an illegal structure and removable as such. Forbes Street, 70 Pa. 125 (1871). This argument is convincingly put by Kucirek & Beuscher, *supra* note 41, at 193. *Cf.* Bibber v. Weber, 199 Misc. 906, 102 N.Y.S.2d 945 (Sup. Ct.), *aff'd*, 278 App. Div. 973, 105 N.Y.S.2d 758 (1951). The *Headley* case relied upon the absence of such a clause in dismissing the challenge to the New York law. *Cf.* In the Matter of Southern Blvd., 262 App. Div. 263, 28 N.Y.S.2d 386 (1941), *aff'd*, 293 N.Y. 874, 59 N.E.2d 783 (1944), suggesting that the law would be unconstitutional if it denied compensation for a building erected in the bed of a street without a permit. Only in Pennsylvania has a denial of compensation clause been sustained. Hinaman v. Vandergrift, 197 Pa. Super. 140, 177 A.2d 174 (1962); Harrison's Estate, 250 Pa. 129, 95 Atl. 406 (1915). See Bentz v. Commonwealth, 75 York L. Rec. 190 (Pa. C.P. 1962). Here the building encroached two feet on the reserved right-of-way, and the court ordered that damages be reduced proportionately. The removal by injunction analogy should be helpful here. Injunctive relief would clearly be available to remove an offending structure erected without a permit, and denial of compensation is equally as reasonable as a penalty.

[76] Davis, *supra* note 43, at 23. This count excludes Pennsylvania, in which official maps are noted for "all third class" cities, a report which requires further checking in view of possible misunderstandings about the nature of official maps which may have inflated the Davis figures. See also Euclide, *Green Bay's Experience with an Official Map*, The Municipality, March, 1960, p. 70.

[77] Davis, *supra* note 43, at 28, 29; Kucirek & Beuscher, *supra* note 41, at 193-200.

[78] Phillips v. Westfield Bd. of Adjustment, 41 N.J. Super. 549, 125 A.2d 562 (L. 1956), *rev'd*, 44 N.J. Super. 491, 130 A.2d 866 (App. Div.), *appeal dismissed*, 24 N.J. 465, 132 A.2d 558 (1957); *cf.* Jenckes v. Building Comm'r, 341 Mass. 162, 167 N.E.2d 757 (1960).

more relevant. Uniqueness is a prerequisite for the granting of a zoning variance, on the theory that alterations required by general conditions demand legislative intervention. Like a zoning variance, an official map variance is an intrusion upon the legislative scheme, so that the same rules may apply. So far the uniqueness issue has not been directly litigated in the official map cases, although the courts have proceeded on the assumption that uniqueness is not an element to be considered. Attention has focused instead upon the financial plight of an individual lotowner, specifically upon whether it is shared by individuals in similar circumstances in the same vicinity.

A satisfactory judicial definition of the commonly used "fair return" standard has also been slow to evolve. A New York trial court has held that the owner must be permitted to put his land to its "most profitable" use,[79] a suggestion which is not in keeping with the usual assumption that no variance is required if the land can be put to a reasonably profitable use. A final consideration is that the fair return standard is almost impossible to apply to residential property.

Conditions may be imposed on official map variances in order to minimize the effect of the nonconforming structure upon the mapped street. Some municipalities have experimented successfully with a restriction to temporary structures,[80] removable at the owner's expense. Another helpful device has been the use of an amortization formula, which places a life expectancy on the improvement allowed by the permit and reduces acquisition costs proportionately by the length of this period which has expired prior to the taking. However, this technique is of limited usefulness as applied to substantial structures with a lengthy life span.[81]

A review of two common situations in which variances have been approved may help to illustrate the variance problem.[82]

[79] Vangellow v. City of Rochester, 190 Misc. 128, 71 N.Y.S.2d 672 (Sup. Ct. 1947). *Cf.* S. S. Kresge Co. v. City of New York, 194 Misc. 645, 87 N.Y.S.2d 313 (Sup. Ct.), *aff'd*, 275 App. Div. 1036, 92 N.Y.S.2d 414 (1949) (lessee may be entitled to variance although lessor derives fair return from property because of a long-term lease).

[80] See Kucirek & Beuscher, *supra* note 41, at 198-200, comparing practices in New York and Wisconsin municipalities. They discuss Vangellow v. City of Rochester, *supra* note 79, which suggests a condition similar to that described in the text.

[81] See Rand v. City of New York, 3 Misc. 2d 769, 155 N.Y.S.2d 753 (Sup. Ct. 1956), holding that a ten year amortization period was too short for a building with a fifty year life expectancy.

[82] The discussion that follows is based on cases which have:

1. *Substantial or Total Restriction of the Lot*

Variances are freely given in these cases, suggesting that financial hardship to the owner is the guiding spirit behind the variance clause. The difficulties arise in application. When all of the lot is affected, the courts have no difficulty in approving a variance.[83] A similar case is presented by the "key" or corner lot. When street reservations are imposed on both streets at an intersection, building on the remaining lot area may be impossible. As in the setback cases, a variance will follow.[84] On the other hand, the cases are less certain in intermediate situations, although the percentage of the lot which is restricted may be less important than the total impact of the restriction upon the entire property.[85] Of course, under the Bassett-Williams model, the board is only to ascertain the effect of the official map on that portion of the tract within the mapped street, a concession even more favorable to the landowner.[86]

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1) passed on an application for a variance; or

2) passed on a claim that the street reservation is unconstitutional as applied to the lot in question; or

3) passed on a claim, brought forward in an inverse condemnation proceeding, that the municipality is liable in damages for having imposed the street reservation.

What is to be stressed here is the interlocking nature of all three approaches to relief, both in terms of the result to the landowner and the underlying legal concept. A case in which a variance would be allowable under a denial of fair return standard is also a case in which the application of the reservation would be unreasonable on constitutional grounds. It is also a case in which the municipality might be forced to pay damages, on the ground that the police power has imposed a confiscatory restriction which calls instead for the use of the power of eminent domain. The cases on inverse condemnation are drawn from Pennsylvania, where property owners may rely on a statute which authorizes the appointment of a board to assess damages against the municipality for restrictions found to be unreasonable. PA. STAT. ANN. tit. 53, §§ 1081-94 (1957). This is a useful technique which might be extended and which will come in for more discussion later.

[83] Roer Constr. Corp. v. City of New Rochelle, 207 Misc. 46, 136 N.Y.S.2d 414 (Sup. Ct. 1954) (lotowner had applied for permit and was refused; map held unreasonable as applied to his property).

[84] See the following cases in which the Pennsylvania procedures were used to claim compensation in this kind of situation: Sansom Street, 293 Pa. 843, 143 Atl. 134 (1928) (three foot frontage); Crilly Petition, 18 Lehigh L.J. 302 (Pa. C.P. 1939) (eight feet).

[85] Symonds v. Bucklin, 197 F. Supp. 682 (D. Md. 1961) (although 26% of lot was restricted, reservation upheld because reasonable return on property could be obtained through construction of building within approved limits). *Cf.* Del Vecchio v. Tuomey, 283 App. Div. 955, 130 N.Y.S.2d 481 (1954), *aff'd*, 308 N.Y. 749, 125 N.E.2d 107 (1955) (variance approved which decreased reservation strip on corner lot from twelve and one-half to ten feet).

[86] For cases interpreting this language in the New York statute, see 59 Front St. Realty Corp. v. Klaess, 6 Misc. 2d 774, 160 N.Y.S.2d 265 (Sup. Ct. 1957); Vangellow v. City of Rochester, 190 Misc. 128, 71 N.Y.S.2d 672 (Sup. Ct. 1947).

2. *Restrictions on Existing Buildings*

While any structure in existence when the official map is adopted must be paid for when the property is acquired,[87] a more difficult question is the extent to which the official map may preserve the *status quo*. Some cases indicate that the owner's right to rebuild or make alterations cannot be restricted, and therefore they allow variances for these purposes.[88] This attitude toward existing buildings contrasts with the approach to nonconforming structures under zoning ordinances. Because zoning ordinances usually rest upon the premise that nonconforming structures will eventually disappear, alteration and reconstruction are severely limited; and these restrictions have been sustained.[89] Under official map laws, however, the cases have assumed that the property owner has the right to a normal return on existing structures during the period prior to condemnation. This attitude has been influenced by the judicial refusal to compensate the landowner for his loss of profits in the condemnation proceeding.

Whether a difference exists between a use which is nonconforming to a zoning ordinance and one which is nonconforming to an official map is open to question. One point of difference is that a use under the official map law is nonconforming only in terms of the proposed highway, not in terms of incompatibility with other uses in the surrounding area. The position of the nonconforming use under official map laws has not been fully litigated, but the courts have been sensitive to any attempt to depress property values in advance of condemnation.

E. An Evaluation of Official Maps

In recent decisions courts have sustained the official map device as a temporary prohibititon upon the development of land in a

[87] McGrath v. City of Waterbury, 111 Conn. 237, 149 Atl. 783 (1930); The Widening of Chestnut Street, 118 Pa. 593, 12 Atl. 585 (1888). *Cf.* D. W. Winkelman Co. v. State, 17 Misc. 2d 418, 184 N.Y.S.2d 661 (Ct. Cl. 1959), *modified*, 10 App. Div. 2d 894, 199 N.Y.S.2d 712 (1960).

[88] Sansom Street, 293 Pa. 483, 143 Atl. 134 (1928); Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429 (1915); City of Philadelphia v. Linnard, 97 Pa. 242 (1881) (compensation payable when building rebuilt back to building line and left in recess between adjoining buildings). *Cf.* Del Vecchio v. Tuomey, 283 App. Div. 955, 130 N.Y.S.2d 481 (1954), *aff'd*, 308 N.Y. 749, 125 N.E.2d 107 (1955) (partial variance to permit conformance to adjacent buildings). See also French v. Cooper, 133 N.J.L. 246, 43 A.2d 880 (Sup. Ct. 1945) (de minimis; awning may extend over building line).

[89] Selligman v. Von Allmen Bros., 297 Ky. 121, 179 S.W.2d 207 (1944). See Comment, *The Elimination of Non-Conforming Uses*, 1951 WIS. L. REV. 685.

projected right-of-way. Relying upon the availability of hardship variances, the cases have employed the exhaustion doctrine to shield official map laws from broadside attack. Contrary to expectations, little attention has been paid to the time limit during which an official map may be effective. Few statutes contain a time limit, and the few cases on the point are inconclusive. In the context of the *Griggs* case, two years could not be upheld. Elsewhere, a five year limit has been approved.[90] Certainly ten years would be too much.[91] It would seem that the courts are more concerned with the availability of escape mechanisms when real hardship occurs than with the use of an absolute time limit as a guarantee against unreasonable deprivations.

On balance, the official map is a helpful reservation device with some important qualifications. Like the setback, its usefulness in developed areas is limited. The mapping device is also vulnerable if the projected right-of-way cuts too deeply into individual lots. By far the most serious limitation on the official map is the hardship variance procedure. Although the hardship variance has not yet created difficulties in administration, the statutory framework is potentially troublesome. Hardship provisions are owner-oriented, and they may encourage pressure for encroachment. The utility of conditioning the grant of a variance is questionable, partly because property owners may successfully object and partly because the temporary, groundfloor removable structure has a habit of growing roots.

Most important, the variance procedure is self-defeating. Part of the purpose of the official map law is to limit acquisition costs; but the structure permitted as a variance is a licensed encroachment, for which payment will have to be made at some future date. Observers have already noted that several communities will purchase

[90] Philadelphia Parkway Opening, 295 Pa. 538, 145 Atl. 600 (1929). The decision rejected an earlier case which suggested that a landowner whose property lay in the path of the parkway could force acquisition of his property if the city had taken unequivocal steps toward completion of the highway. Philadelphia Parkway, 250 Pa. 257, 95 Atl. 429 (1915). See Note, 13 U. PITT. L. REV. 553 (1952).

[91] Cook v. Di Domenico, 135 So. 2d 245 (Fla. Dist. Ct. App. 1961). Nine years had elapsed since the highway designation, and for this reason the court ordered the issuance of a permit for a gasoline service station. *Cf.* Platt v. City of New York, 276 App. Div. 873, 93 N.Y.S.2d 738 (1949); Kirschke v. City of Houston, 330 S.W.2d 629 (Tex. Civ. App. 1959), *appeal dismissed,* 364 U.S. 474 (1960) (action in damages for failure to issue building permit dismissed; plaintiff should have brought action for mandamus or mandatory injunction); Hammon v. Wichita County, 290 S.W.2d 545 (Tex. Civ. App. 1956).

lots which are unduly restricted by the official map rather than grant hardship variances.[92] Next to be considered are several highway laws which have codified and given statutory sanction to a purchase requirement as an alternative to the variance remedy.

IV

HIGHWAY RESERVATION LAWS NOT BASED ON THE VARIANCE PRINCIPLE

A. The Statutory Pattern

Because most interim control laws are directed to the municipal and county level, state highway agencies must rely for the protection of proposed highways upon the efficiencies of local planning. Even if an official map is authorized for all municipalities, it may be adopted by some and not by others. Some municipalities may administer their maps well and some may not. In metropolitan areas, where scores of local general purpose units coexist, inconsistencies may develop within a limited geographic area. In rural areas, if counties lack statutory authority, no jurisdiction may have the power to establish official maps. These comments are applicable to subdivision controls and setbacks as well.

To remedy the gaps in existing legislation, several states have conferred highway reservation authority upon their state highway agencies. These statutes do not contain a comprehensive plan requirement, and they provide for the reservation of highway rights-of-way on an *ad hoc* basis. The hardship variance device has been dropped or modified, and relief for objecting owners is usually obtained by compelling the purchase of land which is subject to the highway reservation. A few states have also enacted highway reservation laws based on the compulsory purchase technique which are applicable to counties and municipalities.

Considerable experimentation has been attempted in the non-variance highway reservation statutes. Under the Indiana law,[93] which is typical, any landowner restricted by the highway reservation may serve a notice of purchase upon the highway commission. The commission must purchase the land or start proceedings for its

[92] Davis, *supra* note 43, at 27, 28; Kucirek & Beuscher, *supra* note 41, at 199-200.

[93] IND. ANN. STAT. § 36-2955 (Supp. 1963). For similar statutes, see N.C. Private Laws 1927, ch. 196 (selected municipalities); WIS. STAT. ANN. § 84.295 (Supp. 1963).

condemnation within ninety days or the reservation will lapse. The California law[94] retains the hardship variance procedure for mapped state highways within counties. Other statutes link compulsory purchase with the hardship variance. For example, a Tennessee law applicable to the consolidated Nashville-Davidson County government compels purchase only if a board of appeals does not grant a variance permit to the complaining landowner or grants the permit on terms which are unacceptable to him.[95] In Utah, a county board of appeals must issue a variance if the reservation has been in force for more than one year and if the county has refused to take steps to acquire the property.[96] However, the Pennsylvania state highway reservation laws,[97] like its nineteenth century official map legislation, contain neither a variance nor a compulsory purchase requirement. Neither do the Montana and Washington laws,[98] although they limit the highway reservation to one year. Few of the other nonvariance highway reservation statutes place a time limit on the reservation.

What most characterizes the nonvariance reservation laws is the automatic nature of the purchase obligation. Most of these statutes place the option with the landowner, and the highway commission must purchase his land if the reservation is to remain effective. No standards are articulated to determine whether the application really covers a hardship case for which purchase can be justified.

B. Constitutionality and Administration

The compulsory purchase provisions of the nonvariance laws should support their constitutionality, just as the hardship variance supports the constitutionality of the official map laws. Only in Pennsylvania have the nonvariance state highway reservation laws

[94] CAL. STREETS & H'WAYS CODE §§ 740-42.

[95] Private Acts of Tenn. 1959, chs. 330, 356.

[96] UTAH CODE ANN. §§ 17-27-7, -7.10 (1962).

[97] Pennsylvania has several statutes. A divergence law provides for the mapping of relocated highways and authorizes payment of compensation. PA. STAT. ANN. tit. 36, § 670-210 (1961). For a definition of divergence, see Eshelman v. Commonwealth, 325 Pa. 521, 189 Atl. 340 (1937). Two other statutes authorize highway reservations without payment of compensation. PA. STAT. ANN. tit. 36, §§ 670-206 to -208 (1961) (widenings); PA. STAT. ANN. tit. 36, § 670-219 (1961) (new locations). For discussion of the Pennsylvania statutes, see In the Matter of Appointment of Viewers, 103 Pa. Super. 212, 158 Atl. 296 (1931); May v. County of Westmoreland, 98 Pa. Super. 488 (1930).

[98] MONT. REV. CODES ANN. §§ 32-1615.2-.3 (Supp. 1963); WASH. REV. CODE ANN. §§ 47.28.025-.026 (1962).

been litigated,[99] and there the case was at the trial court level. While the statute was held constitutional on analogy to the Pennsylvania official map act, neither law contains a purchase or a variance provision; and Pennsylvania is the only state which has not reversed early cases upholding nonvariance official map statutes. Of some interest in Pennsylvania, however, is the frequent use by landowners of a statutory remedy by way of inverse condemnation. Suit is authorized against the highway agency to secure the payment of compensation in cases where street and highway reservations are alleged to be unduly burdensome, and the analogy to a statutory compulsory purchase provision is clear.

In most states little use has been made of the nonvariance highway reservation statutes. Some state officials have doubts about their constitutionality, and elsewhere administrators are wary of the absolute nature of the purchase provision. Plans for implementation are in progress in a few areas, and some use of the law has been made in Washington; but that statute carries an extremely brief one year limit. In addition, complications have arisen under a local decision which was sketchily decided but which appears to make the state liable for a variety of interim damage which is traceable to the highway reservation.[100]

A few cities in North Carolina, however, have had long experience under a local law which authorizes purchase as an alternative to development within the right-of-way. Several states and communities have also developed informal extrastatutory procedures for the acquisition of hardship parcels. Some of these informal programs

[99] Bentz v. Commonwealth, 75 York L. Rec. 190 (Pa. C.P. 1962); *cf.* Penn Builders, Inc. v. Blair County, 302 Pa. 300, 153 Atl. 433 (1931); May v. County of Westmoreland, 98 Pa. Super. 488 (1930). In the two cases last cited, the holdings were dicta, since the court decided that the proceedings had in fact been brought under the divergence law, which required the payment of damages. *Cf.* Hinaman v. Vandergrift, 197 Pa. Super. 140, 177 A.2d 174 (1962). A lower court dictum to the contrary can be disregarded. Mikell v. Pennsylvania Turnpike Comm'n, 6 Chester 156 (Pa. C.P. 1954). The court read too much into Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), which held unconstitutional a park reservation statute which was similar to the official map acts. The *Miller* case raised some doubts about the Pennsylvania decisions upholding the official map acts, but it clearly did not overrule them. For a Canadian case contrary to the *Beaver Falls* decision, see Regina Auto Court v. Regina, 25 West. Weekly R. (n.s.) 167 (Q.B. Sask. 1958).

[100] State v. Corey, 59 Wash. 2d 98, 366 P.2d 185 (1961); Letter From Edward E. Level, Assistant Attorney General, State of Washington, July 30, 1962. The comments in this paragraph are based on interviews with state highway officials. On the Nashville and Davidson County experience, see Letters From Charles W. Hawkins, Executive Director, Nashville City Planning Division, Nov. 26, 1963 & July 20, 1962.

are carried out as part of the normal land acquisition phase of highway construction. The federal statute authorizes advance acquisition of rights-of-way under agreements between the Bureau of Public Roads and the state highway agency, at a point not more than seven years in advance of actual construction.[101] In Michigan, for example, once the route location report has been approved for highways on which the federal government participates in right-of-way costs, the state is authorized to buy parcels with the understanding that federal reimbursement will be secured later.[102]

While differences in approach can be found and while some purchase programs are more imaginative than others, striking similarities stand out. In no instance is the volume of purchases very large; estimates indicate that between five and ten per cent of planned rights-of-way have to be purchased prior to construction.[103] Contrary to expectations, parcels are not often severed on new routes, so difficult problems of calculating severance damages have been avoided. Partly because highway location is not definite at the time of advance acquisition, the authority acquires the entire parcel rather than guess about the line on which it might eventually be cut.

Reservations for street widenings in cities are more complicated, primarily because a larger number of improved parcels are affected. Greensboro, North Carolina, acting under a local law authorizing hardship purchases, has been successful in acquiring entire properties, tearing down existing structures when they are inadequate, and reassembling the remainders for resale and further development. When business leases expire and a new tenant cannot be located or asks for terms less favorable to the landowner, the city assists by advising the property owner regarding the length of time remaining

[101] Federal-Aid Highway Act § 108, 72 Stat. 893 (1958), as amended, 23 U.S.C. § 108 (Supp. IV, 1963).

[102] Federal approval of advance acquisition depends upon individual agreements with each state. Considerable differences in Bureau of Public Roads policy appear from state to state, and its policy is more lenient in some areas than in others. Some difficulties have resulted from the fact that normal land acquisition processes must be utilized. For example, complex eminent domain procedures must be used for each parcel. Of the places observed, only Greensboro, N. C., had statutory authority for its purchase program.

[103] These observations confirm a similar report from Houston, Texas, where the advance acquisition of individual parcels in planned right-of-way has been authorized for some time under special enabling legislation. Address by W. J. Van London, Engineer-Manager, Houston Urban Expressways, to the American Association of State Highway Officials, Annual Meeting, December, 1950. At that time, less than five per cent of the total right-of-way appropriations was being spent on advance acquisitions.

before acquisition; and a new lease may be negotiated on this basis. If the remaining time is too short, the property may be acquired. Investment for remodeling and repair is also affected by the time problem. Improvements may be permitted in Greensboro if they do not increase costs substantially and if acquisition is sufficiently distant.

The surprising fact about these purchase programs is that they have worked remarkably well, considering that almost all of them are operated without statutory authority. However, the need for a more formal statutory structure is often expressed by highway administrators, and it is clearly apparent from this discussion.

V

Toward a More Effective Interim Control Law[104]

This review of techniques for interim control of highway rights-of-way has indicated deficiencies in the existing legislation as it is applied to state highway systems. Existing controls are largely applied to exclude new structures from proposed rights-of-way. Only subdivision controls are effective in controlling the area adjacent to the highway, and their application is limited to the subdivision of raw land for urban development. The modern highway, which exerts an impact far beyond its confines, requires more inclusive control if damaging impacts are to be prevented prior to construction. Relief must also be available to the landowner who is unreasonably restricted by interim regulation, but the relief afforded must not be excessively disadvantageous to the highway program. The following steps are suggested for implementing an interim control policy which would respond more satisfactorily to the needs of a modern highway system.

A. Statewide Comprehensiveness

A highway network which is statewide would require an administrative control which could be operated from the state level. There are two dimensions to this problem. A review of the decisions has demonstrated that the courts are more willing to accept a temporary

[104] A more detailed explanation of this proposal, together with the draft of a model act, is contained in the report from which this article is adapted. Many of the suggestions which are made here have already been incorporated in the New York county official map enabling law. N.Y. Munic. Law §§ 239-g to -k. The influence of English planning legislation is also acknowledged. See particularly the Town and Country Planning Act, 1962, 10 & 11 Eliz. 2, c. 38, part VIII, §§ 138-51.

restriction on the use of property when it is imposed as part of a comprehensive plan for community development than when it is imposed *ad hoc*. Interim protection of individual highways would be helped measurably by the adoption of a statewide highway plan to which a temporary restriction on development could be related. Some states, such as Ohio and Wisconsin, are in the process of developing plans of this kind, and the fulfillment of a comprehensive highway plan requirement at the state level should not be insuperable.

The second dimension to highway planning and control at the state level raises a more difficult problem—the provision of a state agency which could exercise a uniform and consistent supervision of the entire highway network. In the absence of an effective state urban agency in American jurisdictions, the control authority would probably have to be the state highway department; and interdepartmental coordination and executive direction would have to be relied upon to correct departmental bias. Conflicts between the state highway agency and local planning and highway authorities would occur over route location and the administration of controls. Machinery to settle route location disputes already exists in some states, and it could be adapted to the interim control zone. Once the route was settled, administration of controls could be delegated to local and regional authorities, who would function under state supervision. So startling a reorientation in state-local relationships would impose substantial limits on local autonomy, and the division of authority between state and local agencies would prove troublesome, even apart from the political fact of local resistance to state control. Highway systems have a statewide impact, however, and some shift in the governmental balance of power is inevitable as the state interest in its highway investment is increasingly recognized and protected. Delegation of administrative authority to municipalities under supervision from above has ample precedent in England, where this system is widely used.

B. All-Inclusive Land Development Controls

Existing statutes which only control development in the right-of-way miss the impact of modern highways, which have a substantial effect upon surrounding properties as well. One solution is a highway control zone which would extend a reasonable distance on each

side of a projected right-of-way and which would also protect the area surrounding proposed interchanges. Within the zone no land development of any kind could proceed without permission from the state highway agency or its local delegate. Development, in turn, would be defined broadly to include not only subdivision but also any building construction and any change in the use of land.

Several advantages would be afforded by this proposed system. It would borrow the more successful administrative technique of subdivision control, which applies land use regulations at the time at which development occurs. An important result would be that the highway agency could deal flexibly with development pressures as they arose. For example, a residential subdivision might be allowed if it did not interfere with the highway, but it might be conditioned, as in the case of subdivision control, upon a dedication or reservation for highway uses. One knotty problem involving a division of authority would be potential conflicts with local zoning. Perhaps some system could be worked out which would give the state highway department a veto within the control zone whenever the local zoning designation impaired the traffic-carrying capacity of the highway. The veto might be used, for example, over strip commercial zoning which would clog the approaches to an interchange.

C. Relief for Hardship Cases

An administrative system in which applications for development were made directly to the state highway agency would force it to be realistic about its highway intentions. These intentions would have to give way, for example, if pressures mounted while construction lagged. Should it decide to refuse development of a parcel, however, an equitable method of relief would have to be provided. Outright purchase would appear preferable to the use of the hardship variance, but automatic purchase at the behest of the landowner seems too harsh. Compulsory acquisition should be tied to the proof of the unique hardship which is required under zoning variance provisions. What the property owner claims when he asks the highway agency to take his property is that he has suffered a hardship because the land is unusable by him. In the context of a market-oriented society, his complaint is that the property will not earn him a fair returu, an expectation which is reflected in the test for variances under official map laws. An even more objective test can be constructed if potential returu is capitalized in the purchase price, which reflects

both appreciation and depreciation in value which is attributable to the highway. The market can therefore provide an objective test of the owner's contentions.[105] If the property is not salable, or if it is not salable at a fair price, purchase by the highway agency should be required.

While the hardship purchase provision appears relatively simple in concept, some difficult administrative problems must be solved. One is that the highway agency may permit some development in the control zone, but not the development which the landowner desired. For example, residential development might be permitted although an industrial park was requested. Standards would have to be devised to determine when the development permitted was still so restrictive that the purchase provision should apply.[106] Furthermore, when development was successfully forbidden or when the landowner held his land until the highway agency moved to acquire it, the rules of compensation would have to be adjusted so that no injury was done. Compensation might have to be paid for the loss of a return on the property affected during the interim period. Equally helpful would be enactment of a rule which discounted any depreciation or enhancement attributable to the highway from the eminent domain award.[107] These and other compensation problems have been discussed earlier.

[105] Inability to sell at a reasonable price as a test of fair return finds strong support in the New York zoning variance cases. Forrest v. Evershed, 7 N.Y.2d 256, 164 N.E.2d 841 (1959), citing Crone v. Town of Brighton, 19 Misc. 2d 1023, 119 N.Y.S.2d 877 (Sup. Ct. 1952). In Bellamy v. Board of Appeals, 32 Misc. 2d 520, 524, 223 N.Y.S.2d 1017, 1021 (Sup. Ct. 1962), the court noted that the *Evershed* case was "rapidly reaching cited statute as a legal monument . . . ." *Accord,* Stevens v. Horn, 243 N.Y.S.2d 285 (Sup. Ct. 1963); Shaw v. Giglio, 31 Misc. 2d 282, 220 N.Y.S.2d 44 (Sup. Ct. 1961). For a similar point of view in other states, see Homan v. Lynch, 51 Del. 433, 147 A.2d 650 (1959); Boyer v. Zoning Bd., 27 Lehigh L.J. 272 (Pa. C.P. 1957); Board of Adjustment v. Procasco, 69 Dauph. 204 (Pa. C.P. 1956).

[106] Problems will also arise in cases where the refusal to develop a parcel within the control zone will depress somewhat the price of the affected property, but not substantially. In these cases, it would be too much of a burden on the highway agency to purchase the property. Some alternative method of compensation might be worked out. For example, annual loss of return on the affected property could be calculated, and the highway agency could pay this to the property owner prior and up to the time the property was acquired. Provisions for the purchase of restricted property or for payment of compensation representing loss of return should obviate any need for tax forgiveness, which has sometimes been suggested as a complementary mode of relief to the landowner. Since the landowner would either be relieved of his property or compensated for any interim loss, any inequities which might occur through the continued payment of taxes would be removed.

[107] For the handling of these problems under the English statutes, see Land Compensation Act, 1961, 9 & 10 Eliz. 2, c. 33, part II, §§ 6, 7, 9, Section 9 discounts depreciation, but not enhancement in value, which is attributable to the taking.

VI

CONCLUSION

Time lag between the planning and completion of highway projects has stimulated control techniques to preserve rights-of-way from interim encroachments. While difficult constitutional questions are raised by the restriction of privately held land from development pending public acquisition, judicial acceptance of existing controls gives encouragement that the constitutional objections can be overcome. Building upon judicial decisions and administrative experience, this article has suggested an interim control proposal which turns the constitutional strong points of existing legislation to good administrative advantage.

Taking a cue from court decisions which put heavy emphasis upon the need for an escape provision and relying upon favorable judicial acceptance of the application technique of subdivision regulation, the highway control zone suggested in this article incorporates a purchase mechanism as an escape procedure and relies upon a development permission requirement for enforcement. In this manner, it avoids the pitfall of official maps, which invite constitutional trouble by restrictively limiting the use of land in advance of its development. Instead, the decision to allow or forbid development within the control zone is made at the time of application. The purchase mechanism provides an administrative escape which should surmount constitutional hurdles and which makes the exhaustion principle available as a shield against frontal attack. The result is a flexible method of control, with regulatory and administrative advantages which have already been explained.

Interstate and related expressway systems require a substantial public investment. Necessary time lags in execution present a difficult problem of interim protection, for highways attract land developers who make substantial commitments to reap the increment which access to a highway will bring. This article has reviewed the existing techniques for providing interim controls, and hopefully it will stimulate a discussion of new legal methods to meet the demands our modern highway needs have imposed.