The Process of Land-Use Control as the Determinance of Urban Form

by

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Although land-use controls have been a major determinant in the physical form of the city, their application has been severely criticized by the discipline of urban design for their predominantly negative attitude. These criticisms, though partially correct, have been founded almost entirely upon conjecture rather than fact. They have consequently provided only a criticism of the negative aspects of the existing regulative measures rather than providing possible alternative solutions as well.

However, before criticisms which do provide alternatives may be attempted urban designers must grasp a basic comprehension of the system which they are criticizing. They must understand the positive as well as the negative aspects of the existing land-use control measures before negating their entire application within the urban environment.

The purpose of this paper is to provide an introduction to the existing land-use controls, both public and private, from which this basic comprehension may begin to be achieved. This paper is concerned with the existing public regulative measures exemplified by zoning, subdivision control, and housing and building codes; the existing private regulative measures exemplified by the restrictive covenant; and the existing public incentive measures exemplified by the Federal Housing Administration, and the Urban Renewal.

These measures are examined first in terms of their foundation which consists of the basis of the land-use control law, the legal system in which
it is applied, and the basic means in which it is effectuated, and second in terms of the specific qualities of each individual measure consisting of an examination of each specific process, its history, and its implication toward direction of the patterns of urban growth in the future.

The introduction to the processes of land-use control provided within this paper hopefully will result in the initiation of a meaningful dialogue between the two now distinct disciplines of urban design and law. A dialogue from which positive solutions to the problems of land-use control may be achieved; solutions which will prove viable forces in the direction of the patterns of urban land-use in the future, and finally will result in directions which are equally acceptable to the private as well as the public interest.
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CHAPTER 1

THE NEED

The problems facing the city in the twentieth century are the result of many complex and conflicting social forces, each affecting the sum total of urban environment. The institutions of the city, i.e. political, economical, sociological, psychological, as well as physical, have had to undergo wide and rapid changes to keep pace with developments of these social forces. Unfortunately, because the city has not, as of yet, been able to adapt quickly enough, vast urban decay is occurring.

In response to this increasing urban decay, theorists from each of the disciplines which make up these institutions within the city have addressed their efforts to the problems of urban environment. Each has been concerned with the relationship of its specific discipline to this decay, both in terms of its causes and of its possible cures. The basis of each theorist's concern has centered in the various patterns of urban land-use.

According to Stuart Chapin, urban land-use may be defined as:

The spacial distribution of city functions—its residential communities or living areas, its industrial, commercial, or retail business districts or major areas, and its institutional or leisure functions.

He states further that it is the analysis of these functions throughout the city, in terms of their existing physical patterns, their individual characteristics, and their growth and change which supplies the sum of exist-
Each of these disciplines, in its analysis of the city, has been concerned with the determination of certain goals or objectives which might be ascertained as pertinent to the urban growth patterns of the future. However, one major fallacy which has existed within each discipline's studies is that little concern, as of yet, has been given to the immediate effectuation process of these desired goals in terms of the existing city mechanisms.

Within the discipline of urban design this short-sightedness is of increased importance. Though this discipline should be the most closely concerned with the effectuation of the evolved physical urban form, it has not yet directed much attention toward the evaluation of the existing city mechanisms which ultimately implement that physical form. One of the most basic of those existing mechanisms is that of law, most specifically, land-use law. This mechanism, more than any other, provides a means for the immediate effectuation of prescribed planning goals. However, due to many misconceptions which exist in relation to land-use law, this mechanism has not been implemented to its fullest extent. These misconceptions are generated mainly from an overall lack of knowledge as to the fundamentals of each specific measure. As a result, a need exists to evaluate each of these measures in relation to their implications for the discipline of urban design.

The need exists not because too little has been written in relation to land-use laws, but rather, too much; in fact, land-use laws are oftentimes as confusing to lawyers as to laymen. This is not to say that the
intricacies of law are not complex, but only that the fundamental concepts are not; that their complexity lies in the wealth of legal material in which they are found. The intent of this thesis is to synthesize from the total of land-use law, a concise definition of these fundamental principles as well as their implications to the evolution of physical urban form. This text is not aimed at making lawyers of urban designers but rather at providing urban designers with a basic knowledge of land-use law with the hope that this knowledge would serve as a foundation from which a more meaningful level of communication could begin.

This common foundation will be achieved by evaluating land-use law in relation to its regulative process, the federal policy concerning it, and its legacy to the discipline of urban design. It is hoped that the implications as to the relationship between these two disciplines will provide the stimulus from which "real" solutions to the urban decay may be effectuated, as well as conceived.
CHAPTER 2
THE FOUNDATION

Before entering into a discussion of the various land-use controls, both in terms of their law and of their application, we must first examine the total system within which they are applied. Within this system there exist three common elements which simplify the total process. These common elements are: that all land-use control laws within the United States maintain a common legal basis; that all land-use control law disputes are settled within the confines of a common legal system; and that all land-use control law is achieved by the exercise of one or more of four common powers.

These common elements provide to the land-use control law the stabilization necessary for it to adequately function within the complex, everchanging society of the United States. If these common elements were not provided the viability of the exercise of these regulative measures would be highly questionable.

The common basis of land-use control law is found within the context of the English common law movement, which began during the seventeenth and eighteenth century, and provided a then revolutionary re-definition of "land ownership". Due to the efforts of Sir William Blackstone in his work *Commentaries*, much of the existing English common law was codified. This codification provides the common basis for the total legal system in existence within the United States, includ-
ing land property laws.

THE BASIS

When examining the current methods or concepts of land-use regulation in practice within the United States, an analysis of the fundamental basis of our land-ownership beliefs is imperative. The foundations of these "inalienable rights", and specifically that right of private ownership of land stemming directly from "the absolute rights of the individual", must be ascertained before commenting upon the "positive and negative aspects of current land-regulative methods.

The concept of "private ownership of land" has not always been the "law of the land" within the continental United States. In fact, the Europeans brought this concept with them in the seventeenth century. "Unlike the Indians who regarded themselves as the caretakers of the land, Europeans brought the idea that land was the sole property of its owners, to be used anyway they saw fit."

This concept, though in application in Europe for centuries, was first codified by Sir William Blackstone in 1765 when he published the first volume of his four volume work titled, Commentaries. The basis of all English as well as all American law may be drawn from the pages of this work, described by Eurlich as "one treatise in common law which for all times must remain part of English literature."

Blackstone described law in terms of a "body" and a "soul", the "body" being the "letter of the law" and the "soul" its "sense or reason". Though
most Americans are most casually acquainted with the "letter of the law", relatively few have even passing knowledge of its "sense or reason". To effectively criticize the "body" or "letter of the law" in terms of current land-use theory, we must also understand its "soul" or "sense or reason".  

The fundamental basis of land ownership in the United States is found in the concept of "private ownership of land", i.e. that man has the "inalienable" right of ownership of his "wedge" of earth (a wedge that is defined theoretically as a tract of land bounded by a series of lines which begin at the center of the earth and extent outward, from the center, intersecting the boundaries of the said tract of land). The world is made up of the sum total of each of the individual "wedges" of land. Blackstone drew the fundamental basis for ownership of land directly from Genesis. "In the beginning man was given domain over all the earth; and over the fish, and over evey living thing that moveth upon the earth." According to Blackstone this was man's only "true" foundation to this ownership.

At first, this concept of ownership was construed to mean "ownership in common". The act of ownership was both temporal and transient, lasting only through the duration of its occupancy and then immediately transferable back to the dominion of all men. As mankind increased in "numbers, crafts, and ambitions," concepts of permanent ownership came into being; first in the realm of "movable substances", and finally in the realm of "permanent substancial soil". As man began to work the soil of the earth for food, by necessity his concepts of land "ownership in common" began to be altered. Soon man felt that if he was to work the land to gain the inherent benefits of
the resources then the total product of this benefit should be his, and not for
the taking of others. As a result, man looked to society for aid in this re-
striction of land ownership; "necessity begat property' and in order to insure
that property, recourse was had to civil society, which brought along with it
a long train of inseparable concomitants; states, governments, laws, punish-
ment, and public exercise of religious duty".\(^5\)

The only remaining question was, who in fact was the initial or original
land owner? The answer, according to Blackstone, lies in man's occupancy
of the land:

property, both in lands and movables, being originally
acquired by the first taker, which taking amounts to a
declaration that he intends to appropriate the thing to
his own use, it remains on him, but the principles of
universal law, till such time as he does some other act
which shows an intension to abandon it; for it becomes,
naturally speaking, of public right once more, and is
liable to be again appropriated by the next occupant.\(^6\)

From this foundation of man's "natural right" of ownership, Sir William
Blackstone formulated, in his discourse referring to the "absolute right of
the Individual", the "right of private property". He stated:

that inherent in every Englishman is that right of pro-
perty which consists in the free use, enjoyment, and
disposal of all his acquisitions, without any control
over dominion, save only by the laws of the land. So
great is this "right of private property" that no power
has authority over its usage; not even for the "general
good of the whole community".\(^7\)

It might be interjected that this "right of private property" pertained
only to those substances defined as being capable of permanent ownership
in the strictest sense. In his discourse on "property in things personal"
he states that some substances remain under common ownership. Among these are air, light, and water, which he refers to as "objects of qualified property".

These unwritten concepts of Medieval English Common Law combined with the written concepts of the Roman Statutory Law to form the total of the English legal concepts within The Common Law. The concepts of the Common Law were then in turn combined with the concepts of "equity" to form the total of the English Law.

The Statutory Law evolved in about 535 A.D. from the Corpus Julius Civilis, the law code of the Roman Emperor Justinian I, and was introduced to the English during the Roman Occupation. The society of the Roman Empire, because of its rigorous and dictatorial nature, lent itself ideally to the development of the statutory system.

Whereas the Medieval English Common Law concerned the private relationships of individuals within the society, the Roman Statutory Law concerned the relationship between the sovereignty of the state and the individuals which made up that society. The Statutory Law was written law and provided the advantages of preciseness, simplicity, and clear-cut application in relation to the individual's relation to the state.

Though the Common Law within England consisted of a "mixing" of these two concepts of law, it retained its basis within the concepts of the Medieval English Common Law. The assimilation of these two laws evolved mainly as a result of an increasing conservatism within the application of the existing
medieval common laws over a period of centuries. The age-old concepts and practices of the medieval common law were gradually tempered in favor of that which was viewed as regarding the public interest. Nonetheless, the medieval common law still supplies the fundamental basis of the evolved legislative motives and actions within The English Common Law system.

Early within the development of the law within the English medieval society, a separate concept of law evolved in conjunction with the existing concept of The Common Law. This concept considered the rights of the existing sovereign to "do right for love of God and by way of Charity", to mold, for the sake of justice, the exercise of The Common Law. This concept considered the exercise of the Common Law as to its "reasonableness" as well as to its written letter or precedent. It established the concept of "equity" within the appreciation of the existing law.

The "equity" of the law began where The Common Law ended. Supplementing The Common Law, it established a "conscience" for the applied common law and eventually became an integral part of the total fabric of the English Law. The Court of Chancery, in the fourteenth or fifteenth centuries, established this concept of law as an integral part of the total legal system. This court existed as a separate body of The Common Law Court until 1875 when it was adapted within that system.

The total of the English Law may be divided into two distinct groupings, that concerning private law, and that concerning public law. That concerning private law was generally derived from the concepts of English "natural" law and was
therefore unwritten, while that pertaining to the public law was derived from the concepts of The Roman Statuary Law and therefore written.

The private law concerned the relationship between the private citizens of the society. It concerned the definition, regulation, and enforcement of the legal actions between individuals. Perhaps the best such example is within the realm of the laws pertaining to the acts of marriage and divorce. Though the state is involved in the settlement in an administrative manner, it is "neither the subject of the right or the object of the duty" of the specific laws themselves.

The public law concerns the political or sovereign capacities of the state and its relationship to its subjects. It is concerned with the definition, regulation, and enforcement of the cases in which the state is the object of the duty and the subject of the right. The public law is the portion of law that is concerned with the political conditions and situations of the state; it regulates both the relations between individuals and the state and the relations between the branches of the government.11

These three concepts of law, i.e. the Medieval English Common Law, The Roman Statutory Law, and the Law of Equity, formulated the total scope of the applied English Law, both public and private. The American colonies adapted this English concept of law to meet the needs of their newly formed society.

As a result of this study of Blackstone's codification of the fundamental basis of the Medieval English Common Law in conjunction with the concepts of the Roman Statuary Law and the Equity of the Law, a definition of law, within
any society may be ascertained: Law represents the rules of conduct which pertain to the given political order of the society. The law provides the means within which a society defines and regulates the scope of the actions of its members in regard to one another and in regard to the society as a whole.12

The majority of current concepts of law in the United States in terms of land ownership stems form this basic "sense or reason" of law. The "body", or "letter of the law" as it pertains to the United States was founded upon this basic concept.

The first great American law book, written by Chancellor Kent of New York entitled Commentaries, very closely paralleled the earlier work of Blackstone. Some feel, as does W. Barton Leach, that had Blackstone himself written his code for the colonies which were to become the United States rather than for England, "he might have suggested some limitations on what we call the 'acceptance' of English law on this continent". Had he not been concerned with an England just out of the grasps of the feudal system and with it the property requirements of the feudal system, he might have considered the adaptability of English law to the "economic, social, and political conditions in the American colonies."

Thus generation after generation of budding lawyers found themselves saturated with a set of rules of law, and particularly land law, which had been developed through long historical process to control the great baronial estates of England and not at all appropriate to the wilderness of New England, the convict colony of Georgia, or the slave plantations of Virginia.13

Nevertheless, whether liked or disliked, the general body of the law, and especially land property law was derived from this basic law code, Sir William
Blackstone's *Commentaries*, and for the most part, the concept if not the practice is still in existence.

Although Blackstone's concept of the "absolute right of the individual" as to the use to which he could put his land seemed correct in theory, upon application it became apparent that man's "absolute rights" must be modified to meet the demands of his society. Maitland insists that:

> If we examine our notion of feudalism, does it not seem this, that land law is not private law, that public law, is land law, that public and political rights and duties of all sorts and kinds are intimately, and quite inextricably, blended with rights in land.

According to Haar, even during Blackstone's time the "absolute rights of the individual" as to the use of his land were modified.

> The revolutions of the Seventeenth and Eighteenth centuries lent new importance to private sovereignty of land. Blackstone's viewpoint is typical of the period. But even then questions like the potency of private law agreements to bind future generations of land owners had to be resolved by the emphasis of selected social values.14

These "social values", which were levied by means of restraints against land laws, evolved from the "permacy of the land". Due to land's temporal "indestructibility and immovability", man very early had to recognize the third party rights (in terms of the law concepts of "privity of estate"). English "real property" law developed as a result of this "permacy of land" and, therefore, "never developed a true theory of ownership; title was, and is in essence, possessory and moreover relative rather than absolute."15

An adequate balance between the economic and social pressures influencing land-use, and the perspective land-use controls acting in response to these social demands must be developed within each society. As the needs of society
change, the patterns of definition of ownership also must change. In the past, this process has occurred from century to century allowing enough time for the concepts of ownership to change with these social pressures.

When the corresponding economic and social changes occur at a rapid pace, not allowing time for the patterns of ownership to adapt to them, then problems arise within the respective society. The result is manifested in a distorted pattern of land ownership which inadequately meets the needs of the newly created and rapidly changing society. This phenomenon is the predominant cause of the current problems present in land-use control theory within the confines of the United States in the twentieth century.

A demonstration of this dichotomy between the changing economic conditions and the patterns of land-use, is found within the economic theory of the growth patterns of cities. According to Ernest W. Burgess, in his concentric circle theory, the economic growth patterns will form concentric circles radiating from the central core of the city.

1. Central Business District
2. Zone of Transition
3. Zone of Workingmen's Homes
4. Zone of Better Residences
5. Commuter Zone

figure 1
The second zone, the zone of transition, is as a result of these changing land values. Though these land-values begin to predict the development of high intensity land-use such as office or commercial, the existing land-use remains that of residential. Since the land-use will ultimately become of this intense nature due to its increased land value, the owners of the land are hesitant to expend funds towards the improvement of the existing residential quality. As a result, the neighborhood is characterized by physical as well as social deterioration.

The concept of land-use planning evolved as a means to begin to "bridge the gap" between the demands of society and the concepts of ownership manifested in the existing physical configuration of the society. The main object of planning in a broad sense may be defined in many ways:

To some the main object of planning is to allocate in the national interest the use of land between various competing, or potentially competing claimants; to some it is the means by which the haphazard machinery of commercial competition may be controlled in the interest of amenity; to others it is a mechanism for preservation.

The concept of planning itself implies regulation not only for present land owners but also for would-be land owners. As a result, man's ultimate freedom must be limited at all times within the confines of practical choice, with the ultimate justification of that limitation lying in the problem of population densities upon the land. "The broad justification for planning control must rest on the fact that the need to control the use of land in the public interest has become intense because of the mounting pressure on land."
The concept of land-use regulation was not formulated until the population densities increased to such a stature that the use to which one person put his land maintained a possibility of hindering another person's use of his land. Perhaps the classic example is found within the regulation of the slaughter house in terms of land-use. When the slaughter house existed in rural areas, physically distinct from its neighbors, virtually no need existed to restrict its land-use. However, when the developments were proposed within the confines of populated urban areas the restrictions upon its land-use became necessary to insure that the rights of its neighbors were not hindered by the proposed land-use. As the population densities upon the land increase the need for subsequent restrictions also increase.

![Diagram showing population density vs. land-use control](image)

**Figure 2**

**Population Density vs. Land-Use Control**
The inter-relationship between land-use restriction and freedom can become clear if the concept of "freedom", itself is redefined, or at least limited in scope. Freedom or liberty, according to Allison Dunham, professor of law at the University of Chicago, may be defined in terms of man's knowledge of law and its bearing upon his possibility to direct that knowledge to the achievement of his desired ends, rather, than as man's complete and unlimited freedom to do what he pleases regardless of the ramifications of his action.

The problem of liberty or freedom in relation to planning is the inability of a property owner to anticipate the restraints which are to be placed upon him. As Maitland, the great legal historian, said, "Known general laws, however bad, interfere less with freedom than decisions based on no previously known rule."

For the purpose of twentieth century social co-existence, this definition of man's "freedom or liberty" more clearly responds to the demands of society placed upon the ownership of land than does Blackstone's very strict definition.

This modified concept of freedom is not new. Although the early colonists brought with them from England a strong feeling for the Blackstonian concept of land ownership, it quite readily became apparent that certain adaptations to that theory were necessary. Perhaps the first such example (nuisance laws as they were called) related to the regulation of land-use within the colonies pertaining to the storage of black powder. Due to the danger of explosion, ordinances were drafted which either limited the amounts of powder stored in one place or allocated the specific areas in which it was to be stored.
As the settlements began to expand, the problems of congestion and safety became more pronounced. From these problems stemmed a wealth of land-regulatory ordinances such as:

1. Fire zones (Regulating the type of construction allowed within congested areas of the city).

2. Tenement house codes (aimed at preventing overcrowding of cities).

3. Building codes (aimed at protecting the individual within an over-crowded center).

4. Sanitary codes (aimed at protecting public health).

5. Height ordinances (aimed at alleviating situations created in cities causing "caverns" to be created due to inadequate lighting caused by the increasingly tall buildings).

6. Nuisance ordinances (recognizing that certain occupations were deleterious to specific areas within the city and therefore should be eliminated from them).

Each of these ordinances added to the sum total of limitations which the city governments placed upon the new and existing structures built by the private citizens of the city.21

These early constraints, as well as those now in existence, developed as a result of a number of social demands. These demands have been consolidated into a succinct grouping which in part is determined by the prescribed goals of the total community. A simplified version of this list, compiled by Norman Williams Jr., in his book, The Structure of Urban Zoning, provides the basis for current land-use control theory.

1. Protection against physical dangers. For example, a munitions dump does not belong next to a residence.
2. **Protection against the common-law nuisances.**
These include noise and vibration, the various forms of air pollution, excessive heat and cold, glaring lights, etc. While more common than the actually dangerous activities, these factors still do not play as important a role in land-use regulation as is sometimes thought.

3. **Protection against heavy traffic.** Restrictions on those establishments which create either substantially more traffic, or different kinds of traffic, from the characteristic establishments of an area.

4. **Protection against congestion.** Even apart from considerations arising from vehicular traffic, there is also a somewhat different type of problem—the protection of the relative degree of peace and quiet in a residential neighborhood against the bustle and noise which result from the presence of large numbers of people and their movement.

5. **Protection of light and air and of open space.** Density regulations do set a general level of potential light and air and of open space around residences. Yet density regulations do not really provide effective control over such other factors, ... Specific zoning devices are therefore appropriate in connection with each of the three major purposes of bulk zoning.

6. **Protection of morals.** While protection of morals is generally a minor element in zoning, it is sometimes invoked to justify special restriction on taverns, pool halls, and other establishments thought to lead the young into bad habits.

7. **Protection against "aesthetic nuisances".** This involves structures or establishments which are offensive, not to the sense of hearing or to the sense of smell, but to the sense of sight. The general rule of the constitutional law is supposed to be that, while this aesthetic factor may be taken into consideration in drawing zoning regulations under police power, nevertheless "you cannot zone for aesthetics alone".
8. **Protection against "psychological nuisances."** In other instances, there are strong objections to certain aspects of the environment, based not upon concrete physical factors but upon irrational fears and dislikes. The first is the invasion of a residential environment by certain types of establishments around which irrational fears tend to center. Funeral parlors provide the obvious example of this type. The second type involves the entrance into residential neighborhoods of groups of people who are disliked for one reason or another — usually because of racial, ethnic, or lower economic status. Regulations directed at the latter type of factors are much more common than is generally realized. The impolite term for this is "snob zoning".

9. **Regulations for the rate of development and protection of the municipal tax base.** Finally, certain types of zoning controls are concerned with regulation of the rate and amount of development, particularly in order to keep some control over the resulting demand for public services and so the burden on the municipal tax base.

10. **Protection of property values.**

11. **Protection of the "character of the neighborhood".**

To achieve these goals, man has turned to the various measures of land-use control in existence today, among which are nuisance laws, zoning ordinances, restrictive covenants, subdivision controls, building codes, housing codes, etc. However, before discussing these measures in depth we must first concern ourselves with the actual system within which these goals must be applied. That system, the court system, provides the common grounds wherein each measure is weighed as to its relationship to the commonly held concepts of land property law, expounded by Blackstone, both in terms of its "body" and of its "soul."
THE COURT SYSTEM

The fundamental basis of our law court system, much like the fundamental basis of our law, was also derived from the concepts of The English Law. Again, as in the law, this system was adapted and modified to meet the needs of our society.

Under the English Common Law system, the courts were divided into two physically distinct bodies: The Common Law Court, which concerned the "remedy of the law" (in Blackstonian terms, its "body"), and The Equity Court, which concerned the "reasonableness" of the law (in Blackstonian terms, its "soul"). It was felt that these two distinct court systems were necessary to fulfill all the needs of the English society because the "remedy of the law", even when administered correctly, oftentimes failed to consider the afore-mentioned need for "equity", the right of the sovereign to "do right for love of God and by way of charity".¹

The Common Law Court administered the combined concepts of The English Common Law, both Roman Statuary and Medieval English Common Natural Law. Decisions were based upon the "written" law and the existing precedent (the rulings of like cases which had occurred before this specific case). It maintained a practical quality which administered the law in relation to its Blackstonian "letter". The settlements were limited in nature and consisted of either cash damages, prison terms, or both. These remedies were succinct, strict, and achieved with little concern as to "reasonableness" of application.²
The Equity Court, the Court of Chancery, in medieval England, provided a supplement to The Common Law Court by administering the law as to its "reasonableness". The Chancery Court would exercise discretion as to the decision in relation to the extraneous factors which might concern the specific case but not be considered by the written letter of the law. It concerned the "equity" of the punishment pertaining to the specific case. For the most part, there existed no "written" rules or precedent and the remedy provided was both personal in nature and flexible in application. The actual remedies usually consisted of the issuance of an injunction (an order to stop committing an act) or a writ of mandamus (an order compelling to commit an act). Each issuance was considered as to its "reasonableness" of application.³

From the Equity Court came the concept of "equitable servitude", one man's obligation to another, both stated and implied, which exceeds the confines of written law. That is, a man has the right to do with his property what he pleases, as long as his actions do not hinder the rights of another man. There exists a series of implied obligations between these two men, and the concept of equitable servitude is a statement of those implied obligations.

The American legal system adopted this concept of a two-court law system (i.e. The Common Law Court and The Equity Court) but did not establish two distinct legal bodies. Under the American system, the power of both courts is placed within one body, with the decision as to which concept of law will be applied in each particular case left to the discretion of the presiding judge. Further, this relationship is not clear from the beginning of
the case and as a result, much uncertainty is created as to the manner in which each judge will reach a conclusion.

As an example of the joint application of both the Common Law Court and The Equity Court within one legal system let us examine a hypothetical case. Consider the question of Mr. John Miller's "lovely old beech" on the edge of his private property, but directly in the path of a proposed interstate highway. Though the Commonwealth of Pennsylvania maintains the right to chop down the tree, within its powers of eminent domain as long as it grants "just compensation", he may want to continue to enjoy the beauty and the shade of the magnificent tree that he proposed to his wife under and that his children and grandchildren climbed with relish for years. Therefore, he may appeal to the courts for equity in the judgment. Though he is unlikely to be granted equity in this consideration, nothing stands in the way of the judge granting an injunction stopping the proposed highway construction through Mr. Miller's land if he so deems.

As a result, though the existing municipality maintains the right to exercise its power of eminent domain, within the written letter of the law, the presiding judge maintains the right to halt the construction if he feels the consequences of the construction levy an "unreasonable" hardship upon the plaintiff. Therefore, the law maintains a possibility of interjecting a "conscience" into the administration of the written word of the law.

This dual court system is applied to the concepts of property law to provide a viable means of reaching decisions in regard to the factors pertaining to each specific case. In spite of the confusion which may exist as a result
of the combination of these two courts, The Common Law Court and The Equity Court, the American legal system maintains the capacity to consider each case both in terms of the "soul" of the law and in terms of its "letter". It maintains a possibility of providing a decision which fulfills the interest of the common good.
THE LEGAL MEANS

The major means of implementing the desired controls upon the use and ownership of land fall within the realm of four basic powers: police power, eminent domain, taxation, and private contract. The first three, police power, eminent domain, and taxation must be achieved within the scope of the public welfare and therefore must be by nature general and applicable to all. The last measure, private contract, by definition need not be applicable to the total community, and, as a result, provides a means for extremely definitive controls. A brief examination of each of these measures is imperative before discussing the respective land-use controls themselves.

POLICE POWER

The enforcement by police power may be defined as "community" power, (the existing power of the community over the rights of the individual). As long as the goals to be achieved fall within the realm of the promotion of the health, safety, and welfare of the total community, this power may be applied.¹

The specific legal basis of a community to exercise its police power is not found within the constitution but is, and always has been, a power which was retained by the people in the form of the State. The powers of the Federal government consist only of those delegated to it by the people, and the right of the people to rule themselves was not one of those delegated powers.² The right of the community to exercise police power in regard to property within the confines of our socially complex society cannot be defined. As long as
people are to live together within an urban environment they must follow certain socially respected laws, either written or unwritten, and until each person within the society adheres to those laws the need of the exercise of police powers will prevail. Since the exercise of police power is defined as a device to regulate the use of property and not the ownership of private property it does not conflict with the fourteenth or fifteenth amendments to the Constitution of the United States. ("Nor shall any state deprive any person...of property without due process of law" and "Nor shall private property be taken for public use, without just compensation", respectively). Consequently, the exercise of police power, in regard to the regulation of use rather than ownership, does not demand compensation to the owner.

However, the exercise of the police power is regulated as to its reasonableness of application with the determination of this "reasonableness of application" left for the discretion of the judge. The legal system has felt it expedient to do so, as a result of the many extraneous factors which enter each particular case. It is felt that a limitation of the application of police power would result in an unequitable application of the law and therefore would not serve the common good of all in each case. It is also felt that police power should not be considered a fixed power but should expand or contract to meet the demands of the ever-changing society which it serves. According to Freund, a study of applied police power:

...will reveal that police power is not as a fixed quantity, but as the expansion of social, economic, and political conditions. As long as these conditions vary, the police power must continue to be "elastic".
EMINENT DOMAIN

The concept of eminent domain unlike the police power, maintains an extremely definitive application (pertaining to the appropriation and condemnation of property for public use). Further, the taking of that private property under the guise of eminent domain does require "just compensation" as limited by the fourteenth amendment.

Its concept originated within the natural law movement, and was first referred to by the legal philosopher Grotus, in his De Jure Belli et Pacts, to "designate the power (of the state) over all private property within its bounds". Initially the concept was based upon two premises:

1. That only the state could be the taker (which is no longer true today, as many public service corporations and others have condemnation power).

2. That the state was immune from liability.¹

Early within the United States history the application of eminent domain was limited in nature, usually concerning only rare cases such as condemnation of streets, dams, etc. The rare application combined with the relative low cost of land resulted in little trouble occurring concerning enforcement. This created little demand for express constitutional powers. The concept of "just compensation" was, "seeded from ideas of 'natural equality', reasonableness, dictates of natural justice, and other natural law notions long before the fourteenth amendment." However, as the society became more complex and the costs of the land began to increase, the scope and enforcement of eminent domain began to be contested and has had to be modified to satisfy those new demands.²
As a result, the historical development of the concept of eminent domain may be classified into three overlapping basic periods of development:

1. In the first stage the courts favored unconditional protection of property interests, but, as in the case of common law nuisances granted limited or temporary damages only. (It was considered that future damage might not arise since the plaintiff's judgment would cause the defendant to abate the nuisance.)

2. Then permanent damages were allowed. The first such case involved the destruction of a bridge and the blocking of a highway by a railroad. Here the concept of a permanent appropriation of the property was recognized.

3. Finally, the damages were made the exclusive remedy, and the owner was denied his remedies of injunction, and also of ejectment (once the public improvement was completed). Private rights were subordinated to the public right to use the new structure as soon as completed.

Many questions arise concerning domain. The three most basic are:

1. What constitutes taking in regards to eminent domain?
2. What constitutes the public use?
3. What constitutes just compensation?

Although the Fifth Amendment of the Constitution very clearly states that, "nor shall private property be taken for public use without just compensation", it does not define the limitations or scope of "taking". In colonial times the taking of private land was defined as, "to deprive him of his title to it, or some part of his title, so that the entire eminent domain over it no longer remains within him." Too, the limitation only pertained to his physical property and not to the uses to which he might be deprived. In the latter part of the
nineteenth century the deprivation of "beneficial uses" was contested and finally established as equally pertinent and eligible for "just compensation". At that time many of the state constitutions were amended to add the term "or damaged" to the fifth amendment, finally stating that private property should not be "taken or damaged without just compensation".

The question as to the definition of the public use has also become contested within the context of eminent domain. By weight of judicial opinion use for which private property may be taken is defined as:

1. To enable the United States or a state or one of its agencies to complete its governmental functions, and to preserve the safety, health, and comfort of the public whether or not individual members of the public make use of the property so taken, provided the taking is made by a public body.

2. To serve the public with some necessity or convenience which cannot be readily furnished without governmental aid, whether or not the taking is made by a public body, provided the public may enjoy such service as of right.

3. In certain special, and peculiar cases sanctioned by ancient custom or because of unusual local conditions to enable individuals to cultivate their land or carry on business in a way in which it could not otherwise be done, provided their success will indirectly enhance the public welfare. This is so even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken.

The value of "just compensation" must also be considered in relation to the application of the power of eminent domain. Usually the value of "just compensation" is not determined by the taker, (might the price be too low) or by the owner (might the price be too high). The courts generally look to the
true market value of the property as an indication of the value of "just compensation" (i.e. "the amount of money a willing buyer who is not obligated to buy, will pay an owner willing, but not obligated, to sell, taking into consideration all the uses to which the land is adapted and might be reasonably applied.")

Also, no consideration is given to the prospective value of the land after the proposed improvement has been made. (However, the adaptability of the land to the proposed improvement is considered.) Likewise, no consideration is given to the "consequential damages" which might be incurred due to the enforcement of eminent domain. These usually include personal injuries such as: expense of moving, inconvenience, interruption of business, loss of good will, etc. As a rule of thumb the owner is compensated "only to the extent he can't take it with him."

However, it has "been a custom with the courts to deduct from the compensation intended for the owner the value of benefits occurring to him from public improvements, provided the community at large does not share those benefits". As an example, if a land owner owns a tract of land which lies in the path of a proposed freeway and the said tract of land will be taken by the federal government as an exercise of its power of eminent domain, he is entitled to receive "just compensation" for the land taken. If the proposed freeway cuts through only a corner of his land and therefore does not destroy the total of his tract, then he will be allowed to retain the land which is not affected and will be compensated only for the land taken. However, the proposed freeway will increase
the value of the remaining land. Therefore in this case the "just compensa-
tion" would be the determined fair market value of the land less a portion of
the increased value the owner would be afforded by the proposed construction.
It is felt that this calculation more accurately determines the true loss incurred
by the owner. This concept of deducting benefits has been contested by some,
stating that deducting benefits violates the principle applied within the consti-
tution that compensation must be in the form of money, and that benefits are
not money.

As a result, three basic formulas have been developed in determining the
ture value of this "just compensation". These three formulas are:

1. Value of original tract prior to taking, minus the value
   of the remaining after taking divided by general bene-
   fits equals just compensation.

2. The sum of the value of the land taken divided by damage
   to remainder, minus special benefits equals just compen-
   sation.

3. The value of land taken divided by the sum of the damage
   to remainder minus special benefits equals just compensa-
   tion.

The last formula, where the benefits deducted are deducted only from the
damages to the remainder, is the most widely accepted.

As the complexities of society increase, the concept of eminent domain
must also increase and will remain as one of the fundamental means of achiev-
ing the goals and aspirations of a planned environment.

The concept and process of eminent domain have devel-
oped over several centuries. With the growing demand
for highways, public parks, power projects, state edu-
cational institutions, hospitals, administration buildings
and countless other public improvements, the condemnation
power is becoming increasingly important. It will influence negotiations for public acquisition of property so as to reduce the amount of litigation, as well as furnish the tool of last resort. For these reasons the power should never be ignored.  

THE POWER OF TAXATION

The power of taxation may also be applied to achieve desired land-use regulation. However, this power, when applied in the role of land-use regulations, maintains a questionable constitutional validity. The question concerning land-use regulation by means of taxation is, "whether or not taxation as a regulatory device is constitutional or if it must be restricted only to the raising of revenue?"

According to the Federal Constitution, the power of taxation and police power, at all times, remain distinct. However, in application, within the past few years, this distinction has become no more than legal fiction.

The police power is none other than the sovereign power to restrain or suppress what is deemed, by the dominant interests, to be disadvantageous, and to promote and foster what they deem advantageous to the common good. Taxation then, is the most pervasive and privileged exercise of the police power...it is becoming the most effective of police power.

The power of taxation is limited by the Constitution of the United States by two basic clauses, i.e. the "due process" clause (insuring that the levying of taxes be achieved within the express Constitutional powers) and the "equal protection" clause (insuring that the taxes are levied equally in regard to the use throughout the jurisdiction). These limitations were designed to apply to all powers of taxation, and in regard to land taxation their precise applications take on greater importance.
Although other means within the power of taxation exist, the property tax most often becomes the chief means of regulating the use of land. The application of property taxes varies from state to state, with the main distinction occurring between those states which administer a classified property tax and those states which administer a uniform property tax.

The classified property tax provides a means for a state to levy tax assessments non-uniformly from tax district to tax district as to the actual physical worth of each respective tract of land. The aim of this system is to maintain, "a hope of fuller disclosure of intangibles," within each particular tract of property. As an example, a tract of land whose physical make-up prohibits its development potential would be taxed at a rate in accordance with its worth regardless of the tax values of the adjacent tract of land. This measure provides a possibility for an outright variation of the prescribed tax rates from tax district to tax district; thus, states administering this system maintain a greater possibility of achieving land-use regulation through taxation.

The states which maintain a uniform tax system demand that all tax districts of the same use, within their jurisdiction be assessed uniformly regardless of the intangibles which might exist within each tract. As a result, this method must very strictly adhere to the limitations placed upon it by the constitution and, therefore, is less conducive as a means of a land-use regulatory method.

Even in regard to the strict limitations which are placed upon the levying of taxes by both the federal and the state constitutions, certain means of land-use regulation still exist within these powers. Although an outright variation of the tax rates between like tax districts to obtain a desired end would most assuredly
be voided by the legal system, other means, both direct and indirect, remain available for application. The more direct means of land-use regulation by taxation falls within the realm of tax assessment and tax exemptions. The indirect means is achieved by the provision of tax "write-offs" or "paper tax-losses".

The tax assessment procedure is achieved by assessing a particular tract of land as to its specific use. As an example, land located within areas of high tax values, which would begin to dictate its use, may be assessed at a lower rate in conjunction with a written agreement or covenant restricting its use to be in relation to the assessed value. As a result, the assessed value of the land may be used to gain desired planning goals.

The tax exemption procedure, though more immediately successful than the tax assessment procedure, is more difficult in its highly questionable constitutionality. Under this procedure, an outright tax exemption is granted to various districts if they comply with the wishes of the desired planning goals. This method has been severely criticized from the viewpoint of the economist.

Certain serious shortcomings of tax exemption devices are at once apparent. It is of the nature of an indirect or hidden grant, unknown in amount, and consequently misleading. It is not a subsidy that is openly appropriated, but rather represents a loss in future revenue that must be made up by increasing other taxes; proponents of tax exemptions point out, as has been mentioned above, that it is this very feature that makes it easier to put into effect, but this would not seem ample justification. Concealment as a form of political strategy violates a fundamental concept of democratic government. The tax paying public has a right to know how much it is paying and for what purpose.
Another means of land-use regulation by taxation, that of the "tax write-off or paper loss", is closely related to the tax exemption procedure and is subject to the same criticism. Within this system an investor is provided a tax loss which may be subtracted from his yearly tax by entering into certain prescribed building constructions, most usually pertaining to the supply of housing projects of all types, and therefore more related to income than property tax.

As an example of the "tax loss" and its relation to the development of land-use, let us examine the legal concept of "accelerated depreciation" and its relation to the construction industry. Under the existing internal revenue laws an investor is able to depreciate the value of an existing project which he has invested in at a faster rate during the earlier years than in the latter even though the actual depreciation would occur at a uniform rate throughout the life-span of the project. As a result he is able to show a financial "loss" upon his investment which does not actually exist. Since this "loss" is actually part of his yearly income, he is able to subtract it from his yearly taxable income as a business expense. This reduction in his yearly taxable income saves him in the amount of taxes he must pay. However, at some point in time the building will begin to show a profit, and at that time he must either sell the investment and suffer a "capital gains" tax, or re-mortgage the structure and re-invest into another like project. Thus, in this manner the construction industry is encouraged, and therefore the land-use is affected.

Whether land-use regulation by means of taxation is merely an extension of police power, whether the power when applied in this manner is constitutional and whether its application is ethical are of little consequence. Land-use regu-
iation by means of taxation is and has been one of the most effective land development tools and should not be neglected when examining the alternatives available to effectuate certain prescribed planning goals.

PRIVATE CONTRACT

The concept of private contract is probably the oldest known to man. Long before a clear concept of law was formulated, much less development of the law itself, this legal concept was practiced.

Private contract may be defined as an agreement voluntarily entered into by two parties. These contracts may be written or unwritten (as long as the existence of the contract can be proven within a court of law) where each party in the contract is bound to its stipulations for the duration of that contract. Also, there need be no constitutional or state delegated powers governing private contract other than those express laws which regulate the actions of the individuals within the society itself. Since the private contract is just that, an agreement between two members of a society, it need not be general or applicable to each individual within the society.¹

As a result, the concept of private contract provides a means for very specific and personal protection, under law, within the context of land-use controls within the total city. The only restrictions which have been placed upon private contract have been those of a racial or monopolistic nature.

As an example of a racial restriction, as the enormous immigration of negroes to the northern cities occurred within the early twentieth century, an increasing demand for housing arose. In reaction to this increased demand for housing, the white residential areas began to restrict the sale of houses within their
respective areas to the incoming negroes by means of restrictive covenants (private contracts). In the past few years these racial covenants have been ruled unconstitutional by the courts of the land due to their violation of the "equal protection" and "due process" clauses of the fourteenth amendment of the United States Constitution.

The scope of private contracts can vary in scale from an agreement between two persons to an agreement between unlimited numbers of people as long as each individual enters into the contract by his own volition. To an extent the concept of government is a private contract existing between each individual within the state and the sum total of the other individuals within that state.

The basic land-use control tool in conjunction with the concept of private contract is that of restrictive covenants. These covenants have long provided the means for individual areas to regulate the use to which land could be put within their jurisdiction before any semblance of public protective measure were developed. However, until recently, there have existed many inefficiencies within the context of their physical application. These inefficiencies will be discussed in more detail in the following chapter concerning the restrictive covenants.\(^2\)
CHAPTER 3
THE PROCESS

The basic land-use control measures which are in existence today are zoning, sub-division control, housing and building codes, and restrictive covenants. The first three are actually legal restrictive devices which may be employed by municipal bodies to control the use of land within their jurisdiction. The last one, the restrictive covenant, is a land-use control measure which is employed by the private individuals within the existing municipalities to further restrict the use of land within their specific areas of the city. This chapter is not to provide a detailed account of each particular control, but rather to provide a general background of each land-use control law, to act as an introductory device for the use of non-law oriented people as a "springboard" to the pursuit of a more thorough examination of each specific measure.

ZONING

The zoning ordinance was derived basically from the sum of common nuisance law. Its main advantage over nuisance law is that it provides all of the land owners "with knowledge before the fact", pertaining to the specific uses to which they may put their land. The major reason for the wide acceptance of zoning within the confines of the United States as well as other countries throughout the world is its "systematic" approach, both in terms of enactment and enforcement procedures.
The first comprehensive zoning ordinance was established by the city of New York in 1916. After an extensive six-year study they stated that:

...it is necessary for the protection of land values, for the maintenance of the public health and safety, and for the good of the community at large to weave many of these protective measures into a general ordinance and, to forbid the intrusion of manufacturing into retail business and residential districts, to prevent stores from entering upon residential streets and so to "zone" the city that each use would have generous and sufficient areas within which to carry on its own pursuits without injury to the people or property of the other districts of the city. 3

Many cities within the United States enacted similar ordinances following the enactment of this first ordinance. In 1926, the constitutional validity of zoning was established in the landmark case "The village of Euclid vs. Ambler Realty". Zoning was established as a constitutional means of land-use control within the realm of police power (i.e. to promote the health, safety, and welfare of the total community) as an extension of the common nuisance law. The judges considered the "noxious" qualities of apartment buildings in 1926 in the context of single family dwellings and finally ruled that, "under those circumstances, apartment houses, which in a different environment would be not only entirely unobjectionable but highly desirable, come very near being nuisances." 4

Zoning power falls within the realm of the police power and therefore must regulate use not ownership; need not provide the benefit of "just compensation"; and is administered as to its reasonableness in each situation. However, the application of zoning throughout the community must be of a general nature which is applicable to all concerned. 5
Since municipalities are defined as "creatures of the state", the power to zone must be conveyed or delegated to them from the state. This conveyance consists of both quasi-judicial and quasi-legislative powers. The quasi-legislative powers fall within the realm of the enactment procedure itself in the establishment of the zoning ordinance. The quasi-judicial powers (executive powers) fall within the realm of the inherent enforcement procedure, in terms of the Board of Appeals, Zoning Administration, and the Board of Adjustment.

The enabling procedure was greatly simplified by the establishment of a Model Enabling Act in 1928, by the then Secretary of Commerce, Herbert Hoover. An advisory commission was established to examine the enabling process and to draft a model act which could be followed by all states when enacting their own legislation. This form has been adapted in whole or part by many states, and has been one of the causes for the spread of zoning throughout the United States.

Under the provisions of the State Enabling Act the cities are instructed to establish a Zoning Commission to examine the existing conditions and then to draft a tentative zoning ordinance in accordance with that examination. The ordinance itself, should consist of a statement of its purpose, a written draft of the regulations, and a comprehensive plan dividing the area within the jurisdiction of the city into districts or zones of uses reflecting that stated purpose. After the tentative zoning ordinance has been drafted, the Zoning Commission is instructed to hold public hearings pertaining to that ordinance and finally to submit it to the city council for ratification.
The city council maintains three alternatives as to the ratification of the proposed ordinance. They may (1) place the tentative ordinance before the people for a "straw vote" to gain an indication of the public sentiment, (2) place the tentative ordinance before the people for a "real" vote on the ordinance and then abide by the public's decision, or (3) act upon the tentative ordinance without attempting to gain public sentiment at all. Of the three alternatives, the first alternative is the policy most generally followed by the city councils. If the ordinance is not passed it may either be "shelved" or returned to the Zoning Commission for re-evaluation and then re-submittal. If the zoning ordinance is passed, then the Zoning Commission is disbanded and another governmental agency is established to enforce the measures within the ordinance.

The enforcement of the zoning ordinance is achieved by the establishment of an administrative agency with quasi-judicial or executive authority as set out within the zoning ordinance itself. This executive agency may be the Board of Adjustment, Board of Appeals, or the Zoning Administration. The purpose of this agency is to provide a body somewhat like a court to apply discretion to:

1. The determining of facts arising in the interpretation of the zoning ordinance.

2. The granting of exemptions in the cases set forth in the text of the ordinance, (in regard to its reasonableness).

3. In rare cases when it is authorized, the granting of such variances from the strict letter of the ordinance as the ordinance and law permit.
Such an agency is to "screen" the cases which go to the courts in order to alleviate some of the burden from the courts. If the plaintiff is not satisfied with the decision rendered by this body, then he has further recourse to the court system.

The flexibility of the zoning ordinance presupposes the consideration of certain legal questions. These legal questions are that of the non-conforming use, the variance, the special use permit, the floating zone, the planned unit development, the zoning amendment, the spot zone, and the contract zone. The first five refer to specific legal means of relaxing the regulations of an existing zoning ordinance. The last two are used by the courts when referring to illegal relaxations of the existing zoning ordinances.

The major legal question concerning the initial enforcement of the zoning ordinance refers to that of non-conforming use. These are uses which had existed within the zoned district before the passage of the zoning ordinance, but do not conform to the ordinance. At first these non-conforming uses were enthusiastically allowed, to encourage the passage of the proposed zoning ordinance. However, once the ordinance had become established within the municipality, all that could legally be done, was done, to harass the owners of these non-conforming uses.

The provision for the non-conforming use was inserted to insure the ratification of the proposed zoning ordinance. Had it not been included, the court system might well have ruled against the total of the ordinance as a result of its "unequitable" nature since it would levy an unreasonable restraint upon the previous land owners within the jurisdiction of the zoning ordinance whose land-use did not conform to that now demanded by the zoning ordinance.
Basically, the law problems concerning non-conforming uses follow one of four basic patterns:

1. The permitted changes between different non-conforming uses.

2. The amount of permitted expansion or enlargement of a non-conforming use; usually 25%.

3. Compulsory termination of the non-conforming uses, in cases of abandonment for a given period of time (perhaps a year or two) or accidental destruction.

4. Compulsory termination after a period of amortization.

Due to the nature of these disputes, their frequency generally diminishes in relation to the age of the existing zoning ordinance, after the initial termination of non-conforming uses has been achieved.

Perhaps the major question concerning the application of a zoning ordinance concerns the request for a variance. The variance is a request by a respective landowner within the jurisdiction of the zoning ordinance for a specific relaxation of an existing zoning regulation which applies to his tract of land. Most variance cases which are granted do not concern a change of the "land-use" within the district but only a minor change in a specific regulation. The variance, too, was inserted to insure the constitutionality of the enforcement of the zoning ordinance within the confines of equity, as a means of softening the enforcement of the proposed ordinance.

The granting of a variance is achieved by appealing to the Office of the Zoning Administrator. The variance is granted only after the landowner has adequately demonstrated that the contested regulation imposes an undue hardship upon his use of his property, and that the proposed changes will not be detrimental
to the existing neighborhood. If his request is refused, or if a neighbor contests the granting of the variance, they both maintain final recourse to the court system.12

A **special-use permit** is requested when a land-use is desired of a particular tract of land which does not conform to the land-use prescribed by the existing zoning ordinance but would not prove detrimental to that land-use if some additional controls were exercised. Perhaps the classic example is that of a "riding stable" within the confines of a residential-use district. Since this use is generally not considered detrimental to the adjacent residential areas if it is properly controlled, in regard to proper buffering and placement of its facilities, the use is usually allowed. Basically, this permit may be granted as long as:

1. The area desired changed is of ten acres or more.
2. The use is of a designated type that will in this condition not interfere with the present use.
3. Adequate protection of the neighborhood is provided.
4. The change will not prove detrimental to the neighborhood.
5. Public hearings are held.
6. Proper notice is given to the neighborhood of the desired change.

Generally, the allowable special uses are set forth within the zoning ordinance; however, on rare occasions additional special uses are permitted which are not set forth in the initial ordinance. Since these special uses are prescribed within the initial ordinance and are of small scale they do not constitute a re-zoning of an area and therefore are judicial rather than
Another zoning measure which is prevalent within the context of zoning enforcement is that of the floating zone. This measure is virtually the same as the special-use permit except that it is written into the actual zoning ordinance by the city council as a re-zoning of a specific area from one use to another and is therefore a legislative rather than a judicial act. The specific floating zone is generally predetermined within the initial zoning ordinance as a proposed future revision and is not added as an amendment.

Another measure to add flexibility to the enforcement of a zoning ordinance is the concept of Planned Unit Development (P.U.D.). Within this concept certain zoning regulations are relaxed upon approval of the planning agency if the total scheme demonstrates that the desired relaxations do not prove deleterious to the resultant environment. Perhaps the best such example is the relaxation of the population density requirements within a Planned Unit Development. The required land density under the proposed zoning ordinance of one dwelling unit per acre may be lowered to one dwelling unit per three quarter acre if the total calculated density for the entire tract of land remains at one dwelling unit per acre. In this way, the possibility for larger open areas is maintained within developments of relative small scale as long as the dwelling units themselves are designed in regard to this reduced density. As a result, the Planned Unit Development affords a possibility of a flexible adaptation of the existing regulations to produce a more creative solution.
A question which often arises concerning a proposed zoning change is the contention between the **zoning amendment** and the **spot zone**. Within a zoning amendment the city council may enact a zoning change, in regard to a particular tract of land which, they state, "updates" the existing ordinance. If a particular landowner within the amended area disagrees with the revision he may plead his case to the court, claiming spot zoning. He must prove that the enacted amendment did not "update" the existing ordinance, but actually conflicted with the ordinance and is not in accordance with the comprehensive plan. If the judge rules in his behalf then he will refer to the zoning change as a spot zone. If he agrees with the change, he will refer to it as a zoning amendment.

Another legal question which may arise concerning a zoning revision or taxation is the question of a **contract zone**. Within this measure, a landowner may bargain with the city to obtain a desired zoning change. As an example, he may donate a portion of his land to the city for a park if they will enact a zoning amendment which will revise the use of his land to suit his desired purposes. If the city enacts such an amendment under those circumstances then their act may be struck down as "contract zoning". They have in effect "sold" a zoning amendment to a private citizen within the city. Here again the court system is used to settle the legal disputes which may arise.

The most prevalent form of zoning (in fact for all practical purposes, the only type of zoning) is that of the cumulative zone. Within this zoning situation, a transcending hierarchical order is established between the various use districts, i.e. a residential zone may contain only residential uses while a commercial district may maintain both commercial and residential, and, lastly,
an industrial zone may maintain both commercial and residential uses as well. Within this situation, the single-family dwelling is given the supreme consideration in regard to the other land-uses within the city. However, perhaps this is as it should be, since the single-family dwelling is of the most importance to the majority of the people of the city.17

Though the cumulative zone is the most prevalent in some special cases the non-cumulative zone is also applied. The non-cumulative zone is a "single-use" zone in that no land-use other than that prescribed by the zoning ordinance is allowed within that district. Though very few cities maintain total non-cumulative zones, most cumulative zones maintain some non-cumulative situations within them. As an example, the R-1 district is, for all purposes, a non-cumulative zone since no other use is allowed within it aside from those designated as special-uses. Also, in some cases, certain industrial uses which are regarded as dangerous are zoned non-cumulatively. As a result, the non-cumulative zone provides the possibility to apply very stringent restrictions upon areas within the city when it is deemed necessary to do so.

As an example of a typical zoning ordinance let us consider the zoning ordinance of The City of West University Place, located within the city limits of Houston, Texas. The advantage of the West University Place is that it is large enough to require an ordinance which adequately demonstrates the major characteristics of a "typical" zoning ordinance, yet small enough to not require an ordinance of such complexity as to confuse them. The zoning ordinances of large complex municipalities are oftentimes so complex in themselves that they are difficult to comprehend.
The City of West University Place is a residential community of approximately 14,500 people, containing 5,400 homes located upon a site of approximately 1,248 acres. Of this total acreage, 19.7 acres are used for commercial purposes. Though The City of West University is located within the jurisdiction of The City of Houston, the city is a self-sufficient municipal body. The city government consists of a five-man Commission with a Mayor which determines the policies which are effectuated by the City Manager. West University Place maintains its own water and sewage supply, police and fire department, city recreational board and municipal swimming pool. The unique feature of The City of West University Place is that it maintains and enforces a zoning ordinance while The City of Houston, Texas, does not.

Basically the zoning ordinance of The City of West University Place consists of:

An ordinance establishing zoning regulations and districts in accordance with a comprehensive plan, and regulating and redistricting the height, number of stories, type and character of construction of building and other structures; the percentage of lot that may be occupied; the size of yards, courts and other open spaces; the density of population; the location and use of buildings, structures and land for trade industry, residences and other purposes; dividing The City of West University Place into districts and regulating and restricting the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land within such districts and providing uniform regulations for the several classes or kinds of buildings or structures, type and character of construction and uses within the restrictive districts; adopting a zoning map disclosing the several districts and use areas and the restrictions and limitations and provisions applicable to such districts and areas; providing for a Board of Adjustment and defining the powers of same; prescribing a penalty for violation of this ordinance; and, declaring an emergency.
The ordinance itself specifically regulates the types of structures allowed within each specific use district. As an example, examine the section of the ordinance referring to the "Uses and Buildings in Single Family Dwelling Districts".

In a single family dwelling district, no building or premises shall be used and no building shall be erected or structurally altered which is arranged or structurally altered which is arranged or designed to be used for other than one or more of the following uses; except otherwise specifically provided in this ordinance:

1. Single family dwelling.

2. Central office buildings of corporations; firms, or individuals engaged with furnishing of telephone services to the public or equipment in connection with such buildings or a part of said telephone system, necessary in the furnishing of telephone services to the public. No public business office and no repair or storage facilities shall be maintained.

3. Accessory buildings, including one private garage when located not less than 75 feet back from the front lot line, and not less than 10 feet back from any street line, and 3 feet from any lot line, or located in a compartment as an integral part of the main building and not less than 10 feet from any street line and 3 feet from any lot line; and, also including room or rooms for the use of servants employed on the premises.

4. Uses customarily incident to any of the above uses when located upon the same lot and not involving the conduct of a business; including customary home occupations engaged in by the office of a physician, surgeon, dentist, musician, or artist when situated in the same dwelling used by such physician, surgeon, dentist, musician or artist as his or her private dwelling; provided no name place exceeding one square foot in area, containing the name and occupation of the premises, and no sign exceeding eight square feet in area appertaining to the lease, hire, or sale of a building or premises; and no commercial advertising sign of any other character shall be permitted in such a dwelling district.
A comprehensive zoning map is provided to prescribe the exact location of each of the various use districts within the city. This map very specifically dictates the type of structure allowed within each use district. As an example, this map indicates, in accordance with the zoning ordinance, the maximum square footage as well as the type of construction allowed within each of the varying use districts. As a result, this map, drafted in 1947, very specifically determines the quality of the living environment which will be ultimately produced.

Upon an interview with the administering officials of The City of West University Place, it was gleaned that a variance may readily be achieved for a relaxation of a specific regulation within one use district, but it is extremely difficult to obtain a variance or special-use permit to obtain a change in "use" of a district. As a result, the possibility of change exists only within a very limited nature.

The zoning ordinance within The City of West University Place has become the major legal device for the protection of the living environment of the total community. Though the majority of the developments initially maintained other legal protective measures such as restrictive covenants, the existing zoning ordinance supersedes the aforementioned measures. As a result, the majority of these existing devices have been allowed to lapse in lieu of the zoning ordinance.

The effectiveness of the applied zoning ordinance in the effectuation of its desired purposes may be demonstrated by comparing the projected comprehensive zoning map delineated in 1947, to a land-use map delineated by the
firm of Caudill, Rowlett and Scott A.I.A. in relation to a proposed planning study for the city in 1963. This comparison indicates that the majority of the planned areas prescribed within the initial zoning ordinance have existed intact for twenty years with little, and surely no major, changes. As a result, the Zoning Ordinance of West University has adequately protected the living environment of the existing city within the confines prescribed by the ordinance itself.21
The primary application of zoning has been that of "zoning against nuisance", and, as a result, has been justifiably concerned with what should not be done, rather than what should be.

Zoning against nuisances — "thou shalt not, zoning" — must encompass 99 percent of the words spoken about zoning and an even greater proportion of the zoning ordinances in effect throughout the nation. One very good reason is that legislators and citizens alike can understand nuisance zoning. In earlier days the question "How would you like to have a slaughter house next door?" was enough to get enthusiastic support, not for zoning but against slaughter houses; and the ordinance would pass. Today, you substitute "filling station or automobile junkyard for slaughter house and you get the same result."

Although it is understandably easier to comprehend that which should not be done, this is not to say that what should be done should be ignored. In fact, within the context of the rapid turnover of rural land to urban land within the United States today, perhaps "What should be done?" takes on more than casual value.

Accordingly, Zoning maintains a positive (what should be done?) as well as a negative (what should not be done?) possibility. A possible example of such a positive possibility of the zoning ordinance is by means of "incentive zoning".

The incentive zone provides the developer with an incentive or "reward" for guiding his development along the lines suggested by the public planning body. An example of such a measure may be found within the development of the Lincoln Center Theater District, located in New York City. An analysis of current trends revealed that the theater district, which had been flourishing for
years, was on the verge of dying as a result of increased land values within the prescribed area. These increasing land-values were beginning to demand land-uses of a greater intensity than afforded by the before-flourishing theaters. To encourage future construction of additional theaters as well as retain those already existing, The City Planning Commission of New York City provided an incentive to the developers of that district in the form of a provision for additional floor area bonus up to 20 percent of the total building area, afforded to them if they included a theater within their district. Therefore, the developer gained by the additional building area and the city gained by the furthering of a desirable neighborhood character within the city.23

However, this application falls dangerously within the realm of a contract zone and, consequently, maintains a highly questionable legal validity within the enforcement of the zoning ordinance. As a result, the effectiveness of such measures depends upon the power of the existing enforcement bodies as well as the existing neighborhood sentiment for, or against, the proposed development since the major contention of the development must come from that source.

Another major problem concerning the development and application of zoning in the past years has been its almost singular aim of the protection of residential environment. Although that is still, and should be, an essential aim of future zoning ordinances, they must also begin to consider other use districts which are developing in conjunction with residential and are of equal importance. In fact, these use districts, residential as opposed to commercial as opposed to industrial, are all inter-related; each solution must be considered within the context of the others.
City problems are inter-related, and their needs are best answered by treating them in the framework of comprehensive planning and zoning. Zoning ordinances and building codes are necessary agents for carefully designed programs for developing, restoring, and maintaining urban areas.\(^{24}\)

As of yet, the majority of zoning law applications has failed to achieve this end.

According to Richard F. Babcock, in his book *The Zoning Game*, there exist only two rational theories as to the purpose of zoning. These two antithetical theories are (1) The property value theory and (2) The planning theory.

The property value theory is based upon the "dynamics of the market" and within this theory zoning is applied as a means to maximize the market values. The basis of this theory is that the "proper" zoning of property is determined by the market forces and as a result zoning becomes secondary to the market mechanisms.

The dynamics of a community, so long as that community remains economically free, dictate the uses to which land will inevitably gravitate, whatever expedient of zoning may be employed. Zoning otherwise employed than as a braking mechanism is probably misapplied and, historically, is probably futile.\(^{25}\)

A corollary to this theory is that planners, and therefore planning, by definition are no more than meddlers within the city who, in the long run, hinder the total growth process.\(^{26}\)

The planning theory is based upon the premise that zoning is only a tool of planning and should be applied in that manner. As a result, in the planners' view, zoning is only one tool of a number of effectuate an overall municipal plan. The problem here, according to Babcock, is that the majority of planners
feel, "that the validity of local land-use laws should be measured only by their consistency within the municipal plan". As a result, the plan itself becomes ultimate rather than the sociological, political, and economical goals themselves. If the plan reflects these aspirations, as it should, there is no problem; however, all too often these goals are subordinated by the planning commission themselves and as a result are not reflected within the proposed plans.

According to Babcock:

...if planning is intended to achieve not only physical amenities but also to accomplish some unstated or widespread social and political objectives, zoning has been more effective than its originators dared expect. In this sense, far from being a "regulative tool", zoning has been a positive force shaping the character of the municipality to fit its frequently vague, but never the less powerful preconceptions.  

In concluding Babcock states that both these theories maintain certain valid points of consideration and that each in its own sense is correct. Both err when applying zoning as a means of complementing their own vested purposes.

Zoning needs no purpose of its own. Zoning is no longer a "movement" like single tax or Prohibition; zoning is a process. It is part of a political technique through which the use of private land is regulated. When zoning is thought of apart from the governmental process it is obvious that it can have no inherent principles separate from the goals which each person chooses to ascribe to the political process as a whole.
The rapid decentralization of cities, in the twentieth century, as a result of the introduction of the auto to the American scene, has created a situation commonly referred to as "urban sprawl". As the number of persons "fleeing" the central city to its urban fringe began to increase, a large demand for adequate housing was created. This demand was, and is, predominantly satisfied by the responses of the private section of the public in the form of private developers. Since more than three-fourths of the land developed at the fringes of the city is given to residential development it is imperative that the problems of control of land-use at the edge of the city are effectively handled to insure the functional and economic viability of the community.¹

Of the many regulatory tools developed in response to this decentralization, subdivision control methods most specifically relate to the process. At first, subdivision control laws pertained only to the demands, such as the taking of private property for the purposes of street right-of-ways, etc... and, at that point in time, subdivision control laws were based upon a concept of "eminent domain".²

As the rapid growth of the twentieth century fell into full swing, the municipalities painfully began to recognize that the inevitability of streets and sewers was eminent within any subdivision, as a responsibility of the municipality, and proceeded to "reap the added
profit" implied by that impending construction without actually supplying them to the purchaser. Rather, they would move on to greener pastures leaving the problem of the initial construction and up-keep of streets and sewers to the municipalities themselves.  

As this lesson was learned time and time again, the municipalities gradually increased their inherent powers within the subdivision regulations, and began to place the restraint of supplying adequate streets and sewers upon the developers themselves. The means of applying this regulatory measure was achieved mainly "by the device of prohibiting the subdivision of land until the plan of such subdivision was approved and ordinarily recorded". Since the city performed this approval and recordation process, they were in a position to place certain demands upon the respective developers.

The major approval of the plat is generally left to the office of the Public Planning Commission. Since the major aim of the Planning Commission is to develop a comprehensive plan for the city, and then to try to co-ordinate the efforts of the private as well as the public decision-makers in conformance to that plan, the subdivision control regulations became one of their most important tools.

Though the initial definition of these implied powers of the subdivision control was related to the power of eminent domain, the newly expanded measures found their force on the police power. The exact means of achieving these ends is by the city's asserting that the plat cannot be filed for public record until approval is certified thereon, with the City Planning Commission carrying the responsibility of seeing
that this requirement is met. In most states a State Statute prohibits the "lot and block" sale of land (sale of land by individual parcels without recording them with the Office of County Clerk) as a misdemeanor. Further, they require that a proposed subdivision plat be approved by a public agency before being recorded. If the requirement is not met, then the developer of the subdivided land is subject to criminal punishment, and in some cases the purchaser maintains the option to claim the sale invalid and demand the return of his money.

As an example, when a plat is submitted to the Planning Commission for approval, they may offer "suggestions" to the prospective developer as to certain changes which they might deem desirable, from the standpoint of the city, in regard to the physical form of the plan. Although under constitutional law they may not possess the legal right to compel the developer's compliance to their wishes, they do possess the possibility of withholding or at the very least delaying the needed approval if he does not comply. As a result, they are able to assert some of their desired planning goals into each of the proposed subdivision developments.

As an example of this subdivision control process, let us examine the subdivision control activity of The City Planning Commission of Houston, Texas. In the subdivision approval procedure required by this Planning Commission the quite lengthy "give and take" quality becomes readily apparent. The extensiveness of the subdivision control activity is apparent by the number of individual subdivisions which
were submitted for approval within the second quarter of 1969. Within that time span, more than eighty subdivisions were applied for and subsequently recorded by the Office of the County Clerk in the County Court House, Harris County, Houston, Texas. The physical amount of the urban environment which is ultimately controlled, at least in part, by this regulation is quite extensive. As a result the powers of subdivision control within the City of Houston quite extensively aid in the determination of the physical built urban form.

An example of a "typical" subdivision may be found within The City of West University Place located within the City of Houston. Over a period of sixty years, from 1910 to 1970, the city has developed, subdivision by subdivision with each individual subdivision subjected to a similar approval procedure as described above. Since each subdivision was developed independently of the others, the specific physical lay-out of each varies; however, the overall physical pattern of the streets, utilities, etc., are generally quite compatible. This compatibility may not have occurred had not the powers of subdivision control been exercised by the city from the outset of the initial development. Each of the specific subdivisions was filed and recorded by the County Clerk's Office within the City of Houston, and therefore an accurate record of each plat is maintained. Consequently, the exercise of the subdivision control regulations from the outset of the subdivision of the City of West University Place was instrumental in the final determination of the resultant physical built environment. 5
PLAT REVIEW SEQUENCE

Houston City Planning Commission

1. Preliminary conference by engineer or developer with Planning Department staff

2. Planning Department sends copies to affected City departments and other governmental agencies for their review and recommendations

3. Planning Department receives comments and recommendations from other agencies

4. Planning Department consolidates and makes recommendations to the Planning Commission

5. City Planning Commission may:
   - Disapprove plat
   - Refer action
   - Approve plat with or without conditions

6. Engineer incorporates requirements of City Planning Commission

7. Planning Department channels final plat through steps 2, 4, and 5 for final action by City Planning Commission

8. Engineer submits copies of approved final plat to Planning Department for checking and required signatures

9. Planning Department transmits executed plat to County Clerk for recording at plat is within city or to County Flood Control Districts for signatures if outside

Plat outside city limits within 1 mile jurisdiction Harris County

Recommended but not required.

Figure 6
The primary cause of the controversy surrounding subdivision control legislation lies in its total lack of a standard enactment procedure such as exists within the zoning process in the form of the "Model State Enabling Act" of 1928. Subdivision control has had to develop without the aid of such a guideline, and, consequently, the nature of subdivision regulation varies from state to state with little uniformity. The lack of uniformity between the states has led to a lack of uniformity of enforcement procedures as well.

Unlike zoning, which had its constitutional validity established in the landmark decision pertaining to the village of Euclid vs. The Ambler Realty in 1926, subdivision regulation has had no such case to point to for its validity. As a result, the advancements within the subdivision regulation process have been achieved upon a rather unstable basis, which has caused the respective municipalities to hesitate in asserting, or expanding the powers or comprehensiveness of their respective subdivision control measures.

The nature of these subdivision control acts varies both in terms of statutory and territorial provisions. The statutory provisions are concerned with the actual legal scope of the subdivision control law. As an example, the statute limitations upon the legal definition of what constitutes a subdivision vary from state to state, i.e. Michigan, a subdivision is defined as a plat divided into ten or more divisions; in Nevada, a subdivision is defined as a plat divided into five or more divisions, with the majority of the states defining a subdivision as a plat divided into two or more divisions.
The various subdivision control legislation also varies as to its territorial provisions, i.e. the jurisdiction within which the subdivision regulations may be enforced. Generally, each municipality may legally enforce its regulations only upon the land within the limits of its jurisdiction; however, larger cities may maintain the right to enforce their subdivision control within an area between three and five miles from the limits of the city as well as does the City of Houston, Texas, under new existing state statutes. In some rare cases, such as Wisconsin, provisions have been made for an office of "State Director of Regional Planning," whose job is to regulate the growth of all municipalities within the jurisdiction of the state. His office carries with it quite similar regulating procedures, as does the local Office of County Clerk. 8

The type and exercise of control varies from state to state. While some states merely enforce a set of technical requirements in terms of utilities which must be provided, others provide for a wide array of subdivision controls pertaining to the general lay-out grades, curves, names and widths of lots, dedication of areas for parks, and the making of these improvements by the subdivider. 9

The effectuation of these restraints has been achieved with little problem for a number of reasons. If correctly enforced, all participants related to the procedure stand to gain, whether they be the developer, the community as a whole, or the subsequent purchasers themselves.
The developer gains financially in many ways. First, he is protected from those of his profession who would provide a somewhat less than standard quality subdivision for a few dollars less, thus indirectly restricting the quality of environment which he might honestly want to provide due to unfair competition. Second, upon application for plat approval, the developer's plan is subjected to an analysis in terms of the information compiled by the city pertaining to its projected growth and, therefore, the plat is provided a form of indirect market survey. Third, since the system as it is, basically works and without levying an undue hardship upon the developers they do not want to cause any changes which might levy stricter restraints upon them.\(^{10}\)

However, it must be reiterated that the exercise of the subdivision control regulations requires that he provide the predetermined services. Though the provision of these services increases the sales potential of his subdivision, they still levy a financial burden upon his initial development.

The community also gains from the exercise of its subdivision control regulations. Since the subdivisions themselves determine the ultimate character of the city, by effectuating proper subdivision control measures, that city is able to partially determine its ultimate urban, or suburban, character. Also, the city is able to play a role in determining the initial placement and standards of the utilities and services which must ultimately be provided to the inhabitants of
community such as schools, fire and police protection, parks, water and sewage disposal, etc. Further, by means of subdivision regulations the cities are able to determine the quality of the living environment which indirectly influences the level of taxable revenues or the tax base of the respective community. In this manner, the cities play a role in the determination of certain levels of taxes or additional revenue available for the municipalities in the future. Finally, the municipalities gain by demanding an accurate filed record of each plat of each subdivision from the onset, enabling them to maintain an adequate, clear record of each plat of land within its bounds.11

The lot purchasers themselves have a double gain. They first gain because the legislation assures them of a predetermined standard of utilities which must be provided in every case, and because this predetermined standard of utility provided them aids in the determinations of a stable tax base which protects what will probably be the largest investment of their lives.12

However, this is not to say that the concept of subdivision control has not undergone its share of criticism in the twentieth century. The major criticisms are: that its application is achieved in too strict a manner, curtailing the flexibility of design and that its scope of application should be broadened to encompass all use districts within the city rather than pertaining solely to residential developments.
The strict enforcement of the subdivision control regulations has led to a "stifling of creativity" within the urban environment. All too often the make-up of the existing regulations consists of specific rigid restrictions which limit the design process while protecting the urban environment. As a result, the most difficult question facing the application of subdivision controls within the context of the urban environment is, "How to give liberty without permitting license? How to regulate without crippling initiative?"13

One means of achieving regulative measures which do "regulate without stifling creativity" is by means of the performance code. Basically, the performance code obtains its desired objectives by the establishment of rather general criteria which ultimately determine quality rather than drafting specific predetermined regulations or solutions to reach desired quality. The application of performance codes is finding more and more favor within the specification writing of many of the more progressive architectural firms throughout the nation.

As an example, architectural firms have discovered that if they established standards of quality which must be met in regard to the construction of a project rather than prescribing the definitive materials which are required in every case, then the bids they received were generally lower than those received if they issued the standard specification. By establishing the standards of equality which must be
adhered to, rather than the specific material, the ultimate decision as to the actual material to be used is left to the contractor himself. He is more in tune with the factors influencing the various material within his field and is therefore in a more advantageous position to reach this initial decision. As an example, if the price of steel is up and the price of copper is down and the general performance of each material is uniform, then he is in a position to decide upon copper over steel. If steel is called for specifically within the specification then he is not as readily in a position to make that decision. Further, since the ultimate decision is left to the architectural firm itself they have not relinquished any of their design control in the exercise of these performance codes. As a result, they are able to allow more flexibility within the initial decisions without losing control of the total design.

If the respective land-use control measures levied upon the prospective developments were more directive, as in the performance code, perhaps a more viable solution for the regulation of land-use would result; a regulation which served the needs of the public while not restricting the actions of private urban forces.

The scope of subdivision control should be broadened from merely asserting certain pre-determined standards of utilities, in terms of street widths and names, curbs, etc. to asserting planning decisions of more encompassing environmental ramifications such as the recommendation to prospective developers of more imaginative developments such as Planned Unit Developments, or Home Owner
Associations, etc., (which will be discussed in more detail within the section concerning restrictive covenants). To some extent this broadening has already been achieved, at least within the confines of the residential environs in the form of The Planned Unit Development aforementioned. However, its application should be further expanded to encompass the other use districts as well, such as in industrial parks, commercial malls, etc. If the scope is broadened, then the role of subdivision control regulations within the comprehensive planning of the urban environment will take on added importance.

Finally, the exercise of subdivision control regulations should be achieved in conjunction with other land-use regulatory devices, such as zoning ordinances, etc. According to Haar, the two measures, zoning and subdivision control, work well together because zoning is concerned with the regulation of land-use, and subdivision control with that of land-use quality. If this exercise of subdivision control regulations is employed in conjunction with the other regulatory devices in terms of a performance code then a semblance of planned urban growth may be achieved. If the subdivision control is to remain a viable force within the development of the urban environment, it must meet these demands. It must provide a means of regulation which truly "regulates without permitting license".
BUILDING AND HOUSING CODES

The remaining means of public land-use regulation are those represented by the Building and Housing Codes. The measures of these types form secondary restrictive measures in relation to the other more broad public regulatory measures such as zoning and subdivision control. These are secondary not because they are less effective than the previously discussed measures, but rather because they are aimed at determining the very specific qualities of the physical environment, both spatially and structurally. Due to this very specific nature they will be discussed in much less detail than those previously examined.

The basis of these land-use regulative measures is found in the common nuisance laws. They are aimed protecting the residential environment at a very definitive scale and are therefore more concerned with what cannot be done than with what can be. Almost universally these measures are enforced by means of the police power; consequently, though the context of these laws is specific, their application throughout the city is achieved on a very broad scale. As a result, they are instrumental in the creation of an adequate, safe living environment at a human scale throughout the city.¹

The housing and building codes find their derivation in the housing reforms which began in New York City in 1847, with the Tenement House Laws. Though both these codes were derived from this basic beginning,
as they developed they gradually evolved into two distinct bodies: a building code which regulates the exact minimum requirements for public structural safety and is applied at the time of construction; and a Housing Code which regulates the conditions of occupancy and is applied periodically throughout the life of the structure.  

The standards of enforcement of both the building and the housing code must bear a reasonable relation to the existing economical conditions of the city in which they are applied. If the standards applied are too low, then they will be met by the participants regardless of the code, and if they are too high they will become a burden upon the community which no community will be able to enforce. Thus, the codes become the "pace setter" of community improvement. They must be high enough to establish a standard, yet low enough to remain feasible. 

The enforcement of the building code is administered by an appointed building inspector. All plans of proposed projects or improvements must be submitted to him for approval before the construction begins. If the proposed structure is approved, then a Building Permit will be issued to authorize its construction. If a Building Permit is not issued, the required changes are not made and the construction is begun, the owner is subject to public sanctions such as fines, and penalties or injunctions halting construction. Thus, this measure is specific, generally negative in nature, and administered to determine the initial quality of the final built environment.
The housing codes regulate the conditions of occupancy which apply to both single-family and multiple dwelling units. They determine the basic amenities which should be provided such as adequate kitchens, bathrooms, etc.; minimum electrical heating and plumbing fixtures; minimum standard of occupancy usually requiring certain amounts of living and sleeping areas per person; and minimum maintenance and repair. As a result, this tool maintains a possibility of becoming effective for neighborhood maintenance and, may be applied to upgrade the living conditions of the residential environment. Thus, this measure, though specific, generally applies limitations in a positive manner and are administered to determine the evolved quality of the living environment.4

The enforcement of the housing code begins with an inspection by the appointed city official. If a violation of the housing code is determined, the owner is given a prescribed period of time to make the needed repairs. Usually, the landowner maintains a possibility to appeal the decision rendered against his property to either an appeal board or a prescribed city official. If he loses the appeal and does not comply with the repairs then he is subject to public sanction. Generally, the possible city sanctions are in the form of fines and penalties, injunctions against violators, in cases of major infractions demolition without just compensation, or other municipal actions such as the city's making the needed repairs and then applying a lien against the property until the owner repays them.
The major criticism of the building code is its bureaucratic nature, both in terms of application and revision. The codes themselves are all too often applied by the exact letter of the code and in many cases, new materials which would prove at least as effective as those prescribed within the code, if not better, are not allowed because the code expressly specifies the acceptable materials. Perhaps this criticism would not be as important if this bureaucratic nature did not carry through to the revision of the codes as well. In many cases, the materials called for by the code have been outdated and are not always the best possible solution. Perhaps the most classic example is that of the plastic pipe. Though plastic pipes have been proven longer-lasting, safer, easier and therefore more economical to install than their steel or copper counterparts, they have been barred from many of the existing building codes. They have been barred not for reasons of safety, but for reasons of personal or vested interests. Since the reduction in the installment and maintenance of the plastic pipe very directly affects the Plumbing Trade, they have, by pressures levied by labor unions, been instrumental in blocking the addition of this new development within the existing codes. As a result, at times the existing code very directly stifles the use of new materials within the construction industry.

The housing code, due to its flexible application which determines a standard quality which must exist rather than specific solutions, maintains a more creative opportunity within the built environment. However,
it has been criticized for its "middle class standard" in that the standards devised are those of the middle class and are, in many cases, inapplicable to the lower income levels. In this manner, the housing codes hinder the construction of low-cost housing for the lower income levels. However, it must be stated that these levels, as well as those of the upper and middle, need a prescribed standard of quality, and, as a result, the standard prescribed is criticized, not the code itself.

The housing codes have, in the last few years, been applied within the urban renewal projects throughout the city. At first, in 1949, when the Urban Renewal was practiced in a "surgical" manner (acquisition, demolition, and reconstruction) this measure maintained only a secondary role in the determination of the resultant form. However, when in the late 1950's and early 1960's a practice of rehabilitation as well as demolition was established this measure became instrumental within the administration of the process. Due to its very definitive nature, it was able to deal with the individual problems of each structure within a deteriorated area. As a result, it has become a viable force within the total of the Urban Renewal Policies of neighborhood rehabilitation.

The building and housing codes provide very definitive means in dealing with the built form of the city, both proposed and evolved. They afford an opportunity to precisely levy restraints upon the individual structures throughout the total of the urban fabric. If their application becomes less bureaucratic in nature, prescribing standards
of quality rather than precise solutions, they will become extremely viable forces within the total of the urban environment.

RESTRICTIVE COVENANTS

Another means of controlling the use of land is by placing restrictive covenants upon the use of the land, more commonly referred to as deed restrictions. This form of land-use regulation is achieved by means of a private contract between two or more parties and therefore need not consist of restrictions which are general in nature and applicable to all. These covenants provide the opportunity for the land owners to apply restrictions of a very specific nature upon the use of the land and, as a result, they are able to determine very specifically the actual environment of their neighborhood. They are able to apply certain restrictions which could not otherwise be applied within the confines of the existing public land-use control measures such as those which regulate the aesthetic quality of the living environment.¹

Though the basic legal tenant upon which covenants are based (that of private contract) has existed for centuries, the application of restrictive covenants within the continental United States did not gain prominence until the nineteenth century. Its main aim was that of protecting the residential environment from the then rapidly expanding industrial complexes, and, consequently, the covenants were more concerned with what could not be developed than with what could be. As a result, the covenants in existence today are generally negative rather than positive in nature.²
The covenants themselves are generally drafted by the subdivider at the time of the subdivision of the land. The actual scheme of restriction is then filed with the County Clerk to insure that proper access and notification of the existence of the restrictions is available to subsequent purchasers. However, the major turmoil related to deed restrictions lies not with the specific drafting of the covenants or with the recording procedure but with the interpretation of the existing restrictions themselves.

Under generally accepted legal doctrine, the scheme of covenants creates a reciprocal agreement between the initial purchaser, the subdivider, and any subsequent purchasers. The agreement contains the right to enforce the covenant and the duty to conform to its restrictions. The major legal concern relates to how covenants can bind (or benefit) subsequent purchasers —— in standard legal phrasing, whether the covenants "run with the land".

The major court rulings in relation to the landmark case of Sandborn vs. McClean (1925), have held that a condition of reciprocal agreement or implied promise exists between the subdivider, the purchaser, and the subsequent purchasers within the restricted area. The problem arises when attempting to determine the exact nature of this "building scheme". For the most part, the answer to this question has been left to the discretion of the presiding judge.
Although much confusion exists within this area (the interpretation of the enforcement of the restrictive covenants) certain requirements of restrictive covenants may still be ascertained. Four basic requirements, according to Norman Williams Jr. in his book, *The Structure of Urban Zoning*, may or may not be pertinent:

1. The suit must be brought by a property owner, i.e., a plaintiff who actually owns a piece of land in the affected area — referred to technically as the "dominant tenant".

2. The covenant must "touch and concern" land. Apparently this means that the obligations of the covenants should somehow be related to the use of land, as normally they are.

3. There must be "privity of estate". I think it is fair to say no one can give a really clear explanation of what this means. It has to do with succeeding to the same legal interest possessed by the original parties.

4. The obligations of the covenants must be negative — not affirmative.

As an example of the declaration and filing of restrictive covenants, let us examine the restrictive covenants pertaining to the use of land within the subdivision of Pershing Place Section 1, of The City of West University Place, Houston, Texas. The restrictive covenants of Pershing Place were drafted and filed by the subdivider, Wm. E. White, at the Office of County Clerk, Harris County, Houston, Texas. As a result, the restrictions which appear within each deed refer to that initial declaration by the registration number and the official map. The declaration of restrictions for the subdivision of Pershing Place is as follows:
Whereas, the lots in said addition so owned by the undersigned are about to be put on the market for sale, and it is desired that a uniform plan of restrictions be adopted and placed on record with respect to said lots. Now, therefore, I the said W. E. White, also sometimes written as Wm. E. White, hereby declare that from henceforth the following restrictions shall apply with respect to said lots in said addition and said lots shall from henceforth be subject to said restrictions as herein more fully set out.

The actual restrictions pertaining to Pershing Place were drafted prior to the passage of the now existing zoning ordinance, and, as a result, much overlap exists between these initial restrictions and the existing ordinance. However, they still provide an excellent example of the type and working of the restrictions which are declared within the deeds.

(a) That there shall never be erected, permitted, maintained or carried on upon any of the said property any saloon, or place for the sale or manufacture for sale of malt, vinous or spirituous liquors, any foundry, brickyard, cemetery, any establishments for the care or cure of persons afflicted with any disease, or any institution for the care or restraint of the mentally impaired, or any detention home, reform school, asylum or any institution of like or kindred nature, nor any slaughter house or tankery or any noxious interests, trade or business.

(b) That no part of said property in Section 1, Pershing Place, shall ever be used for any type of business houses or stores.
(c) That no part of said property shall be sold, conveyed, rented or leased in whole or part to any person of the African or Mongolian races, or to any person not of the white or Caucasian race.

Two specific restrictions mentioned above are worthy of mention. First, under the existing zoning ordinance the offices of Doctors or Dentists are allowed within the confines of the residential areas of the total city. By means of the restrictive covenants, Pershing Place has legally restricted their placement within this subdivision. Secondly, the restrictions of Pershing Place still maintain a racial covenant which, if contested, would result in its being termed unconstitutional and therefore illegal as a violation of the "due process and equal protection" clauses of the United State Constitution. It provides an excellent example of such racial covenants which for many years, until the late 1950's were legal restrictions within the confines of the restrictive covenants.

The enforcement of the restrictive covenants must be achieved within the Court System. The actual complaint must be issued by a "dominant tenant", i.e. a landowner within the restricted area who is directly affected by the alleged violation. He would be referred to by the courts as the plaintiff. The person who has committed the alleged violation will be referred to as the defendant. The plaintiff will seek an injunction (a court order instructing the defendant to halt his proposed projection), against the defendant. To obtain immediate
action against the defendant, the plaintiff may file for a temporary injunction. This measure temporarily halts the further construction of the project while the case is heard in court. The plaintiff must place a bond or sum of money, of sufficient amount to fully repay any damages incurred by the defendant by the halting of his construction if he, in fact, wins the case. The defendant may in turn, post another bond which will enable him to continue construction of his project while the case goes to court. The bond must be of sufficient amount to replace the structure if he loses the case. Upon trial of the case, if the judge decides in favor of the plaintiff, (holding that the defendant violated the restrictions) he will issue a permanent injunction, halting the construction permanently.

A defendant who is accused of violating deed restrictions may plead at least three matters in defense. These are:

1. That the act complained of is in fact not a violation of the deed restriction and is itself unenforceable against his land.
That the plaintiff is guilty of laches. This means that the plaintiff simply waited too long to bring his action against the defendant, and that the defendant thinking that no action would be brought, went ahead and spent money in construction of a building or doing what is alleged to be a violation. The defense of laches is one which effectively does away with the restriction insofar as the immediate defendant is concerned. However, the fact that one person violates a restriction in a subdivision and gets away with it does not necessarily mean that anyone else may violate the same restriction.
3. The defendant may argue that there has been a change of conditions in the neighborhood. This means that the neighborhood is no longer suitable for the purposes for which the initial restrictions were placed. A judge is likely to hold that the doctrine of changed conditions applies when there has been a substantial number of violations in the subdivision and the loss to individual landowners from applying the restrictions would be greater than the benefit to be obtained by the other residents of the subdivision if the restrictions were enforced. This concept was created as a result of the equitable nature of the court system.
Because deed restrictions must be enforced by a private law suit, persons of low or middle income may not be able to support law suits to protect their subdivision. Therefore, if a large corporation wishes to invade a residential subdivision and get land for commercial or other prohibited uses, it can proceed lot by lot and require the residents to sue to prevent violations up to the point where the residents have no more money to spend for law suits. At this point, the corporation can merely acquire the land and devote it to the prohibited use. The size of the pocketbook of the residents, therefore determines whether their deed restrictions will indeed be kept intact.

Recognizing that the cost of enforcing deed restrictions can be so substantial that middle income subdivisions may not get much protection through them, the Texas Legislature passed an act which enabled
cities such as Houston to use the Office of the City Attorney to assist the private land owners in enforcing their deed restrictions. In addition, the city may refuse to issue building permits where issuance of the permit would allow a violation of a private deed restriction. This failure of the deed restrictions was most harmful within Houston, Texas, since the restrictive covenant, subdivision control, and the housing and building codes are the only means of regulating the residential land-use. Houston does not maintain a zoning ordinance.

Before the introduction of zoning within the United States, (prior to 1916 with the City of New York) private restrictions, in conjunction with the existing common nuisance laws, provided the only means by which to achieve desired land-use controls. With the advent of the zoning ordinance, the concepts of private restrictions had to take on a secondary role in relation to zoning as a means of promoting the regulation of land-use. However, this measure in conjunction with adequate zoning laws has provided ample means for establishing rather definitive controls in the context of the total city.

As an example, something which may be accomplished through the use of restrictive covenants and not by the public controls such as zoning or subdivision control is maintaining of close aesthetic and architectural control over a subdivision. Aesthetic control, which is of doubtful constitutionality within these more public measures, is perfectly supportable as a matter of a private contract.
Other measures which may be accomplished through subdivision restrictions are those of maintaining private clubs, private swimming pools, and the like for use by the members of the subdivision only. The only restrictions which may not be constitutional, as aforementioned, are those of a racial nature.\(^7\)

The applications of the restrictive covenants generally overlap the measures of the existing public controls such as zoning or subdivision. This overlap occurs because the restrictive covenants usually refer to such controls as dwelling quality and size, building location, lot area and width, easements, nuisances, water supply, sewage disposal, protective screening, etc. In fact, the Data Sheet of Protective Covenants, from HHFA, very precisely outlines the regulations of this type.\(^8\)

The application of the concept of restrictive covenants provides a wide array of possibilities in conjunction with the other existing public land-use measures, in relation to industrial, commercial, and residential developments. Two examples of more progressive applications of these restrictive covenants are in relation to the development of industrial parks and residential Home Owners Associations.

Within the confines of the Home Owners Associations the proper co-ordination of each of the land-use control measures, both public and private, with the existing market forces provides the possibility for developments which are able to maintain large areas of open spaces
and other amenities which would not be possible by the use of public funds. The extent of these developments as well as their yearly maintenance is more rightfully supported by the residents which use them rather than depend upon the yearly budget of the municipality of which they are a part. Also, since each of the organizations maintain a review board within the confines of their restrictive covenants they are afforded a more personal control over the physical development of their particular subdivision within the limits of the more public police power.

Within this system, the inter-relationship of the various land-use regulatory controls is as follows. The existing public zoning regulations are employed to establish the relationship between the specific subdivision and the remainder of the city as well as to establish the very general regulations under which all the subdivisions within the city must abide. The restrictive covenants are employed to provide the more definitive regulations which need pertain only to this specific development and not to the entire city, such as the architectural review committees, the assessment funds for the up-keep of the grounds, etc. The subdivision control measures are employed to insure that the determination of the "building scheme" is established from the beginning, as well as to assure the accurate recording of plats and supplying of utilities, etc. As a result, the inter-relationship of each of the land-use restric-
tive measures insures the physical viability of the entire community for many years to come within a firm and functional legal framework.

A specific example of such a development is Radburn N. E. New Jersey. The success of Radburn is mainly attributed to the superblock arrangement, the firm legal foundation consisting of the covenants running with the land (such as those aforementioned), and the establishment of a dual association, the Home Owners Association to provide the firm leadership needed to maintain such a community and the Citizens Association which provides the democratic possibility within the total leadership of that community. For these reasons, in conjunction with the longevity of the development from 1929 till the present, Radburn provides an excellent example of the possibility afforded by the application of the coordination of the existing land-use control measures, both public and private.  

However, one major criticism which may be levied against developments of this type is that while they afford an opportunity for the middle and upper income levels, they provide little or no opportunity for the lower incomes. If these developments are to become a truly viable force, affecting the total of the urban environment, their application will have to be extended to serve that segment of our population as well.
Another such example of the adequate assimilation of the existing land-use regulative measures in tune with the existing market forces is that of the planned Industrial Park. Here, the existing land regulations are applied in such a manner that they provide adequate protection for the industrial as well as the adjacent areas, without completely hampering the economic feasibility of the project itself.

Within plans of this type, restrictive covenants are employed in conjunction with existing zoning and subdivision control regulations to provide a more rigorous standard to assure a compatibility "among the occupant plants and between the park and the community in which it is located". According to a study conducted in conjunction with the industrial park development of Cabot, in San Francisco, California, the problem was to provide additional land-use restrictions which were acceptable to the adjacent community yet not unreasonable in respect to the industrial developments which would ultimately make up the park.

The specific restrictions which were imposed to achieve their increased land-use control measures, more in tune with, and therefore more acceptable to the private market, were of the following nature:

1. Types of operations permitted: (established to restrict the uses allowed as well as to establish the acceptable standard of "nuisance levels". i.e., those that apply to smoke, noise, order, vibration, water, etc.)
2. Site Size: (established a minimum lot size.... usually two acres.)

3. Site coverage: (established a maximum percentage of land coverage permissible.... usually 25 to 50 percent.)

4. Building line set back: (established a minimum distance from lot lines and roads to provide adequate provisions for landscaping.)

5. Parking and loading areas: (established to determine that the facilities which are provided are adequate and aesthetically pleasing, i.e. by means of fencing and planning planting, etc.)

6. Outdoor storage: (established to prescribe aesthetic restrictions such as screen and fencings.)

7. Landscaping: (established to assure adequate planning.)

8. Building construction and design: (established to determine the acceptable performance codes, as well as to provide for initial design approval by an architectural review committee before construction.)

9. Sign control: (established to effectuate an orderly and aesthetic solution to the orientation and identification problems.)

Finally, as well as these basic considerations the covenants also provided for considerations such as establishing the duration of the existing covenant itself, provision for alteration or reviewing of the covenant, provision for enforcement of the covenant, etc. II

By employing a proper relationship between the existing public and private means of land-use controls, an achievement of a desirable industrial development, which was neither harmful to itself not to the adjacent areas, was realized. The restrictions adequately determined a pleasing working environment without hindering the workings of that environment.
CHAPTER 4

THE POLICY

The last measures which will be discussed exist not so much in terms of written legal regulations as in the form of federally sponsored policies. These policies are administered by federal agencies and may be voluntarily employed by both private and municipal developers in the effectuation of urban form. The major aim of these federal policies is to provide financial incentives which will encourage the growth of the city along certain prescribed patterns. Two examples of such agencies who administer these policies are the Federal Housing Administration and The Urban Renewal Agency.

FEDERAL HOUSING ADMINISTRATION

The F.H.A. does not base its effectuation procedure upon limiting laws, but rather upon incentive measures in the form of possible gains for the participants.

The principal role of the F.H.A. was to secure better mortgage terms for the housing consumer by offering very low cost mortgage insurance to private lending institutions. Contrary to popular belief, F.H.A. neither lends the money to nor does it insure the borrower. It merely insures the lender against loss in case the borrower defaults.  

In order to sell F.H.A. to the money lender yet still provide advantages to the consumer, the F.H.A. legislation consists of a form of "give or take" situations. As an example to the money lender:
Obviously, the amount of the down payment and the term of the mortgage — i.e. period during which the principle of your mortgage is outstanding, because the down payment and the term of the mortgage both affect the risk on your principle and the insurance absolves that risk. On the other hand, you would not be particularly happy about a lower interest rate. The fact that your principle is at no risk may suggest some reduction in the interest rate. But the interest rate is important to the marketability of the mortgage.

It is the compromise between these situations which forms the total of the F.H.A. legislation as it attempts to aid the construction of housing within the United States.

The birth of the F.H.A. was inspired by the banking crisis of the depression years. In 1931, Herbert Hoover called a President's Conference on Home Building and Home Ownership to examine the current housing crisis and to determine a governing strategy to eliminate that shortage. In spite of the inconclusiveness of the findings of the conference, Congress established the Federal Home Loan Bank System in 1932. "These institutions were authorized to receive deposits from member savings and loan institutions and to extend loans to them in time of financial need." Also tied to these measures was federal participation in housing finance. The major purpose of this agency was, first to save the homes of families threatened by foreclosure, (Home Owners Loan Act) and second, to provide equity to banking institutions, (Home Loan Bank Act) which aimed at injecting life into the construction industry and the real estate market. However,
neither of these institutions was able to stimulate the residential construction industry.

In 1934, under the National Housing Act, the federal government established a system of mortgage insurance under the control of the Federal Housing Administration (F.H.A.). Under this system, the act authorized (1) Federal Insurance for short term loans for home repair and improvement, and (2) the establishment of an insurance fund for mortgages on homes built under federal supervision or purchased after federal appraisal.

The purposes of the F.H.A. mortgage insurance system were...First, the F.H.A. gave commercial and savings banks and life insurance companies a form of Federal aid comparable to that granted by the Home Loan Bank System to savings and loan institutions. Secondly, it improved mortgage lending practices and construction standards.

The next major step in the federal aids to housing programs came in 1937 with the United States Housing Act. This act authorized the nation's "first long-range" program of aid to public housing and slum clearance, establishing the first Public Housing Administration.

With the eminent end of World War II, the federal government established the Veterans Administration to provide insured home mortgages for the returning veterans. The first post war housing policy was established by the Housing Act of 1949, and extended the opportunities provided private builders and mortgage loans offered by the previous acts, as well as permanently establishing the essential role of public housing as a substantial part of a comprehensive local re-building effort.
A major revamping of federal housing policies was achieved in the Housing Act of 1952. Under the provisions of this Act an extension of the urban renewal program was established, and, most important, the act re-established the role of the Federal National Mortgage Association. The F.N.M.A. was first established within the provisions of the National Housing Act of 1934 and concerned itself mainly with "intermittent purchases of F.H.A. - insured mortgages where private mortgage money was not readily forthcoming. The basic purpose of the F.N.M.A. was to provide an outlet for F.H.A. mortgages to act as an insurance for the money lenders on F.H.A. - insured mortgages.7

In the following year, 1953, the Housing and Home Finance Agency was reorganized to form the crux of current Federally-backed institutions which are effective in the implementation of land-use planning in the cities of the United States.8 While the F.N.M.A. was initially adopted to provide a fringe-purpose activity of purchasing F.H.A. mortgages in times of tight money, in the post-war years this institution became instrumental in the purchases of all F.H.A. insured mortgages.

The effectuation of the F.H.A. programs is limited to prescribed uses. Basically, they provide insured loans only for residential uses, single and multi-family dwellings, condominiums, cooperatives, rental housing, housing for the elderly, home improvements, nursing homes, mobile home courts, and experimental housing. As a result, they are
limited in the amount of financial aid necessary at one time, and consequently are more related to specific types of lending agencies.

The major lenders who supply F.H.A. insured low interest loans are of two types. The first group, represented by commercial banks, etc., demand investments of a stable nature which will provide a relatively quick return on the monies invested and, therefore, supply the financing for F.H.A. sponsored home-improvement and short-term construction loans. Lenders such as insurance companies, non-profit organizations, churches, etc., who do not require quick returns from their investments but do demand a certain amount of financial security supply the long-term F.H.A. sponsored Home Owners Loans which may extend for over a period of many years. The lending agencies which do not supply F.H.A. financing are those who maintain relatively small working assets and pay rather high dividends to their depositors, and therefore require investments of a more rapid and high return. These organizations are typified by savings and loan associations. As a result, the majority of the F.H.A. financing is derived from more stable lending organizations such as banks, insurance companies, churches, etc. 9

The middle income levels gain financially by the intervention of the F.H.A. insured programs in relation to the purchase of their homes. The F.H.A. provides a more economically feasible package by exercising some control over the costs placed upon the purchase of his home.
The F.H.A. legislation provides the opportunity for the home buyer to initially purchase his home by establishing a minimum allowable down payment under these insured loans. This minimum down payment is currently 3 percent of the price of the home. As an example, if the desired home costs 20,000 dollars, the initial down payment required is only 600 dollars. In this manner the amount of money needed initially to purchase the home is reduced to a sum which is economically feasible to acquire.

The F.H.A. further reduces the costs to the home buyer by establishing a maximum interest rate which may be applied to the home purchase which is lower than the market interest rates. Currently the required maximum F.H.A. insured interest rate is 8-3/4 percent while the market rate is 10 percent. Due to the accrued interest compilation process, the cost afforded the home buyer by an increase of only 1 percent would be 4700 dollars of additional interest over a life span of a 30 year loan upon the purchase of a 20,000 dollar home.10

However, in spite of these financial benefits afforded the middle income home buyers by the F.H.A. insured mortgages, the purchasers do not always purchase homes within the scope of these programs for a number of reasons: The purchaser is not always knowledgeable in financial matters and knows little about the concepts of accrued interests; he may not qualify for the F.H.A. insured loan since they rely heavily upon the purchaser's credit rating; the F.H.A. programs will insure loans only up to a prescribed figure, currently 30,000 dollars;
and finally, the F.H.A. programs are more difficult to process than are the more conventional programs. As an example, in Los Angeles, the F.H.A. programs may take up to six weeks for processing while the more conventional means may be achieved within ten days.\textsuperscript{11}

The F.H.A. programs provide virtually no benefits to the upper income levels and relative few to those of the lower. The upper income levels maintain rather high financial assets and have little or no need for the opportunities afforded them by the low down payment, low interest loans, (restricted to investments under 30,000 or less) since they are generally more concerned in demonstrating financial losses than gains, for income tax purposes. Usually the price range of housing in which they invest precludes any advantages which may be offered by the existing F.H.A. legislations.

Though the lower income levels are afforded minor benefits in the form of the F.H.A. participation in the federally sponsored public housing projects they are afforded no opportunities towards the purchase of their own homes. In fact, the qualifications required by the existing F.H.A. legislations of potential participants systematically exclude those of the lower income levels for financial reasons. As a result, they have virtually no alternative but to participate in rental projects which offer them no return upon the money which they invest. Even within projects of this type they are subjected to a value system which is different from their own. This will be discussed in more detail within the criticism of the F.H.A. policies.
The F.H.A. policies have been criticized both positively and negatively in their most recent history. Perhaps the most positive success of the imposed F.H.A. legislations has been in the realization of the "Jeffersonian idea of a nation of free holders", at least within the middle income levels.

A chart devised by Charles M. Haar, illustrating the number of privately owned homes between 1935 and 1955, adequately demonstrates this point.

**PRIVATELY OWNED PERMANENT NONFARM STARTS**

Within this chart, the increase of privately owned homes financed by the F.H.A. has shown a remarkable increase within a relatively short twenty year span.\(^12\)

Those who feel positively toward its implementation feel that three characteristics have had certain advantages to both the consumer and to the lender:

1. The gain is in mortgage funds available in all parts of the country at a standard interest rate, longer mortgaging periods and lower down payments.
2. The consumer derives an indirect benefit in that the house he buys has been inspected by a federal agent.

3. While the owner receives no guarantee of construction quality, he gets some assurance of minimum construction standards.13

The F.H.A. regulations have aided in the co-ordination of existing regulatory methods into workable packages by demanding that a standard of regulatory control be established before issuing a governmentally insured loan. Many of these packages, such as the Home Owners Associations or Planned Unit Developments, provide the opportunity for variations in the standard grid patterns which oftentimes develop as a result of the existing regulations. In effect, these workable packages become more closely related to performance codes than to very strict regulating devices which have been previously enforced. However, these packages, as of yet have met with only minor approval for a number of reasons, ranging from a lack of knowledge of the existence of the regulations to a basic lack of foresight on the part of the developer and the city officials themselves.

The reasons which are applauded by the proponents of the F.H.A. legislations as positive affects of its application, are those which are condemned by its opponents. According to Haar, this increase in construction, most predominantly middle class residential construction, was not achieved without ultimately determining the physical character of the living environment as well.
Just as legal controls over physical style and permitted use have a decided affect upon the value of development, so also fiscal policy in its turn may determine location, type, and rate of development. The degree to which credit is available influences the investment programs of financial institutions, the nature of the building industry, the volume of construction, the standards of quality and design -- and may even sway the basic land tenure.14

Within the middle income living environment, this effect has been most assuredly felt. The restrictions placed upon the proposed development were not solely financial, such as the maximum imposed limit upon which the F.H.A. will insure a loan, previously 25,000 dollars (which determines the price limits of the majority of the developments), but also pertain to very strict and limiting land-use regulations as well. In fact, the F.H.A., in its earlier days, refused to lend on projects that failed to meet certain building and zoning standards, and as a result, municipalities which did not maintain such enforcement procedures drafted their new regulations in relation to the established policies drafted by the F.H.A.15 Thus, many of the existing restrictions found within the other public regulatory agencies are also found within the policies of the F.H.A. and, in fact, were directly derived from them. The seemingly diverse land-use control measures re-enforce each other's perpetuation. Though this need not become harmful to the evolvement of urban form, the regulations which were drafted in the 1930's fail to meet the needs of the 1970 society and become quite difficult to change.
In many areas, where the limitations have not been updated both in terms of their written law and their enforcement procedure, they may begin to fail to meet the demands of the rapidly changing society. Physical restrictions such as maximum density requirements, site development requirements (such as the 12,000 sq. ft. minimum lot size resulting in a lot 120 ft. by 100 ft., in conjunction with the 25 ft. set back requirement from the street, and a lot 10 ft. set back requirement from the lot lines), etc. begin to effect the physical built form. Perhaps the most out-spoken of these critics is Peter Blake who, in Gods' Own Junkyard states that:

In our equalitarion democracy, we have achieved the ultimate in making certain that all men are created equal; we have just about empowered a branch of the government, the Federal Housing Administration (F.H.A.) to specify the size and shape of the typical American suburban master bedroom (in which all Americans are thus created equal); to specify the size and shape of the typical family room (in which all American tots crawl around equal); to specify the size and shape and style of the suburban house (in which all American youngsters grow up equal); and we have empowered the F.H.A. to specify the width, length, straightness, or curvature, surface, presence or absence of trees, sidewalks, telephone poles, etc., of every single suburban street (on which all American teenagers play equal at their considerable peril).
Blake's criticism is reinforced by Lloyd Rodlyn, who argues that the housing procedure by the F.H.A., as well as the policies used to accomplish it have been self-serving and have actually been a cause of urban decay.

Perhaps the most important criticism of the existing F.H.A. policies falls upon its middle class orientation. The financial limitations, such as the basis of the F.H.A. loan upon a credit check, and the 3 percent minimum down payment upon purchase demanded by the current F.H.A. policies only in part reflect this orientation, and, at least, are partially excusable. However, the imposition of the middle class standards throughout the total of the F.H.A. programs cannot be excused.

According to Von Eckhard, in his book *Bulldozers and Bureaucrats: Cities and Urban Renewal*:

> The F.H.A. further complicates this problem (Urban Renewal) by imposing middle class standards for such things as front yards, electric outlets, and plumbing...it is the outlook of a glass-eyed banker whose mother never scrubbed in a wash tub.\(^\text{19}\)

He continues to state that the F.H.A. and the automobile have provided within the "reach of millions, the dream of a house all to one's own (in a lily white neighborhood) with a lawn in front and a swing for the kids in the back".\(^\text{20}\) As a result, the white middle class flee from the inner city to the suburbs taking their business with them, therefore depriving the city of both their tax income and their leadership.
It is the lower incomes who lose on all fronts. They must qualify for F.H.A. to receive its benefits, and cannot; they must pay their own way within the city, and cannot; and they must survive within their own environment, and they cannot.

With greater demands, on a dwindling tax base, the city is further run down and more middle class residents flee, until, as someone observed, the city itself to be made of "the rich, poor, old, and peculiar......21

The F.H.A. legislation has also been criticized on economic considerations. Basically, the economists state that the tax exemption theory provides a hidden grant or appropriation which levies an undue hardship upon the remaining tax payers who have to take up the burden of the reduced tax without full knowledge of the procedure which resulted in the reduction.22

Although these criticisms of the F.H.A. are valid within today's society, they often fail to realize that the policies have, in effect, achieved their initial goal, that of the rapid provision of middle income housing for a rapidly growing population even if this achievement has not met certain economic restrictions. The major critics of the current F.H.A. policies have very succinctly determined the shortcomings of the legislations, but have not, as of yet, done much in correction of their fallacies and in many cases condemn the entire policy rather than search for changes within its application. They must begin to effect, within the existing F.H.A. policies, the needed changes which will insure the positive, as well as negative results within the physical built form of the urban environment.
URBAN RENEWAL

The urban renewal is a federally funded program for the rejuvenation of the deteriorating neighborhoods within the urban environment. The state legislature, as in zoning, must pass enabling legislation allowing the municipalities to participate in the renewal programs. Once this legislation has been passed the municipalities who choose to undertake an urban renewal program must then establish a local urban renewal authority to administer the process within the city. This agency must carry out the prescribed steps within the urban renewal program towards the effectuation of the urban renewal.

These steps are: the demonstration of a need for urban renewal and the construction of a comprehensive plan in response to that need; the acquisition of the private land by the means of the exercise of the public power of eminent domain; the clearing of that land to make it ready for redevelopment; the subsequent land-value write down of that land; and its resale to the private developer for redevelopment. The federal government subsidizes a major portion of that land-value write-down, usually two-thirds of the loss incurred by a large municipality and three-quarters that which is lost by smaller municipalities. The Urban Renewal Programs must be locally conceived, planned and executed as a concerted effort of the community, by means of its public and private resources, to correct and prevent urban decay.
The goal of the urban renewal programs is to encourage the efforts of diverse municipalities, by federal assistance, toward the elimination and prevention of "slums and blight", whether residential or non-residential, and the removal of the factors that create those blighting conditions. The goal is achieved by neighborhood conservation, code enforcement, rehabilitation, clearance and redevelopment. Though the original intent of urban renewal was to provide adequate housing for all within the city, in actuality it has been predominantly employed to serve the needs of commercial rejuvenation within the city's central core by redeveloping its deteriorating areas and therefore augmenting its declining tax base.

This rejuvenation is achieved by the compulsory acquisition of private land by the public body and a subsequent land-value write down, and resale to private developers at a loss. It is thought that the additional tax revenues made available by the renewal construction will more than compensate for the revenues lost by its resale at a loss. However, as of yet, this has not been the case. Though the land value has increased, the increase has not been of a quantity substantial enough to repay the initial loss.\(^3\)

Initially the concepts of urban renewal were applied in a "surgical" manner. The three basic steps taken were: the acquisition of the land, the demolition of the construction upon the land, and the construction of new structures. The application of urban renewal
in this manner failed both economically (in terms of the vast wealth needed to pay for the acquisition, demolition, and reconstruction) and socially (in terms of the social ramifications of the destruction of entire neighborhoods within the confines of the city). As a result, the concept of rehabilitation was added to the old concept of demolition to provide a more economically and socially viable solution to the problems of urban decay.

The historical basis of the present Urban Renewal Policies is found within the Public Housing programs of the National Housing Acts of 1937. The original legislation was aimed at the elimination of the delapidated tenements located within the deteriorating slum neighborhoods. Within the scope of these applications the slum land was taken by the public power of eminent domain, repaired with public funds, and then made reavailable for low income housing. However, by the end of World War II it became readily apparent that the programs of this nature were not adequately solving the rapidly increasing need for additional low income housing or the problems of urban decay.4

The Taft-Ellender-Wagner bill, the Housing Act of 1949, was a response to this realization. The most radical provision within this act was the use of public funds to purchase designated private property, clear the land, and then resell it to other private interests, at a loss, to encourage the infusion of private construction funds into the deteriorating central city.
There was no provision for the development of a comprehensive plan in conjunction with its implementation, but rather its emphasis was in spot renewal. As a result, the ensuing projects maintained no relation to their surroundings. Little consideration was given to the inhabitants which it replaced, and consequently much social injustice resulted. These, combined with the problems of implementation in terms of enforcement codes, delays in the clearing, planning, and rebuilding process added to the criticism of the bill.

In 1954 the urban renewal policies were again re-examined. The major accomplishment of this re-examination was the introduction of the "ad-hoc program" as a replacement for the previous existing "spot renewal" policies. The ad-hoc program was defined within the context of a seven-point program among which were the addition of the concepts of conservation and rehabilitation to that of demolition, and the establishment of a master plan for the entire city before undergoing specific urban renewal projects.

Again this program was criticized for its lack of social concern as well as its failure to impede the rapid urban sprawl of the large metropolitan cities within the United States. Central business districts continued to die, losing to the growth of regional shopping centers, in spite of this vast input of federal funds into the central city.

The Housing Act of 1961 was aimed again at alleviating these criticisms. A greater importance was placed upon neighborhood participation and a larger proportion of lower income housing was demand-
Greater incentives were added for developers who included retail developments within their construction. As a result the "adhoc program" was replaced by the "augmented" program which began to demonstrate limited social concern. However, delays in approval of development continued to hamper the renewal process.

In 1968, still another housing act was passed, again aimed at alleviating these criticisms. Reduced approval periods, increased grants and loans, and higher proportions of lower income units in new housing construction are included within this program. Even this program has failed to fully solve the problems of urban decay and is being met with increasing opposition.

To qualify for urban renewal the local agencies must demonstrate a measure of "substandardness" within the projected renewal area. This determination of blighted areas within the city has not been an easy task. To aid in this determination certain vague standards have been devised to establish measurable criteria for "sub-standardness". The evaluation was achieved by instigating a "point system" which is applied to an existing residential structure to determine its relative level of "sub-standardness". However, the criteria, when first introduced, emphasized an urban renewal process directed toward the eventual demolition of the existing structures and consequently, the ratings were aimed at that end. As the need for alternatives to demolition became apparent, the criteria prescribed within the "point system" had to be modified. The public officials were forced to realize
that "sub-standardness" actually consists of many factors aside from those pertaining specifically to the structure itself, such as the design of the street, the lot and the block, and the ensuing ramifications of the project. This redefinition process is still being achieved within the confines of the urban renewal programs.8

The cities must also present a "workable program" to the urban renewal agency to become eligible for federal assistance. This program must demonstrate a broad, systematic elimination of the blight conditions through the following measures: an adequate code enforcement which consists both of existing, as well as proposed regulative methods; a neighborhood analysis to demonstrate the need for the program, socially, physically, and economically; a comprehensive plan reflecting the needs ascertained within the neighborhood analysis; an administrative organization capable of effectuating the renewal program; a financial projection which demonstrates the economic feasibility of the program; and, finally, a provision for joint individual and public participation within the planning and effectuation of the proposed program.9

The cities are afforded seven possible programs of federal assistance within the scope of the existing Urban Renewal Policies. These programs are: a community renewal program which assists the development of an overall community; an individual urban renewal program which assists the renewal of specific areas within the city
in accordance with a comprehensive plan; a code enforcement program which assists in the enforcement of the codes within the deteriorating neighborhoods throughout the city; a demolition program which assists in the clearance of structures which have been determined unsound; a demonstration grant program which assists in the development and testing of methods and techniques to be utilized in ensuing programs; a general neighborhood program which assists in the conducting and preparing of surveys and comprehensive plans for entire deteriorating neighborhoods throughout the city; and finally, a feasibility program which assists in determining the practicality of a proposed urban renewal program both economically and socially.\textsuperscript{10}

The comprehensive plan of the Charles Center Project was evolved from an extensive neighborhood analysis of the existing conditions in terms of the blighted areas in relation to their proposed corrections. The determination of the feasibility of the project within the confines of the existing neighborhood was achieved by the consideration of factors such as the actual site selected for treatment, the use of the site as projected, the market prospects for each building, the land cost to the developer, the method of financing each proposed building, the impact of the project on the other buildings in the city, the impact of the project upon the existing tax structure, and the relationship between the underground parking and the proposed project. From these examinations they formulated a comprehensive plan which maintained an economic feasibility within the city in tune with the existing physical character of the proposed site.\textsuperscript{11}
The estimated budget for the Charles Center Project exemplifies both the vast amount of funds consumed in the effectuation of urban renewal and the amount of joint federal and municipal participation which is achieved. Of the total estimated net project cost of $30,600,000, after land disposition, nearly three-quarters, or $24,200,000, was contributed by the federal government. These estimated costs resulted from expenditures ranging from the initial land acquisition to the final landscaping of the finished project. The major expense within the project was that of the land acquisition which came to $27,100,000. The resale of the land for the private interests recouped only $10,600,000 of that initial investment due to the land-value write down, which was absorbed by the joint federal and municipal urban renewal funds. $16,500,000 was passed on to the private developers as an incentive for them to participate within the proposed project. Within the total project the municipalities estimated share will be only $7,600,000 of the projected $30,600,000 expenditure.\textsuperscript{12}

The effectuation of the project was achieved by a very rigidly conceived administrative process. This process established the responsibility as well as the relationship of each distinct governmental agency to the total project.
Also, a firm concept of land-use control was devised in relation to the physical effectuation of the proposed project. The purpose of these controls was to prevent encroachments of reductions in the carefully designed open spaces between buildings, both at street level and in the sky; to enforce the separation of pedestrian activity from vehicular circulation, parking, and servicing; and to achieve the highest possible excellence of architectural design. The controls were achieved in regard to existing public measures, restraints incorporated within the disposition documents, and in covenants running with the land for the 40-year life of the plan.  

A comprehensive plan which maintained an economic feasibility within the city, in tune with the existing character, was achieved by the careful formulation of the total urban renewal project in regard to these considerations. As a result of the strict adherence to the policies established within the concept of the "workable program" in conjunction with the existing mechanisms of the city, the Charles Center Project has been effectuated with considerable success and provides an excellent example of the effectuation process of inner city urban renewal.
A map of Baltimore's Central Business District, showing the relationship of Charles Center to the primary functions of the center city, the proposed inner loop of expressways, and other in-town urban renewal projects.

figure 16
A property map of the Charles Center area, indicating the former boundaries of properties which have been assembled. The heavy lines indicate either parcels which will remain, or new parcels which are to be sold for redevelopment.

figure 17
An example of the rehabilitation urban renewal policy may be found within the concept of "vest-pocket" parks in effect within New York City. The Planning Commission noted in a 1965 report of the Community Renewal Program, that two criticisms of the present "surgical" approach to urban renewal existed: (1) That the existing housing needs within the city could not be met by the application of this "surgical" approach, and (2) that due to community opposition, to the urban renewal policy of clearance and relocation, it becomes obvious that this "surgical" approach is ineffective in terms of its social ramifications.15

As a result, the New York City planning agency constructed a program of urban renewal much the same as the method demonstrated by the Charles Center Project, but which concerned only minor demolition and major rehabilitation. Within this plan, they employed neighborhood planning to develop a viable comprehensive plan which did not result in the total destruction of the existing neighborhood unit. By exercising an approach of a staged combination of new buildings in conjunction with rehabilitation, they achieved a viable urban residential renewal which was economically feasible as well as socially acceptable.

They were not aiming their project at the establishment of broad environmental changes within the neighborhood character, but only at the improvement of the overall quality without forcing the relocation of its inhabitants. Their result was a program which maintained social as well as environmental advantages.
A major criticism of Urban Renewal is levied against the disastrous social effects upon the inhabitants of the prospective renewal areas. Since renewal efforts, by definition, occur within the slums or blighted areas of the city, the lower income levels have to bear the majority of the pain.

The initial urban renewal projects, aimed at eliminating the slums within the city, called for the complete clearance of the slum land. As a result, the first efforts consisted of merely tearing down the existing slums and replacing them with public-housing, such as that provided within the F.H.A. 221(d)(3). As a result, tall public housing structures took the place of the dilapidated existing structures and totally changed the character of the neighborhood. The public housing that replaced the previous was generally of a higher cost and more often than not forced the original inhabitants of the renewal area to relocate. The resultant effect was the total destruction of a previously cohesive, if dilapidated, neighborhood unit. According to Scott Greer, in his book Urban Renewal and American Cities, public housing became increasingly a service for...residentially restricted Negroes... slab towers filled with poor Negroes in the middle of Negro working class neighborhoods. Critics spoke of it as "immuring the slums" or slums with hot running water.

As a result of these earlier criticisms, the subsequent urban renewal programs were amended to provide, within the provision of a
workable program, a measure of "neighborhood involvement". The advantage of this involvement was many-sided. They established neighborhood groups consisting of persons who were most closely affected by the proposed development and therefore maintained an immediate interest in the determination of the program. They maintained an economic as well as an emotional stake in the final outcome. The Urban Renewal agencies hoped that if the neighborhood units could be successfully included within the total decision-making process, which would ultimately determine the physical form of the project, then a possibility of producing, or retaining a community spirit might be provided. The inclusion of these groups within this decision process provides for a solution which maintains a possibility of meeting the demands of the inhabitants of the renewal area as well as those of the city, however this has yet to be the case.

However, the inclusion of these groups within the urban renewal programs has caused many problems as well. The participation of the neighborhood groups within the planning process increases the difficulty of developing long-range community plans since these groups are ultimately concerned with the very immediate area, and not the total city. Their reaction to the proposed renewal projects is generally based upon their opinions of the specific planning agency itself, or upon their basic attitude toward urban renewal as an entity in itself rather than upon the broad advantages, or disadvantages of the proposed project. As the proposed programs become more specific these
inherent problems become more complex. Since the role of the neighborhood groups has taken on increased political importance in the past few years, their opposition has resulted, in many cases, in the abandoning of renewal projects. 19

A major problem within the residential slums and blighted areas stems from a total lack of understanding of the problems initially affecting the development. Public officials with middle class standards impose those standards upon the lower incomes. In many cases their analysis completely fails to comprehend the factors, both positive and negative, which ultimately result in the physical form of the residential slums. When referring to the urban renewal of the West End of Boston, Herbert Gans, states that:

\[
\text{The planners and caretakers were wrong. The West End was not really a slum, and although many of its inhabitants did have problems, these did not stem from the neighborhood. Most important, the West Enders were not frustrated seekers of middle class values. Their way of life constituted a distinct and independent working-class culture that bore little resemblance to the middle-class sub-culture. The behavior patterns and values of working-class sub-culture ought to be understood and taken into account by planners and caretakers.} \text{20}
\]

However, the problems within the urban renewal programs are not restricted to the residential environment. Many problems also exist within the commercial renewal projects as well. While the majority of the commercial urban renewal programs are aimed at the problems of correcting the dying inner core of the city, many urban theorists are
proclaiming that the inner core of the city within an automobile orien-
tated society is a dying entity and should be left to die. According to
Scott Greer:

It is likely that a new aesthetic of cities is
developing, even at present. The enormous
spread of Los Angeles is divided into super-
blocks by freeways; the giant grid overlies
arterials which meet in the center. The en-
tire metropolis is moving toward a situation
in which giant subcenters organize most of
life for most citizens........... If this is so,
the attempt to recreate the central city as it
once was had better be abandoned, for it can-
not possibly succeed.21

Herbert Gans states in his book, The Urban Villagers, that the
major fault of the present urban renewal policies within the United
States is a result of the complete inclusion of the private enterprise
within the projected projects in great proportion.

This policy then and the powerful realtor,
builder, and banker lobbies which have in-
sisted on its inclusion in all urban renewal
legislation must also be implicated in the
process that took place in the West End.
For example, since the Boston redevelop-
ment agency, like all others the country
over, had to provide sufficient incentives
to attract a private developer. Its deci-
sions --- beginning with the selection of
the West End as a renewal site --- were
shaped by the demands, or anticipated de-
mands and the source of investment capital.

Further he adds that:

Whatever conclusions of the center studies,
however, my theses, --- that current renew-
al policies benefit the developer most, the
area residents least, and the public interest
in a yet undetermined quantity --- will re-
main valid.22
As a result, the renewal programs have undergone a number of criticisms which have resulted in increased political opposition to their present effectuation. Among these are: that the renewal programs have turned out to be less financially rewarding than had been speculated by the private businessmen and realtors upon the inception of the first urban renewal projects; and that the liberals within the city, which initially backed the urban renewal policies as panacea for the poor, have become increasingly disillusioned with the actual social effects of the built projects. As a result, the originally tight coalition made up of the liberals, planners, majors, businessmen, and realtors has begun to break down. As the pressures applied by the various neighborhood groups opposing the renewal programs increase, the programs become less attractive to the mayors and politicians.

The urban renewal has successfully provided a means of assembling large tracts of land within the inner city which may then be developed as the city desires. The federally-sponsored Urban Renewal Program has provided sufficient additional funds to accomplish this redevelopment; however, the initial programs have not always considered the needs of all the interest groups within the city. While supposedly increasing the tax base of the inner city, encouraging the commercial interest back to the dying core, encouraging the private enterprise within the urban renewal program, etc., they have all too often failed to consider, or have ignored the needs, the social aspirations of the
inhabitants which they replace. All too often these objectives are superseded by these other secondary goals.

Urban Renewal and the re-housing of slum dwellers are necessary and desirable objectives. The means of achieving them, however, ought to be chosen in relation to these objectives, rather than to such extraneous ones as attracting middle and upper income citizens back from the suburbs, contributing potential shoppers to a declining down-town business district, creating symbols of "community revival", or providing for powerful community institutions. Re-development should be pursued primarily for the benefit of the community as a whole and of the people who live in the slum area; not for the re-developer or his eventual tenants.
CHAPTER 5
THE LEGACY

The primary purpose of land-use control is, and always has been, to direct the use of land within the society in regard to the public interest, with the assurance that each individual within society is afforded at least a minimum quality of environment in which to live. The land-use controls establish basic limits, below which no one within the society should be expected to live. Limits which protect his "unalienable rights" to the use of his property from those who might violate them.

The controversy concerning the land-use controls has not arisen in reaction to that purpose, but in reaction to the means by which that purpose has been achieved. The division between those limitations which protect the rights of the individual, and those which restrict them, is virtually impossible to ascertain. As the complexity of the society in which they are enforced increases so must the complexity of the land-use controls themselves. As the controls become more complex, this distinction becomes more fine, and the controls in turn become more controversial.

Though the primary aim of the existing land-use controls is to channel this use of land along the public interest, all too often they place more emphasis upon the restriction of urban growth itself than upon its direction. As a result, the controls sometimes maintain a negative rather than positive attitude within the existing society; an
attitude in which positive applications of existing land-use controls, such as in performance codes, are subordinated to those more negative, such as are the majority of the existing Building Codes. If the existing land-use controls are to become more effective devices of directing the use of urban land in the future, in the United States, they must develop this more positive nature which will ultimately direct rather than restrict urban growth.

Negative attitudes have resulted partially because the regulative measures have many times been applied too definitively within the society and have failed to consider the sum of the existing city mechanisms within which they must ultimately be applied.

Public desire to "do something" about the existing condition of urban areas is apparently greater than public understanding of the operation of the private forces. Greater understanding of the operations of the private forces before defining ways and means to public objectives might result in an entirely different form for the aids and controls that guide private forces in the direction of public objectives and safeguard the public interest.

The land-use controls must effectively discern these existing mechanisms and adapt themselves to utilize their processes in the regulation of the urban form: a regulation which is equally acceptable to the private as well as to the public interest.

The existing land-use controls must also be simplified into workable packages which may more readily be applied in a positive manner within the context of the existing city mechanisms, to establish a
prescribed quality of urban environment without restricting its possible growth. The more the controls become a part of the existing city mechanisms, the more they become a part of their existing bureaucracies as well. This also has been a major criticism of the existing land-use controls within the United States.

Many obstacles hamper the full use of positive devices. To assure compliance with a public objective and the proper use of public aid, too many controls are sometimes imposed. These are expressed in regulations promulgated by the administrative departments or agency responsible for their administration. Regulations vary in stringency, depending upon the nature and extent or the public aid provided. Sometimes regulation is such that private groups are reluctant to get involved in a project made possible by the enabling legislation. Some governmental red-tape is unavoidable and justifiable, but it deters the free entry of private enterprise into new fields of activity.

The legacy of the law of land-use to Urban Design is to aid in this simplification process, to provide possible directions in which these revisions may be achieved.

However, the discipline of Urban Design cannot expect to direct that simplification without first grasping at least a basic understanding of the fundamental principles of the existing land-use controls. Urban Designers must obtain a working knowledge of the factors underlying these existing controls, the how and the why, before criticizing their application, or considering to direct their future growth. They must examine their processes and then direct their criticisms towards those processes. They must be aware that these existing land-use
controls evolved over a period of time and will change in time, and that they, as Urban Designers, maintain a real possibility of affecting that change. To effectively utilize that possibility they must provide directions founded upon fact rather than upon conjecture, and this fact may be accomplished only through a basic knowledge of the processes of the land-use controls.

This text is to provide an introduction to those processes of land-use control in order to act as a catalyst from which a dialogue between these two distinct disciplines may evolve. Hopefully, this initial dialogue will result in further cross communications from which a co-ordinated effort, directed towards the conception of future land-use controls which regulate, without determining, the patterns of urban growth, will be achieved. This text is to provide that beginning, that basic introduction to the law of land-use control, from which this meaningful dialogue may begin.
FOOT NOTES

THE NEED

1Stuart Chapin Jr., Urban Land Use Planning (Harper and Brothers, 1957), p. 3.

2Ibid.

THE FOUNDATION

The Basis


3Ibid.

4Ibid. p. 114.

5Ibid. pp. 114-118.

6Ibid. p. 118.

7Ibid. p. 51.

8Ibid. p. 362.


10Ibid.

11Ibid. pp. 21-22.

12Ibid. p. 8.

Foot Notes cont.

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The Court System


2Ibid.

3Ibid.

4Ibid.

5Ibid.

The Police Power


2Ibid.

3Ibid. pp. 526-529.
Foot Notes cont.

5Ibid. p. 90.

Eminent Domain

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3Ibid. pp. 526-529.
5Ibid. pp. 534-536.
6Ibid. p. 538.

The Power of Taxation

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3Ibid. p. 569.

Private Contract

Foot Notes cont.

THE PROCESS

Zoni:


3 Metzenbaum, op. cit., p. 7.

4 Babcock, op. cit., pp. 3-8.

5 See Police Power: The Foundation.


7 Babcock, op. cit., p. 160-166.

8 Basset, op. cit., p. 37.


Foot Notes cont.


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18 The City of West University Place Planning Agency, The Zoning Ordinance of West University Place (Unpublished Zoning Ordinance, West University Place, Houston, Texas, 1937).

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20 Ibid. p. 5.


22 Strong, op. cit., pp. 6-7.


24


26 Babcock, op. cit., pp. 115-120.

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5City of West University Place Planning Commission, History of West University Place (Unpublished paper, Houston, Texas).


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Federal Housing Administration


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4 Ibid. p. 224.

5 Ibid. p. 225.

6 Ibid. pp. 233.

7 Ibid. p. 234-236.

8 Ibid.


10 Lefcoe, op. cit., p. 623.

11 Ibid. pp. 625-626.


14 Ibid.

15 Lefcoe, op. cit. p. 633.


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21 Ibid.
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6 Ibid. p. 306.

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9 Ibid. p. 689.


14 Ibid. pp. 47-51.


17 Ibid.


19 Ibid. p. 147.


21 Greer, op. cit. p. 165.

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