Professor Krasnowiecki's article offers a penetrating analysis of the legal aspects of planned unit development. His discussion of statutory law, the courts, and the neighboring challenger reveals the inherent defects and inconsistencies of a system which draws sharp distinctions between the legislative and administrative function and sees planning as an instrument for protecting private property interests. Professor Krasnowiecki also addresses himself to the local restrictions that are necessary to balance the existing interests of the land owners and the municipality against the potential benefits of planned unit development. His suggested solutions, such as the use of a floating open space easement, are refreshingly imaginative and eminently practical.

PLANNED UNIT DEVELOPMENT: A CHALLENGE TO ESTABLISHED THEORY AND PRACTICE OF LAND USE CONTROL

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Introduction

We have, I believe, become convinced that existing zoning, subdivision and other development controls have failed to encourage, and in fact have directly discouraged, a more imaginative product, particularly in new residential development. The existing controls, it is often noted, tend to focus on the individual lot, a focus which makes sense where development occurs on an individual lot basis but which offers the residential developer nothing better than a "cookie cutter" with which to create a community. Current subdivision controls, for example, assume that the entire site (excepting streets and drainage rights of way) will be distributed in lots for the individual enjoyment of each home. In fact, however, the lots are frequently used in common by the children and sometimes even by the adults. It may be appropriate to ask why we do not allow the developer to borrow a part of each lot and assemble some areas for common use and recreation from the start.

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1 In preparing this article, I have benefited by the experience gathered during the course of a study sponsored jointly by the National Association of Home Builders and the Urban Land Institute. The results of that study have been published under the title: URBAN LAND INSTITUTE, LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT (Tech. Bull. 52, 1965) [hereinafter cited as LEGAL ASPECTS OF PLANNED UNIT RESIDENTIAL DEVELOPMENT].

2 By using the word "borrow" here, I do not intend to encourage the view that the lot reductions should be related to open space on a one for one basis. See text at pp. 80-81 infra.
There is much to be gained by a fresh approach. By recognizing the need for common recreation, the homes can be designed and sited for greater privacy and the home owner need not be put to the choice between suffering daily invasion or becoming an outcast. The ability to use a portion of the entire site as common open space will give the developer “play” in the siting of his homes so that if he is forced to use one design he can cluster them around cul-de-sacs instead of stringing them out like matchboxes in a row. If we abandon the idea that the automobile must have access to the lot and allow the developer to use interior lots, walkways and common parking facilities, a whole range of interesting site planning possibilities would become available. From here, why not escape the matchbox effect entirely, by encouraging the developer to use a combination of different housing types? By adding neighborhood stores, the variety and convenience which makes for an interesting community might be supplied.

These are some of the ideas associated with the current movement in favor of “cluster” and “planned unit” residential development. They are not new ideas. Contrary to popular belief, the draftsmen of the original model enabling legislation did not overlook the project approach to residential development. Indeed, in 1925, Bassett and others prepared a model planning law which included, in Section 12, a provision for planned unit residential development.

Section 12 of the law was enacted in New York and its procedure has been available at every level of local government, without interruption, since 1927. Yet, so far as I know, it was not employed by any New York municipality until 1960 and, when challenged in court, it was misinterpreted and virtually held unconstitutional. I shall speak of these developments in greater detail later.

The fact that section 12 remained unused for over thirty years suggests that there was some resistance to it on the part of local authorities. Undoubtedly there was a lack of interest on the part of developers. This may have been due to unfamiliarity with this form of development or uncertainty about the market reactions to it. Perhaps there was something about the law that made it impractical or risky from the developer’s point of view.


4 See 7 REGIONAL SURVEY OF NEW YORK AND ITS ENVIRONS, LAWS OF PLANNING UNBUILT AREAS Part II, 272-73, 309-12 (1929).

5 See text accompanying notes 80-84 infra.
Today, there is certainly no lack of interest on the part of developers—though there may still be some uncertainty about market reactions. It is not the function of lawyers to determine how the market will respond; that has to be left to the developer. But if there is something about the law that makes it impractical or unduly risky for the builder to undertake this form of development—that is our province. In discussing what is wrong with the present system of zoning and subdivision control and how it should be modified to encourage better forms of residential development, it is possible to forget that the job has to be done by developers. If a better development is to be encouraged, the controls devised will have to be sensitive to the developer's needs. It is from this point of view that I want to consider the topic.

An illustration may be helpful: A developer is planning a residential development on a sixty acre tract. He has bought twenty acres outright and has obtained favorable options on the other forty acres from two different owners. The land is zoned single family detached for a minimum lot size of 30,000 square feet. The zoning ordinance, however, contains a "cluster" provision which allows reductions in lot size down to 20,000 square feet provided that the number of dwelling units placed on the entire site does not exceed the number that would have been placed if the minimum of 30,000 square feet had been adhered to. The balance of the site, exclusive of streets, is to be placed in common open space.

Under the standard subdivision procedure, the developer may file a preliminary plan for the entire sixty acre tract and may be permitted to proceed to the filing and approval of a final subdivision plat by sections. If he decides to proceed with a standard development at 30,000 square feet minimum lot size, the developer is certain that he will be allowed to proceed to final platting and subdivision approval by sections of twenty acres each.

To obtain final approval, the developer must make detailed engineering studies, prepare a detailed site plan, and immediately improve or furnish bonds for certain public improvements within the area covered by the final plan. Normally, he is not required to bond public improvements that will be added in subsequent sections.

If he decides to use a standard development he will inevitably decide to proceed by sections. The average developer simply cannot afford to freeze capital in a project for more than a year or two. We can assume that the case law permits the local authority to change all

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6 See authorities cited note 3 supra. See also National Ass'n of Home Builders, Journal of Homebuilding, July 1964, pp. 49-59 (editorial comments), for an indication that market reaction would be favorable.
of the requirements even after final approval unless the developer has progressed substantially to the completion of the development.7 There is, therefore, little advantage in filing a final subdivision plan for the whole sixty acre tract. Frequently, there are substantial disadvantages. For example, in our case there may be the cost of exercising the options earlier than necessary, as well as the cost of detailed engineering studies, improvements and bonds.

Now suppose that the “cluster” alternative is applicable to developments of sixty acres or more, but that the ordinance requires the developer who chooses this alternative to file a final subdivision plan for the entire sixty acres. The alternative has lost its attraction so far as this or most other developers are concerned.

The cluster technique may save the developer some expense on street frontage and utility lines,8 but he has some added costs. If the job is to be done well, he must engage an experienced site planner. In addition, he must select a plan for the ownership and maintenance of the common properties. The best choice is the homes association,9 but establishing one involves legal expenses as well as the developer’s time in supervising and coaching the homeowners who will run the association. If there is also a requirement that the developer proceed at once to obtain final approval for the entire sixty acre development, the savings of a planned unit may not offset the additional costs.

In order to discourage the developer, it is not necessary that the local ordinance provide that he must finally plat the entire development. It may be sufficient if the ordinance requires him to set aside the entire open space area as soon as he begins development. If, given the topography and other factors, the best site plan would call for one open space area in a central location, it is easy to understand why the local authority might insist that the developer set aside the entire open area before proceeding with the first section of the development. Under any other procedure a meaningful area would have to be put together in snippets, and there is no assurance that the developer would proceed to subsequent sections.

If the developer owns the entire sixty acre tract, he might not object to setting aside the entire open space area from the start. But there are two discouraging considerations. Any open space which is definitely located on the face of a subdivision plat recorded with the first section or in the accompanying documents (as, for example, in a declaration of covenants) may be permanently frozen in a given loca-

7 See notes 128-31 infra and accompanying text.
tion because of the case law which holds that individual lot purchasers acquire an implied easement over any areas so located. It may become difficult to modify the site plan for subsequent sections if the open space area has to remain where it was initially placed. Even this may concern the developer less than the thought that, under the existing law in most jurisdictions, the local public authority is free to change all of the requirements applicable to the future sections. Having committed all of the open space area to common use from the start, the developer may find that a change in requirements on subsequent sections (for example, increase in minimum lot size to 40,000 square feet) has destroyed his financial calculations. Had he traveled the standard development route, he would have developed the first twenty acres at a minimum lot size of 30,000 square feet without setting aside any of the remaining portion of the tract as open space. If a change had then occurred in the regulations applicable to the remaining portion of the tract, he would have had the alternatives of stopping development or going on to a 40,000 square foot minimum, but now he is caught with dedicated open space and a change in the minimum.

In our illustration we have assumed that the best site plan calls for a single open space area roughly in the middle of the tract. It may be that the best arrangement would call for three smaller open areas, one in each of the three sections of development. But this suggests another thought. Under the present system, is there not a marked tendency to force a distribution of open space that responds more to the developer's need for section by section development than it does to good site planning?

My illustration may overstate the factors that trouble the simple cluster approach, which does not depart from a single housing type and involves merely a stated reduction of lot size against an offsetting reservation of open space. But the same factors are present in the more ambitious planned unit development, which may combine a variety of housing types and accessory commercial uses. Here one

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10 See notes 110-11 and accompanying text infra. The cases that imply an easement in favor of the lot or home purchaser rest on equitable considerations which recognize that the average lot or home purchaser is not sufficiently informed to protect himself by demanding an express easement. Therefore, it is doubtful that an express disclaimer by the developer in the deeds or on the face of the plat will be given effect by the courts.

11 See text accompanying notes 124-30 infra.

12 Some ideas for the solution of this problem are discussed in the text accompanying notes 113-15 infra. There are other problems connected with the location of open space. For example, suppose title to the sixty acre tract has been assembled in such a manner that there are three secured interests involved, each having a stake in a different portion of the tract. Who will determine the location of the open space? If there is only one secured interest for the whole tract, will the local authority accept a procedure under which where seventy homes are planned one seventieth of the planned open area will be released with each home sold?
cannot dismiss the problems as trivial. Not only will the dual role of open space—as an amenity related to the entire project, and as a method of control of density—become more difficult to handle, but a whole new set of relationships will have been added to increase the unit characteristics of the project.

For such an ambitious project the developer's initial expenditures on site planning, design, engineering, and legal services will be substantial. To justify such expenditures, the developer may have to begin with the higher density housing types first or else a large portion of his capital may remain frozen in the project too long. Different housing types represent different potential densities. If the developer is required to preserve within each stage the density which is prescribed for the project as a whole, the location of the open space will tend to be governed by the density characteristics of each housing type rather than by what makes sense for the project as a whole.

On the other hand, to have housing go up in one place and to have offsetting open space located in another raises questions as to what will happen if development is discontinued for any reason. Moreover, certain housing types may be acceptable only as they relate to the whole project, and the thought that discontinuance of the project would leave them on their own may be thoroughly objectionable to the local public authority. A solution to this problem would be to require the developer to begin with that portion of the project which would be acceptable on its own. However, if the acceptable section would not furnish the developer with adequate compensation for the initial expenditures or the added risks of such a project, planned unit residential development will be discouraged. In short, a sound program for encouraging better development must respond to this formula:

For every increase in the initial expenditures and for every extension of the time that any expenditures remain frozen in the project, there must be a corresponding reduction in risk or an increase in the potential profit as compared with standard development. The two elements of the formula that can be directly affected by the planning controls are: (1) the timing of the expenditures, and (2) the risk.

Under present subdivision control laws, a great many expenditures are tied to a single event in the process of development: the approval and recordation of a final subdivision plat. Instead, why

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13 These questions are further considered in the text accompanying notes 115-21 infra.

14 The following enabling legislation contains language which makes the bonding or actual construction of all subdivision improvements a mandatory condition of final plat approval: HAWAII REV. LAWS §§ 147-52 (1957) (county); HAWAII REV. LAWS §§ 147-87 (1957) (city planning commission); KAN. GEN. STAT. ANN. § 13-1111 (1964) (first class cities); KAN. GEN. STAT. ANN. § 19-2918 (1964) (county); MO. STAT. ANN. § 64.060 (1949) (class one counties); MO. STAT. ANN. § 64.580 (Supp. 1962)
can't expenditures for streets, utility lines, and sewers (sanitary and drainage) be related more closely to the time when they are actually needed?¹⁵

Why must we guard jealously the right of government to change its mind after it has approved a plan of development? Nobody can quarrel with the need to guard against a clear threat to health or safety, but we allow changes solely in the name of a nebulous idea of "public welfare." If a better form of residential development is discouraged, one may doubt whether the public welfare has actually been served. Perhaps, in this instance we ought to abandon the old saw that "men must turn square corners when they deal with the Government."¹⁶

Considering the manner in which planning controls affect the costs and risks of development, leads one to some additional questions, perhaps even more significant than those already mentioned. Is the developer required to secure the approval of more local agencies in completing a planned residential development than he is in building a standard development? More importantly, is he exposed to several public hearings when in standard development he can get by with one? Anyone who has witnessed a public hearing will readily testify that it is an experience which a normal developer would rather not repeat.¹⁷

When the developer has obtained the local approvals, what are the chances that a court will invalidate them at the instance of neigh-

(county and township); PA. STAT. ANN. tit. 53, § 22770 (1957) (second Class cities); PA. STAT. ANN. tit. 53, § 58066(c) (1957) (first class townships); PA. STAT. ANN. tit. 53, § 66256(c) (1957) (second class townships); W. VA. CODE ANN. §§ 5250-25s (1961) (municipalities). With the exception of the provisions listed, the enabling statutes are couched in permissive terms (i.e., the wording frequently is that the local public authority "may" require that certain subdivision improvements be made or bonded prior to trial plat approval). Despite this language, it is often difficult to persuade the local authorities that they are free to postpone the bonding. Express authority to defer the construction or bonding of subdivision improvements is found only in Ohio; OHIO REV. CODE ANN. § 711.101 (Page Supp. 1964). A recent amendment of the New York laws may operate to the same effect: N.Y. TOWN LAW §§ 276(3), 277(1); N.Y. VILLAGE LAW §§ 179-k, -l. (The planning board may give final approval to a plat and, concurrently, may permit the developer to file the approved plat in sections. The amended law authorizes the board to give the entire plat final approval upon the installation or bonding of improvements within the first section filed.)

¹⁵ From the public point of view, of course, the larger are the developer's early expenditures on the project the greater his commitment to completion. See discussion at pp. 91-93 infra.


¹⁷ Most developers will spend several days in preparation for a hearing on a substantial project, and few will attend without an attorney, site planner, engineer and other professional consultants. The cost of any one hearing is frequently quite considerable, both in time spent and in actual cash outlay. Nor is the hearing itself a particularly pleasant experience, since public attendance is drawn largely from those who oppose the project.
boring residents in the community? This is a question that has been given frequent consideration but without attention to an important distinction. For example, when the future of "flexible" controls is discussed, it is commonly assumed that all changes which relax the controls applicable to one property must be subject to review at the instance of the owners of some other property. When the question of review is considered, whether it be as to scope or proper forum, no distinction is made between an owner's challenge to planning action that tightens (or fails to relax) the controls on his own land and his challenge to an action that relaxes controls on his neighbor's. Yet it is the presence of review based on the latter type of challenge that has endowed our planning controls with the negative characteristics often complained of.

Lest it be thought that I am suggesting sweeping and unlikely reforms, let me say again that for the moment I am merely illustrating those factors that may discourage better forms of residential development. For better or for worse, we do in fact expose local planning action to challenge by disaffected neighbors. Wise or inevitable as this may seem, it is still possible to complain of its effects and to cast about for some modification that would retain what is worthwhile and reject what is useless. For example, we might consider who carries the risk of a spurious challenge. Under the present system, the challenger is free, but is under no obligation, to obtain a restraining order or seek a stay in the local proceedings to stop development pending a decision on the merits of his challenge. If he applies for a restraining order or seeks a stay, he may be required to furnish a bond to cover the developer's loss if the case goes against the challenger on the merits.\(^{18}\) If he does not, and the developer proceeds with notice of the pending action, there is little evidence that the challenger is prejudiced on the merits for failing to stop construction.\(^{19}\) Normally, there-

\(^{18}\) Stays on appeal and restraining orders to prevent further construction in zoning cases are commonly governed by the general rules of civil practice pertaining to restraining orders, temporary injunctions, and superceded which either require or give the court discretion to set bond. See, e.g., Weiner v. 222 East Chestnut St. Corp., 303 F.2d 630, 631-32 (7th Cir. 1962); Cheltenham Township Appeal, 413 Pa. 379, 381, 196 A.2d 353, 354 (1964); cases cited note 19 infra.

\(^{19}\) See, e.g., Lavitt v. Pierre, 203 A.2d 289, 292 n.1 (Conn. 1964) (citing Armstrong v. Leverone, 105 Conn. 464, 475, 136 Atl. 71, 75-76 (1927) (a restrictive covenant case)); Torello v. Board of Zoning Appeals, 127 Conn. 307, 16 A.2d 591 (1940); In re Ricardi's Appeal, 393 Pa. 337, 142 A.2d 289 (1958). It is, of course, hard to say in any particular case to what extent the courts are influenced against the plaintiff on the merits by his failure to prevent construction. For example, Lavitt v. Pierre, supra, went against plaintiff on the merits. There are one or two covenant cases where the courts have denied permanent injunctive relief on the ground that the plaintiff had failed to obtain a preliminary injunction to stop construction, even though the action for permanent injunction was filed promptly: Bauby v. Krasow, 107 Conn. 109, 115-16, 139 Atl. 508, 510-11 (1927) (alternative holding); University Gardens Property Owners Ass'n v. Schultz, 272 App. Div. 949, 71 N.Y.S.2d 814,
fore, the challenger will make no attempt to seek a stay or a restraining order, thus throwing upon the developer the risk of determining which way the case will go on the merits. Even a slight possibility that the challenger might win will stop the developer from proceeding with the construction. If the developer stops, and the case takes a year or two before it is finally determined that the challenger was wrong on the merits, the developer has lost the intervening return on his investment in the project, not to mention the loss caused by slowdown in turnover and the possible loss because of an intervening change in the market. These repercussions of the possibility of challenge—a possibility which runs high in any departure from standard development—are not calculated to encourage the initial expenditures associated with planned unit development.

Do We Need a Private Attorney General?

What is the position of the neighboring challenger? In pursuing this question, I do not want to create the impression that I am unsympathetic to his interests or that he is as intrepid a litigant as the attention given to him here would suggest. Rather, by examining the position of the neighboring challenger, I want to draw attention to some characteristics of our zoning system which affect its ability to accommodate innovations such as planned unit development.

The neighboring challenger is, in a practical sense, the legal guardian of the dynamic aspects of the zoning process. If local authorities doubt whether they are free to adopt any new approach in favor of development that doubt must ultimately be traced to the presence of the neighboring challenger. Potential applicants—as I plan to demonstrate later—are not likely to test the issue.

The basic right of a neighbor to challenge planning action undertaken on land other than his own has been largely assumed by the courts. Certainly, there has been very little serious discussion of the point. Support for his standing can be found in the language of the Standard State Zoning Enabling Act which allows for review of the board of adjustment at the instance of "any person aggrieved" or "any taxpayer." 20 Clearly, the reference to "any taxpayer" carries the neighbor's

reversing 71 N.Y.S.2d 810 (Sup. Ct. 1947). Both of these cases, however, involved construction of a single dwelling. The cost of preventing construction until final determination on the merits, therefore, might have been slight and the sympathy of the court for the dwelling owner strong. Moreover, in Bauby the court consoled itself by holding the plaintiff entitled to damages.

20 Section 7 of the Standard State Zoning Enabling Act (U.S. Dep't of Commerce, rev. ed. 1926) gave to "any person . . . aggrieved" and "any taxpayer" standing to appeal to a court of record from "any decision of the board of adjustment"; and gave to "any person aggrieved" the right to appeal to the board of adjustment from "any decision of the administrative officer." The reference to "any person aggrieved" as a party entitled to appeal to and from the board of adjustment (or
bor's standing, at least so far as review of the board is concerned. But this language has been retained in the enabling legislation of only seventeen jurisdictions. Even if one could say that the more frequent reference to "persons aggrieved" demands standing for the neighbor, that reference is applied in the statutes only to review of local administrative action. Indeed, the statutes are commonly silent about review of local legislative action, yet the neighbor has been accorded standing.


22 As experience with similar language in federal statutes plainly demonstrates, reference to "any persons aggrieved" in and of itself obviously does not require that the neighbor be given standing. See Harrison-Halstead Community Group v. Housing & Home Fin. Agency, 310 F.2d 99 (7th Cir. 1962), cert. denied, 373 U.S. 914 (1963); Kansas City Power & Light Co. v. McKay, 225 F.2d 924 (D.C. Cir. 1955), cert. denied, 350 U.S. 884 (1955) (both cases holding that Section 10(a) of the Administrative Procedure Act, 60 Stat. 243 (1946), 5 U.S.C. § 1009(b) (1958), allowing review at the instance of "any person . . . adversely affected or aggrieved," did not serve to take the plaintiffs outside the rationale of Alabama Power Co. v. Ickes, 310 U.S. 464 (1938) (the court held that a utility company had no standing to question the validity of federal loans to a competitor, since the plaintiff's desire to be free of the threat of lawful competition was not a legal interest). The Supreme Court has twice read similar language in the Communications Act § 14, 66 Stat. 718 (1952), 47 U.S.C. § 402(b) (1958), more broadly: Scripps-Howard Radio, Inc. v. FCC, 316 U.S. 4 (1942); FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476 (1940). Although these cases remain controversial, they certainly do not stand for the proposition that a statutory reference to "persons aggrieved" automatically extends standing to any person whose interests are affected in any way, regardless of other considerations. See Jaffe, Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255 (1961). See also part one of the two-part article under title Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961).

23 The validity of legislative action, through rezoning, is commonly tested at the instance of the neighbor by declaratory judgment or by injunction (the catchall
What then is the real basis for granting standing to the neighbor? Normally he is not asserting an independent common-law cause of action such as nuisance or trespass (and if he were, it might be said that he has an adequate private remedy). Furthermore, if he should claim that there has been a "taking," he would find little support in the cases. Although the neighbor may suffer a loss, a similar loss of judicial review. See, e.g., Keller v. City of Council Bluffs, 246 Iowa 202, 205-06, 66 N.W.2d 113, 115-16 (1954) (declaratory judgment); Richmark Realty v. Whittif, 226 Md. 273, 280-82, 173 A.2d 196, 200-01 (1961) (declaratory judgment); Cassel v. Mayor and City Council of Baltimore, 195 Md. 348, 353-54, 73 A.2d 486, 487-88 (1950) (injunction); Brechner v. Incorporated Village of Lake Success, 23 Misc. 2d 159, 160, 201 N.Y.S.2d 254, 256 (Sup. Ct. 1960) (declaratory judgment—citing earlier cases, many of which involved challenges by landowner directly affected. It may be noted, furthermore, that Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951), a case of special significance to planned unit zoning procedures, see note 44 infra, came up for review by declaratory judgment, a fact that is indicated by the lower court opinion, 276 App. Div. 1019, 96 N.Y.S.2d 58 (1950)). Although most of the cases require that the neighbor show special damage, i.e., damage different from that suffered by the public at large, they do not explore the significance of this limitation. See additional cases collected at note 26 infra; text accompanying notes 57-61 infra.

Cases which deal with the propriety of review by prerogative writ reflect considerable uncertainty about the foundations for such a review. Sunderland v. Building Inspector of North Andover, 328 Mass. 638, 105 N.E.2d 471 (1952) (mandamus proper remedy); State ex rel. Croy v. City of Raytown, 289 S.W.2d 153 (Kan. City, Mo. Ct. App. 1956) (certiorari not proper remedy); Gammino v. Town Council of South Kensington, 182 A.2d 117 (R.I. 1962) (certiorari not proper remedy); Pierce v. King County, 62 Wash. 2d 324, 382 P.2d 628 (1963) (certiorari proper remedy). For the New Jersey view, see text accompanying notes 31-35 infra. One Pennsylvanian court, puzzled by the absence of statutory provision for review, held that the neighbor can appeal from a rezoning under the provision allowing "any person aggrieved" to appeal from the board of adjustment, see note 20 supra. The court reasoned that the board "is only an authorized arm or agency of the city council," and that obviously a statute that provides for review of the agent necessarily provides for review of the principal: Huebner v. Philadelphia Sav. Fund Soc'y, 127 Pa. Super. 28, 32-33, 192 Atl. 139, 140-41 (1937). The problem was finally solved in Knup v. Philadelphia, 386 Pa. 350, 126 A.2d 399 (1956), which held that the neighbor must wait until issuance of the building permit, then appeal to the board of adjustment and from the board to the courts (thus forcing the entire proceeding under the statutory language of § 7 of the Standard Act, see note 20 supra). Nor is New York immune from some confusion as to whether the New York equivalent of § 7 of the standard act will support review of certain decisions of the local legislative body. The confusion stems from the fact that New York has dropped the reference to "any taxpayer," see note 20 supra. With the reference gone, the New York equivalent of § 7 is susceptible to the construction that "any person aggrieved" may obtain review not only of any decision of the board of appeals but of any "decision" of the village or town board (which is the local legislative body). Since review under the New York equivalent of § 7 is controlled by Article 78 of the Civil Practice Law (statutory certiorari), this has raised some interesting questions not entirely irrelevant to our problem because they lie close to the controversy in Rodgers, supra. However, these questions are too complicated to justify examination here: see Lemir Realty Corp. v. Larkin, 11 N.Y.2d 20, 181 N.E.2d 407, 226 N.Y.S.2d 374 (1962); Zeffman v. Board of Trustees of Great Neck, 40 Misc. 2d 130, 242 N.Y.S.2d 738 (Sup. Ct. 1963); Parkplain Realty Corp. v. Town Board, 137 N.Y.S.2d 474 (Sup. Ct. 1954).

24 I would not want to be taken as saying that absent a common-law cause of action the neighbor cannot make a claim to standing. Rather, all that I have said so far is that he cannot rest his claim on a common-law cause of action and, to this extent, his case falls initially within the narrow "invasion of legal right" doctrine of a case such as Alabama Power discussed at note 22 supra. Nor does a statutory provision extending review to "any person aggrieved" automatically establish his claim to standing. Plainly, however, he has other strings to his bow and these are explored in the text and notes that follow.
occasioned by a far more decisive participation of government in the use of neighboring property—through condemnation—cannot be claimed as a taking. Moreover, I do not believe he has an equal protection argument. He is not asking for equal freedom for himself, only equal restrictions for others. Although the neighbor's claim to constitutional protection may not be disposed of that easily, there is, in the last analysis, very little to support the view that his standing is constitutionally compelled. This is not the place to expand at length on these points. Suffice it to say that the neighbor's standing to obtain review is neither obviously conferred by statute nor obviously compelled by any constitutional principle. In short, if we extend standing to the neighbor, it is either because we are persuaded that zoning is primarily designed to protect his interests, as distinguished

25 See, e.g., Sharp v. United States, 191 U.S. 341, 354-56 (1903); Campbell v. United States, 266 U.S. 368 (1924) (extending the principle of Sharp and other cases to hold that severance damages are limited to the loss attributable to government use of the severed land and does not include loss attributable to government use of other adjacent land taken from other owners). The Court stated:

If the former private owners had devoted their lands to the identical uses for which they were acquired by the United States or to which they probably will be put, as found by the court, they would not have become liable for the resulting diminution in value of plaintiff's property. The liability of the United States is not greater than would be that of the private users . . . .

266 U.S. 368, 371-72.

The reader will, of course, note that there have been many cases since then involving government interferences with the use of adjacent land where a constitutionally compensable "taking" (or "damage"—where the state constitution so provides) has been found although no part of the tract had been actually confiscated. See Mandelker, Inverse Condemnation, The Constitutional Limits of Public Responsibility (1964). But all those cases, I would submit, present the question of whether the government can sustain an even smaller scope of liability than the private owner—none go so far as to give constitutional protection to loss that would not ground a private action against a private individual.

26 An individual probably has no constitutional right to demand that the government maintain restrictions on others to protect his own restricted use, Ayer v. Commissioners on Heights of Bldgs., 242 Mass. 30, 36, 136 N.E. 338, 340-41 (1922), even if he has bought in a restricted area on the faith that the restrictions would be maintained. No one, the courts have stated, can claim a "vested right" in the restrictions established in his district. Bischoff v. Hennessy, 251 S.W.2d 582, 584 (Ky. Ct. App. 1952); Wakefield v. Kraft, 202 Md. 136, 143-44, 96 A.2d 27, 29-30 (1953); Page v. City of Portland, 178 Ore. 632, 639, 165 P.2d 289, 293 (1946); Gratton v. Conte, 364 Pa. 578, 584-85, 73 A.2d 381, 385 (1950); Eggebeen v. Sonnenburg, 239 Wis. 213, 218-19, 1 N.W.2d 84, 86-87 (1941); Ham v. Weaver, 227 S.W.2d 286, 292 (Tex. Civ. App. 1950). This, however, does not dispose of the matter. Though reliance does not give the neighbor a vested right to the established restrictions, it may be argued that it does give him the right to protest relaxations which are not for the public good. Indeed, a number of cases have put the neighbor's rights in those terms: Friedland v. City of Hollywood, 130 So. 2d 306 (Fla. Dist. Ct. App. 1961); Garner v. City of Carni, 28 Ill. 2d 560, 564, 192 N.E.2d 817, 818-19 (1963); Kennedy v. City of Evanston, 348 Ill. 426, 429, 181 N.E. 312, 313 (1932); see Wakefield and Page supra, at pages cited. But, put in those terms, is this a recognition of a constitutional right in the neighbor, or is it rather the recognition of a need for having someone who can guard the interests of the community at large? It certainly does not matter which interpretation is adopted, as long as we are persuaded that the neighboring challenger performs a useful function in the latter role. See text at notes 31-34 infra.
from those of the public at large, or because we sense that the interests of the public at large cannot be left at the mercy of elected officials, or both.

Traditionally, of course, our zoning has been conceived of much more as an extension of individual property rights than as an instrument of public policy. Reflecting this view, the courts have sometimes stated that the neighbor must show individual loss, as distinguished from loss suffered by the public at large, before he will be accorded standing. But the courts that have adopted this requirement have seldom made any serious effort to define what sort of loss is entitled to protection; indeed, in most cases, the bare allegation of loss


It could be argued, of course, that the protest requirement cuts the other way, and that it was intended to be the neighbors' sole assurance of responsible public action. But this view, though not excluded by the comment of the draftsmen, see Standard State Zoning Enabling Act § 5, comment (U.S. Dep't of Commerce, rev. ed. 1926), would hardly reflect the spirit of that time. Likewise, it seems clear that the draftsmen of the standard act, and the legislatures that adopted this language, intended to include the neighbor within the ambit of "persons aggrieved." Bassett, it may be noted, saw the standard act's provisions for review largely as a safety valve against complete invalidation of zoning—a view which does not address itself to the complaints of a neighbor. See Bassett, Zoning, 9 Nat'l Mun. Rev. 311, 331 (1920). There is evidence that he opposed the provision which would allow standing to "any taxpayer." See Williams, Law of City Planning and Zoning 204 n.14 (1922). But this does not prove anything about his intent towards the neighbor. Indeed, he later assumes, as did everyone else then or since, that the neighbor is included within the language "persons aggrieved." Bassett, Zoning, 153 (1926). In short, the neighbor has history on his side when he argues that the zoning legislation intended to give him standing. And in response to the sterile point that he can show no independent legal right, he can counter with the point, no less sterile, that the statute conferred new rights upon him. See Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 430-31, 86 N.E.2d 920, 922-23 (1949).

28 See note 27 supra.

29 See cases cited notes 23, 26 supra.
has been accepted as decisive. I shall come back to this point again.\textsuperscript{30} It is enough to say here that standing to obtain review might have been drawn more narrowly were it not for the prevailing lack of confidence in our planning process. The neighboring challenger is seen as a useful guardian of its integrity.

This view has been most strongly expressed in New Jersey. The New Jersey Supreme Court summarized the result of the cases: “we have recognized a broad right in taxpayers and citizens of a municipality to seek review of local legislative action without proof of unique financial detriment to them . . . . The community at large has an interest in the integrity of the zoning plan . . . .”\textsuperscript{31} The broad right to standing in New Jersey goes back at least to the oft cited opinion of Judge Dixon in \textit{State ex rel. Ferry v. Williams}.\textsuperscript{32} Noting that in England the private action to redress a public wrong has been infrequently allowed, Judge Dixon stated:

> with us the exception to the rule is extended so far as to justify this court in acting by mandamus, certiorari or quo warranto, at the instance of private persons, for the redress or prevention of public wrongs by public bodies and officers . . . whenever the applicant is one of the class of persons to be most directly affected in their enjoyment of public rights, and the public convenience will be subserved by the remedy desired.\textsuperscript{33}

The neighboring challengers appear “so to speak, [as] private Attorney Generals”\textsuperscript{34} to assert the public interest.

If the neighboring challenger’s standing rests largely on the idea that we need a private Attorney General, do we need an irresponsible one? This thought was uppermost in Judge Dixon’s mind when he confirmed the wide role of the New Jersey challenger. He said:

> The general indifference of private individuals to public omissions and encroachments, the fear of expense in unsuccessful and even in successful litigation, and the discretion of the court, have been, and doubtless will continue to be, a sufficient guard to these public officials against too numerous and unreasonable attacks.\textsuperscript{35}

\textsuperscript{30} See text accompanying notes 57-59 \textit{infra}.

\textsuperscript{31} \textit{Kozesnik v. Montgomery Township}, 24 N.J. 154, 177-78, 131 A.2d 1, 13-14 (1957).

\textsuperscript{32} 41 N.J.L. 332 (Sup. Ct. 1879).

\textsuperscript{33} \textit{Id.} at 339.

\textsuperscript{34} The analogy was proposed by Judge Frank in a different context: \textit{Associated Indus. v. Ickes}, 134 F.2d 694, 704 (2d Cir. 1943); see note 22 \textit{supra}.

\textsuperscript{35} \textit{State ex rel. Ferry v. Williams}, 41 N.J.L. 332, 339 (Sup. Ct. 1879).
Is that our experience in suburban zoning? If not, should we consider some additional guards against unreasonable attacks? Despite the impatient tone of my remarks, I am not insisting that the neighboring challenger be eliminated, although that has been virtually the case under the English Town and Country Planning Act for years. If our system of zoning administration were of better quality, I might urge that the challenger be eliminated. It seems clear that his presence has given our planning controls an even greater local bias than is necessary. Moreover, because planning decisions are made on a local level, there is much to be said for the view that local redress for decisions that favor development (and that is what we are talking about) lies in the ballot box and not in the courts. However, I said earlier that I would not urge sweeping or unlikely reforms.

Consideration might be given to requiring the neighboring challenger to post adequate security for costs and, to some appropriate extent, for the loss that he might cause to the private defendant in the case. This security might be made a discretionary matter with the courts or other reviewing agencies so that egregious abuse or injury would not go unchecked. It was noted at the outset of this discussion that the possibility of a neighboring challenge can have a marked effect on a developer's choice between standard development and something more imaginative. Not only does the imaginative development require greater expenditures at the start but also, as matters now stand, it is more likely to be challenged. This greater likelihood, incidentally, is a curious reflection on neighboring challengers in general. It is not that the neighboring challenger would prefer the standard development; it is that he would prefer no development at all, and a departure from the normal encourages him to try his hand.

In suggesting that the neighboring challenger be required to post appropriate security, I recognize that there are many problems. For example, on what basis would the court or other reviewing body determine that security ought to be posted? What would be "appropriate security"? Security for costs of litigation incurred by the public and private defendants in the case may serve the purpose of discouraging some baseless suits, but I question whether it would encourage the de-

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36 See note 39 infra.
37 The suggestion that the neighboring challenger be required to post security is not radical; a shareholders' derivative action has the same requirement in a number of states. Indeed, the position of the shareholder in a derivative suit bears a strong resemblance to the position of the neighboring challenger in a zoning case. Neither, it might be said, has an individual claim, but both stand to lose if their interests as a whole are not vindicated. In both cases, however, there is a danger that baseless suits will have adverse effects on the interests of the entity as a whole. See text accompanying notes 57-60 infra.
38 See text accompanying notes 57-60 infra.
veloper to invest in a departure from standard development unless the security covers that investment. On the other hand, to require such security would mean that the larger the project the less likely that it could be attacked. That may not be such an objectionable thought when we consider that the larger projects cannot occur in the heart of a community where they are likely to be regarded as disruptions of the established pattern. Indeed, the experience with larger projects has been that they have not been attacked. But that is no argument for making them immune, unless one has little faith in the private attorney general and is ready to abandon him. Perhaps, the security should be measured by the developer’s investment but given a ceiling so that the larger project would not escape review.

There are other possible variations on the idea of security. For example, under the English system, the neighboring challenger has standing to obtain review only when permission for development has been granted for a use which falls within a certain class designated by the Minister of Housing and Local Government. The very limited

39 In Buxton v. Minister of Housing and Local Government, [1961] 1 Q.B. 278 (1960), the Minister granted an application for a chalk pit and neighbors sought review under what is now §179 of the Town and Country Planning Act, 1962, 10 & 11 Eliz. 2, c. 38. The court held that a neighbor is not “a person aggrieved” within that section unless he is a “section 37 party.” Section 37 parties are those who under §37 of the Town and Country Planning Act, 1959, 7 & 8 Eliz. 2, c. 53 (repealed) (now §§15, 16 and 17 of the act of 1962) are entitled to “make representations” in regard to an application for development. These individuals are: (a) the owner of the land in question (if the applicant is not the owner); (b) the tenant of an agricultural holding (if the applicant is not the tenant); and (c) any member of the public if the proposed development falls within a class designated by the Minister under what is now §15 of the act of 1962. Obviously only (c) brings in the neighbor. The Minister has designated the following as developments falling under §15 of the act. STAT. INSTR., 1963, No. 709:

(a) construction of buildings for use as a public convenience;
(b) construction of buildings or other operations, or use of land, for the disposal of refuse or waste materials;
(c) construction of buildings or other operations (other than laying of sewers, the construction of septic tanks serving single dwelling houses, and works ancillary thereto) or use of land, for purpose of sewage disposal;
(d) construction of buildings or use of land for purposes of a slaughterhouse or knacker’s yard;
(e) construction of buildings and use of buildings for any of the following purposes, namely, as a theatre, cinema, a music hall, a dance hall, a skating rink, a swimming bath or gymnasium (not forming part of a school, college or university), a Turkish or other vapour or foam bath, a building for indoor games.

Since, in the Buxton case, the application was for a chalk pit, which was not within a class designated by the Minister, the neighbors were not “section 37 parties” with regard to it. It might be noted here that Buxton was a case where the local authority had denied the development application, but the Minister granted it on appeal by the applicant. Had the application involved a development within the designated class, (for example, a cinema) it is implicit in Buxton that the neighbor would have standing to appeal from the Minister to the courts. But what if such an application is granted by the local authority? Under the Town and Country Planning Act, appeals from the local authority can only be taken to the Minister, and the act provides for appeals only by the disappointed applicant, §23 of Town and Country Planning
number of uses effected are known popularly as the "unneighborly uses" and include such items as "a public convenience," "a slaughter-house or knacker's yard," and, interestingly enough, "a building for indoor games." While this way of limiting the neighboring challenge may not be acceptable or feasible in this country, the idea of a list of "unneighborly uses" might be adapted for the limited purpose of determining whether the neighboring challenger should be required to post security.

**The Role of the Courts—Progress by Crude Categories**

The fact that existing zoning controls tend to focus on the lot rather than on the project is often explained historically. The draftsmen of the enabling legislation, it is said, lived in a world where the subdivider's interest ran only to the sale of the raw land in lots and where residential development was left to the individual decision of the lot owner who would contract with a builder of his choosing. Similarly, the rigid segregation of uses is attributable to a world where there seemed to be no need for distinguishing between a use and its physical manifestations to determine its compatibility with other uses. Thus an industrial use in any of its then physical manifestations was obviously incompatible with a residential use, a multi-family use was incompatible with a single family use and so forth. Things have changed since then, and now both planners and consumers are willing to draw finer distinctions, looking to the performance of various uses in their various physical manifestations. The courts, however, have somehow failed to recognize this change and have steadfastly remained tied to the old ideas. The picture one gets of the courts is that they simply stumbled along a false path for no better reason than that this was the way they were pointed at the start.

This description, of course, does not do justice to the current analysis of the situation; but, in all, there has been too much emphasis...
on the historical explanation. Conditions existing at the time when our planning controls were conceived cannot explain why the old lot by lot focus and the old idea of rigid separation of uses have become so firmly entrenched in our system. Nor does the emphasis on historical factors furnish us with any guide for deciding what changes should be made and what problems lie ahead of such changes.

I believe that the tendency to focus on the lot and to separate various uses including various housing types is an inevitable tendency for any system that: (1) allows for the review of planning decisions at the instance of neighboring owners without seriously considering the purposes that can be served, the scope of the review or the criteria that ought to be applied; and (2) is biased in favor of control by regulations established in advance, regulations so detailed that specific proposals will be disposed of more or less automatically when presented—in short, a system which prefers to fashion the shoe without Cinderella.

To say that the bias in favor of preset regulations poses problems for planned unit residential development is to say nothing new. The question really is, what is the strength of that bias and why does it exist? Fundamentally, it is an expression of the idea that government must act in a general and impartial manner and that to encourage responses to individual applications for development would be to encourage discrimination, favoritism, and perhaps even worse. Attractive as this idea is, its application to zoning raises a number of questions: Who will normally claim its protection? Who or what will decide whether there has been a violation? How can its values be most practically secured without compromising other equally important values?

In speaking to these questions, it should be noted that whatever technique is used for handling planned unit developments will not supplant standard lot by lot controls. Lot by lot development can still occur. If new techniques become available for handling whole residential projects, it is generally assumed that the project developer will be given the choice between the standard lot by lot approach and the planned unit approach. Of course the choice to proceed by standard development could be closed off. I do not plan to elaborate this possibility here. It would give a whole new dimension to a problem that has not been solved in its simpler form—where the developer is given a choice. Moreover, at least in the suburbs, there are practical reasons why planned unit development will tend to remain only a choice along with standard development. The idea that development might be encouraged by allowing reductions in lot size against off-
setting open space is hard enough to sell, even when no departure from single family detached housing is contemplated. The idea that varied housing types might be introduced would encounter even more opposition. That these departures might be required is, at present, unthinkable.

If approval of a planned unit development is a departure from standard controls, who is most likely to raise the question whether approval is rationally and evenly dispensed, which we have recognized as the reason for demanding that all of the controls be preset? The developer who received the approval? Obviously not. The developer who received the approval but got less than he asked for? Is he likely to litigate, when the simple answer to his complaint is that he can always go standard development? The developer who was turned down? Is not the same answer available as to him? The developer who was turned down or who got less than he asked for on the grounds that another developer got what he asked for? This is more likely, but would he think it worth his while to face all of the distinctions that could be made on the facts?

I believe that the developer is an extremely unlikely litigant. That does not mean that he has no interest in having the planned unit controls preset; but his interest is much less an interest in protecting impartiality and equality than it is in predicting how his proposal will be treated. That his is a different interest becomes clear when we consider that even if all of the controls are preset, there would be little to prevent the local public authority from tightening them when confronted with the developer's proposal. The local public authority has been allowed to do this in standard zoning and, in the case of planned unit controls there would always be the answer that the developer is free to go standard development.

Since developers are always threatened with a last minute change of mind, their interest in preset controls is largely a guide to what they are required to do, assuming the requirements are not changed. They have a far greater concern for the integrity of the rules once

41 See, e.g., People ex rel. Nat'l Bank v. County of Cook, 206 N.E.2d 441 (Ill. Ct. App. 1965); Morris v. Postuna, 41 N.J. 354, 196 A.2d 792 (1964); Key Realty Co. Zoning Case, 408 Pa. 98, 182 A.2d 187 (1962); Gramatan Hills Manor Inc. v. Manganiello, 30 Misc. 2d 117, 313 N.Y.S.2d 617 (Sup. Ct. 1961); York Township Zoning Bd. of Adjustment v. Brown, 74 York 197 (1960), aff'd, 407 Pa. 649, 182 A.2d 706 (1962); cases collected, Annot., 169 A.L.R. 584 (1947). The fact that the reported cases most frequently involve uses such as apartments, gas stations, motels and shopping centers, should not be taken as proof that single family residential uses are less frequently exposed to tightened regulations, but merely that single family residential developers are less likely to litigate beyond the lower court. That proposals for single family residential development are exposed to frequent change in regulations is indicated by the developer's need for legislation discussed in notes 124-29 infra and accompanying text.
their proposal has been approved—a concern which I have argued is legitimate and should be satisfied if planned unit development is to be encouraged. Another way of phrasing all this is that the developer's interest is to predict what the requirements will be and to prevent their tightening after he has received approval. On changes after approval, the developer can expect very little sympathy from the courts because the courts have never worried about the exercise of discretion which tightens apparent requirements. But the exercise of discretion which relaxes apparent requirements has been a different matter—here the courts tend to go to pieces. And the moving litigant is, of course, the neighboring challenger.

This brings us back to the point of our beginning, the neighboring challenger. His presence, I have argued, must be defended largely on the grounds that he serves as a guardian of rational and impartial decision making in our planning process. But he performs this function only for those decisions which are favorable to development. This point cannot be overemphasized. It is at the neighbor's insistence that the courts are forced to fashion a philosophy of change—of progress, if you will. What has been that philosophy?

Basically, it has been a philosophy of fear, fear of an inability to distinguish good change from bad, a fear all the more fickle because of a failure to define what is meant by "good" and "bad." Let me expand on this point, for it has an important bearing on the reception which may await various approaches to planned unit development control.

Consider first how the courts have treated planning action which tightens (or fails to relax) regulations. Here, although the courts have professed to reach the merits of the action taken, they have in fact studiously avoided coming to an independent judgment of the value (in the planning sense) of what was done. They have taken refuge in a crude balancing process, balancing the burden placed on the challenger's land against the interests of the community.42 By employing this balancing process, the courts have been able to delude themselves that they are deciding the merits of the planning action, whereas what they are deciding is largely whether a presumption of its merits is outweighed by whatever sympathy can be mustered on

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42 The "refuge" part of the process is to be found in the assumption that local planning action must be tested solely by the interests of the community in which it occurs, see Borough of Cresskill v. Borough of Dumont, 15 N.J. 238, 104 A.2d 441 (1954) (the most notable exception to date), and in the presumption that the decision of the local officials is the best evidence on the question of whether the interests of the community are in fact well served. See Bilbar Constr. Co. v. Board of Adjustment of Easttown Township, 393 Pa. 62, 141 A.2d 851 (1958). Fortunately, in the type of case that we are considering, this presumption does not automatically dispose of the whole issue, since the loss to the challenger's property must be balanced against it.
SYMPOSIUM: A LAW PROFESSOR'S VIEW

behalf of the challenger. Some element of judgment on the merits is, of course, present in assigning a value to the sympathy for the challenger. But when that judgment becomes difficult, the courts always have the challenger's loss to supply a sense of meaning to the process in which they are engaged.

Wholly different in this respect is the case where planning action relaxes applicable regulations and is drawn into question by the neighboring challenger. Here, not only is it difficult to say that the neighboring challenger is asserting a constitutionally protected right of his own, but his loss is frequently slight and almost never large enough to weigh sufficiently in the balance—if the merits of the planning action are presumed.

One can therefore understand the discomfiture of the courts when faced with this kind of a case. The courts, I think, sense that the neighboring challenger has little standing of his own. They sense, I think, that he is there to protect the public interest, and that they are being called upon to reach the merits of the planning action. They sense, in effect, that they are being forced into the shoes of the planner—a role which they have eschewed, and which they are ill-equipped to fulfill. It was in this kind of a case that the Pennsylvania court took the unprecedented step in Eves of calling for a comprehensive plan. In other words, the court was calling upon the planner for help. A

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43 See notes 25-26 supra.

44 Eves v. Zoning Bd. of Adjustment of Lower Gwynedd Township, 401 Pa. 211, 164 A.2d 7 (1960). The facts of the case were the following: On April 28, 1958, the township adopted an ordinance creating an "F-1, Limited Industrial District." The district was not then located on the zoning map. Instead, its location was to be determined at the time of application for development by a procedure conforming in all respects to the requirements of the enabling act prescribed for zoning amendments. The ordinance establishing this "floating" district contained a great number of detailed limitations designed to assure the community that the industrial uses permitted by the ordinance would not have an adverse impact on surrounding uses (particularly residential and allied uses). Whether an application would be acted on favorably was implicitly left to the discretion of the township supervisors, because approval required a further ordinance rezoning the applicant's land to the limited industrial district authorized under the original ordinance. On January 5, 1959, pursuant to an application filed on September 11, 1958 and after a public hearing, the township supervisors did rezone a 103 acre tract (lying in the "A" residential district) to the limited industrial district. Neighbors challenged the rezoning in the courts. (It is interesting to note that they followed the unique Pennsylvania procedure, described in note 23 supra. They waited for the issuance of a building permit, then appealed from this to the board of adjustment and finally to the courts.) Both the board and the common pleas court held in favor of the township. The Supreme Court reversed, holding both the rezoning ordinance and the original ordinance invalid on the grounds that such "case by case" rezoning was not contemplated by the enabling act, 401 Pa. at 211, 164 A.2d at 12, and that the actions taken were violative of the requirement that zoning be "in accordance with a comprehensive plan." In discussing the latter requirement, the court, for the first time in zoning history, appeared to call for a plan embodied in documents other than the text and map of the zoning ordinance itself, 401 Pa. at 216, 218-19, 164 A.2d at 10, 11. For a while, it seemed that the court might require such a plan as a condition precedent to all zoning action, but that expectation has since been proved wrong. The case and its repercussions are further considered at notes 46-68 infra and accompanying text.
whole history of the role of the courts in planning could be written from this point of view. I do not have the space to do this sensitively here. The most that I can do is to sketch some tentative thoughts for the value that they may have in determining an approach to planned unit development.

In reviewing planning changes that amount to relaxation of established regulations, what would be one's predominant concern and what rules would one tend to establish in order to avoid being drawn into the planning function? All changes that amount to relaxation of established regulations are, of course, occasions for discrimination. I am sure that the courts have realized that this is a predominant concern. But they have failed to focus on it sufficiently to see a way out of a dilemma: How to assure a rational and impartial process of change yet avoid being drawn into the planning function? As a result, the courts were in fact drawn half-way into the planning function and in the process developed a plan of their own—a plan which was never any good and which today, the courts recognize, makes no sense at all.

It has frequently been noted that the cornerstone of the courts' own plan was a prohibition against change which would introduce "islands" that differ from the surrounding use. In this, the courts have been roundly criticized for failing to differentiate uses on the basis of "performance" and for failing to respond to modern needs. For example, in the *Eves* case, the court failed to recognize that to prelocate the industrial districts would have inflated the price of the land and discouraged the early location of industry in the community, which is what the community needed.

This traditional analysis of the spot zoning concept is sound, but it misses an essential point. By prohibiting spot zoning, the courts were in fact forcing all relatively minor changes to take place by way of an extension of existing use districts. I think this rule arose out of a desire to prevent discrimination and favoritism. How does it furnish such protection? The chances of an extension being an act of favoritism are, of course, somewhat less than in the case of an "island" because an extension can only go in so many directions. Moreover, even the layman can sometimes hazard a guess as to the most likely direction.46

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45 See note 44 *supra*.

46 This, incidentally, explains the courts' penchant for ribbon commercial development. How else can one explain *Pumo v. Borough of Norristown*, 404 Pa. 475, 172 A.2d 828 (1961)? The case followed *Eves v. Zoning Bd. of Adjustment of Lower Gwynedd Township*, 401 Pa. 211, 164 A.2d 7 (1960), by less than a year, yet the court held that an extension of a commercial district along a highway was obviously "in accord with a comprehensive plan" though the borough had no plan other than what could be divined by contemplation of the zoning ordinance and map alone. See
However, it would not be meaningful to insist on change by extension of existing use districts unless one were also to insist that the community be divided into use districts as an initial matter. Furthermore, holding all changes to extension of existing use districts can most usefully perform its function of assurance against favoritism and discrimination if uses are divided into a few crude categories, each in its own district, and if all extensions are held to the same crude category as the district that is extended. For example, if a commercial district includes uses ranging from shopping to gas stations, local public authorities are liable to think twice before extending that district into a residential area for a favorite, even if the favorite intends to build a small colonial looking store on a large, beautifully landscaped lot. Moreover, and this is critical, the courts will find it more comfortable reviewing that decision since the uses permitted in the district are in crude contrast with residential use, and the court does not have to pay attention to the particular plan of development proposed.

What I am trying to say here is that the courts feel threatened when asked to review any zoning change which seeks to blend apparently different uses sensitively to each other. For example, the courts have never been troubled by a legislative or administrative case by case location of gas stations. They have never been afraid of reaching the merits of spot zoning when the change had elements of crude contrast with the surrounding uses. But in *Eves*, the court failed to reach the merits of the actual location of the floating industrial district. Rather it held the idea of case by case redistricting invalid as not enabled.

It has been said that *Eves* was a classic case of the spot zoning objection, and that the court simply chose to overlook the fact that the
"ordinance contained limitations on every foreseeably objectionable manifestation of the presence of industry." Despite the confused character of the opinion, I do not think that the court overlooked this fact. On the contrary, it realized that the presence of such detailed limitations as well as the economic arguments against prelocating industrial districts, demanded the abandonment of the classic spot zoning objection. But it realized too, that the very limitations that would make the spot zoning objection rationally untenable also made its task in reviewing the ultimate location of the district impossible. Where the limitations would have the most success in controlling the impact of the industrial use on its surroundings, the court would have the greatest difficulty in ferreting out the case of favoritism and discrimination. That is why I say the court never reached the merits of the location. Rather, it called for comprehensive planning in a new sense; it was, as I have said, calling on the planner for help.

So far I have spoken of "change" as if there were no distinction to be made between change that is undertaken legislatively and change that is undertaken administratively. I intend to discuss the significance of that distinction later. My purpose here is to emphasize the challenge posed to the courts on review of any planning action that relaxes pre-established regulations in response to particular applications for development. Fundamentally, that challenge is the same whether the action is undertaken legislatively or administratively. The prevailing distinction between legislative and administrative action, however, may affect the reactions to that challenge; alternatively, the reactions to that challenge may affect the distinction. I do not overlook these possibilities. But to understand the significance of the distinction, it is important to understand the character of the challenge itself.

In Eves, the floating industrial district was finally located through a full-scale rezoning procedure. At one point in its opinion, the court seems to suggest that the ordinance would have fared better if the discretion to approve the location had been given to the board of adjustment as a special exception function. Read superficially, one might say that the court adopted the absurd position of requiring that the legislature not only establish standards for the control of its future legislative action, but that it do so with greater specificity than is required for the control of administrative action. But if the court struck at the floating district because it felt itself threatened in its ability to review, its dictum about the board of adjustment is understandable. The court was simply pointing to the extremely narrow scope of review

52 See note 44 supra.
53 401 Pa. at 219-220, 164 A.2d at 12.
which is available on appeal from a legislative action in order to emphasize its predicament.⁶⁴ Although *Eves* involved a change which attempted to relate industrial uses sensitively to surrounding residential use, I have dwelt on it because I believe that the courts may sense the same threat to their ability to review when the change involves an attempt to relate different housing types sensitively to each other and to the surrounding uses.

The traditional refuge of the courts, the requirement that all the standards be set forth in advance of application for development, does not offer a practical solution to the problem. The complexity of pre-established regulations that would automatically dispose of any proposal for planned unit development, when different housing types and perhaps accessory commercial areas are envisaged, would be quite considerable. Indeed as soon as various housing types are permitted, the regulations that would govern their design and distribution on every possible kind of site, their relationship to each other and their relationship to surrounding properties must be complex unless the developer’s choice in terms of site, site plan, and design and distribution of housing is reduced close to zero. It is not likely, I have noted, that local authorities would want to adopt such a set of regulations. For one thing, even an expert planner might have some reservations about how such a complex set of regulations would work out in any particular case. Local authorities would sense these reservations even more keenly.

The suggestion that one might have to accept anything that fits the regulations without getting a second guess at it will, I think, be viewed with such alarm by most local authorities and residents that the idea of planned unit development would be rejected out of hand. Perhaps this is more of a suburban than a center city problem. Indeed, city officials may be willing to establish a set of regulations that fail to exclude the less desirable project without retaining any discretion to exclude it when presented. But if they are, it is because, in high density areas, the cost of land and other factors exert their own pressure for conformity with the surroundings. In the suburbs the chances of simplifying the regulations by setting them short of excluding the poorer project are *de minimis*. Moreover, a suburban community that brings itself to adopt a vastly complex set of regulations for planned unit development is doing the developer no favor.⁶⁵

In short, I believe that if planned unit development is to be encouraged, we must learn to live with the idea that such projects cannot

⁶⁴ This view is supported by the last paragraph in the opinion, 401 Pa. at 220, 164 A.2d at 12.
⁶⁵ See discussion at pp. 65-66 *supra.*
be fully preregulated and that, within bounds, there will have to be a
considerable leeway for discretion to be exercised by some appropriate
local authority at the time the project is presented. I believe that the
builder is prepared to live with this—he may even prefer it—provided
some other matters are resolved in his favor. For example, he would
want assurance that a project, once approved, would not be defeated
by a sudden change of mind on the part of local authorities. He would
prefer to get such assurance as early in the game as possible—before he
is forced to invest large sums in the preparation of detailed plans. He
would prefer a simple and direct procedure for approval through a
single agency and subject to only one public hearing. I have men-
tioned these points before, and I shall consider them in greater detail
shortly.\(^6\)

The builder will not object to a considerable amount of discretion
until approval, but the question is will the courts? It is time that the
courts reconsidered their role in review at the instance of the neigh-
oring challenger. It is because the courts have failed to articulate for
themselves what interests are in need of judicial protection, and what
role they can profitably perform in this connection\(^5\) that all attempts
to encourage better development have been surrounded by an uncer-
tainty which has contributed to the sense that planning controls are
designed for the restraint of all development. Let me summarize and
develop further some of the points that should be considered:

(1) Are there some individual interests of the neighboring chal-
enger that ought to be protected? Consider the neighboring challenger
who is complaining about a relaxation of regulations that have made
possible a planned unit residential development adjacent to his single
family home. I don't think he has any interest that would qualify for
protection unless the market value of his home will be impaired.\(^5\) I
recognize that this is the same as saying that if he does not like it he
should move and that this conflicts, perhaps, with the view established
elsewhere in property law that all locations are unique. But let me
take the easier case—where he will suffer a market loss. If his loss
is attributable to some avoidable feature of the design or distribution of
structures in the adjacent development—for example, when his home
is in the shadow of a blank wall of a garden apartment or town house—

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\(^6\) See text accompanying notes 74-108 infra.

\(^5\) See notes 23, 26, 31-34 supra.

\(^5\) It has been noted, see note 23 supra, that the courts, while frequently calling
for a showing of "special damage," have seldom articulated what sort of loss is
entitled to protection. See the disagreement between majority and concurring opinions
in 222 East Chestnut St. Corp. v. Board of Appeals, 14 Ill. 2d 190, 152 N.E.2d 465
(1958) (opinion on rehearing).
that is one thing. But in the typical case, if the neighbor suffers loss, it will be for different reasons: (1) because his home is worth less if there is any residential development next door; and (2) because in this development there are homes on smaller lots or garden apartments bringing with them perhaps a different kind of people. I recognize that it is hard to distinguish the complaint about the sheer physical impact of the adjacent development, such as the blank wall, from these other claims. For example, development will almost always increase traffic congestion on the challenger's street. But when the neighboring challenger is complaining about market loss we ought to recognize that the loss which is attributable to legitimate competition among human beings for a place under the sun is *damnum absque injuria*. Remember that under our system of zoning, the competition in housing matters is weighted heavily in favor of the existing resident and against the newcomer. What we are dealing with is an existing resident who is seeking the help of the courts against the intrusion of additional housing approved by his elected officials. The courts have given short shrift to commercial owners who challenge the intrusion of other commercial establishments because of competition.\(^9\) I think that the courts should make an attempt to identify the same element when it is presented by the residential challenger and give it no recognition as a legitimate individual interest. If such a practice were adopted as a test of standing to challenge, it would probably eliminate most challenges to planned unit residential development.

But I doubt that the courts would adopt such a test because it has undertones of social judgment and for that reason, if for no other, would be fuzzy in application.\(^6^0\) But there is no reason why the courts should not at least consider how weak, frequently, is the case of the neighboring challenger in his claim for individual protection, even if he sustains a loss.

(2) If the courts would but reflect on the weakness of the neighboring challenger's individual claim, they would see more clearly the nature of their predicament upon review at his instance. Whenever the neighboring challenger's claim to individual protection is weakest, his role and the role of the courts becomes one of a guardian of the public interest. If the courts saw this, they might find it easier to discern what they are best able to accomplish in that role. Certainly it is not their function to review the merits of an honest judgment on

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\(^9\) See, *e.g.*, Circle Lounge & Grille, Inc. v. Board of Appeal of Boston, 324 Mass. 427, 86 N.E.2d 920 (1949); Ratner v. City of Richmond, 201 N.E.2d 49 (Ind. App. 1964).

\(^6^0\) The distinction, however, might be used by the courts in applying a "security for costs" provision. See text accompanying notes 37-40 *supra*. 
the part of local authorities. Courts are entitled, however, to seek assurance that the judgment was rational and honest, and it is this that has driven them to a consideration of the intrinsic merits of the action taken. But an action that does not evoke any serious sympathy for the interests of the private challenger is also the action that leaves the court with nothing to rest on for a determination of its intrinsic merits. This, I have said, is the secret of *Eves*.61

In a case like *Eves*, courts have a number of alternatives open to them.

(a) There is the alternative the court took in *Eves* itself—to call on the planner for help. What the court did not realize was that the kind of help it wanted was not available, both as a matter of practical politics on the local level, and, I think, as a matter of the planning art itself. It is enough to say here that what the court needed was a set of planning principles from which it could tell whether the approval or disapproval of a particular location for industry was a proper choice among a number of otherwise proper locations, when the other locations were by definition unknown. Needless to say the court did not get what it wanted.

The point is that if a court were to react to planned unit development the way it reacted to the floating industrial district in *Eves*, the planner could not supply what the court would be looking for. The court would be calling for the planner's help because the regulations applicable to planned unit development include a discretionary step that might, for all the court knows, involve less than an honest judgment concerning the best interests of the community. Planning principles could be adopted in advance of the particular application for development that would exclude that possibility. But these, I suspect, would need to be as complex as the automatic regulations that we are trying to avoid—or nearly so. It will help to reveal the reasons for my suspicion if we consider how the recent Federal Housing Administration's Land Use Intensity Rating system 62 might serve as a set of planning principles of this sort.

First, how would the proper land use intensity rating be assigned to the project? One way to do it would be to assign ratings to various districts in the community in advance of the presentation of any project. But this is open to the objection that to divide the residential areas of the community into districts and to assign different ratings to each is to resurrect in part the old thinking that proper densities are absolutes, which need not respond to the location and characteristics

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61 See text accompanying notes 44-54 supra.
of a particular site or to the design and character of the proposed dwellings. An interesting solution to this problem, suggested by Mr. Hanke, would be to assign ratings on an isobaric basis (similar to the elevation rings on a map), thus leaving a range of ratings available within each ring. To allow for sound differentiation as to each specific project, however, the range left open within each ring may have to be fairly substantial. Therefore, if the specific intensity rating comes to be assigned only at the time when a particular project is being proposed, the FHA standards for doing this might not satisfy those courts that are disposed to view with suspicion any exercise of administrative discretion in zoning.63 Thus the FHA rating system may have to be complicated by additional standards.

Let us assume, however, that intensity ratings are assigned as an original districting matter—as was done in the Frederick County,

63 The FHA, MINIMUM PROPERTY STANDARDS FOR MULTIFAMILY HOUSING No. 2600 (1963), introduces the rating system with the following language: "The land-use intensity . . . shall be appropriate to the characteristics of the site and its location in the anticipated community pattern." Id. §M301-1. Instructions for assigning the appropriate rating are found in FHA, INSTRUCTIONS FOR LAND-USE INTENSITY FORMS (1965). The Instructions prescribe a series of steps, each one designed to narrow the range of intensity available for the proposed project until an intensity rating is reached for the site in question. In Step 1, the analyst is instructed to arrive at a broad range of intensity appropriate for the "segment of the community in which the specific site is located." In Step 2, the range is narrowed for the site by reference to the building types "common" in the "neighborhood." In Step 3, the range is further narrowed by reference to the "existing densities in the neighborhood." In Step 4, the range is further narrowed by comparing the range so far established with the intensity rating of "benchmark projects"—successful projects completed in similar localities elsewhere. In Step 5, the rating for the project is tentatively selected. The instructions then describe two ways of "testing" the selected rating. Unless I am mistaken, the first is not so much a "test" for the selected rating as it is a systematic list of the required characteristics of the project, given the selected rating and the proposed building type. See Hanke, supra note 62, Form 1028, Figure 10, at 45. This, presumably, gives the analyst an idea what the project might look like if the selected rating is assigned to the site. What he "tests" this idea against, I am not sure. I think the real test is the second test prescribed by the instructions, which requires the analyst to determine whether the selected rating "will permit a practical planned-unit development project that will find ready public acceptance and a good market." This last test, obviously a critical one for the FHA, will involve employing expertise in the real estate market (which, as everyone knows, is a combination of solid experience coupled with a certain amount of wild guessing). In my brief description of the FHA Instructions for selecting appropriate ratings, I may have overemphasized that element in them which suggests that they merely provide a convenient method for rationalizing the status quo. Certainly that element is present, and the FHA Instructions have been criticized for it. At the Annual Conference of the American Institute of Planners in 1964, Roy Potter, Planning Director of Fremont, California, had this to say:

this approach only extends the status quo. Under the Land Intensity Ratio rating, new towns which have adopted plans . . . cannot rise in status to much more than a low-density residential slurb [sic?]. . . . It must be inferred that these new communities must remain semi-cities, waiting for redevelopment in the future when additional federal funds can be legally granted for what should have been built in the first place. . . .

I must leave the reader to judge for himself whether these charges are valid on consideration of the FHA Instructions in full. One thing is clear, however. The FHA Instructions do not provide very concrete guidance for the selection of an appropriate rating except when they are interpreted as calling for a mere extension of the status quo.
Maryland Ordinance. Would the local authority allow the developer to put up any housing types or any combination of housing types so long as the prescribed ratios (on the rating scale) were met? Of course not. Even the FHA does not contemplate this. And the FHA is interested only in the internal impact of the developer's choices—that is, in the effect of his choices on the marketability of the homes within the development (unless, of course, it carries the insurance on adjacent developments). Local planning authorities, on the contrary, are primarily interested in the external impact. Of course, the courts would also be interested in the external impact if what they are called upon to determine is whether a decision to approve will serve the interests of the community at large. In order to adopt planning principles which would satisfy the courts fully on this score, the principles would have to include provisions that would explain in each case why a particular housing type or combination of housing types was or was not approved. Such principles would, I suggest, be as complex as the regulations that we are trying to avoid. As we have noted, complex regulations would not be adopted locally—at least in the suburbs—and complex planning principles would meet the same fate. So, when faced with discretionary approval of planned unit development, if the courts should call on the planner for help, they would find that there are limits to what the planner can do here, as in cases such as Eves. The Pennsylvania courts have, I think, discovered this already.

64 See Hanke, supra note 62, at 31-34 (appendix).
65 See id. at 41.
66 The FHA clearly reserves the right to refuse approval to a proposed housing type or combination of housing types under the "public acceptance and a good market" test described in note 63 supra. Indeed, the FHA Instructions for arriving at the appropriate intensity rating for the site suggest strongly that the rating is determined by reference to what the FHA believes to be the most marketable housing type. See description of Step 2, note 63 supra. Step 2 states that "when more than one building type is appropriate for the proposed site, the land area may be divided on a percentage basis for each of several land-uses or building types. Each part of the land area is then considered separately . . ." (Emphasis added.) Later portions of the Instructions suggest that the "may" was really intended as a "shall" for it is later stated that where separate site areas for varied building types have been analyzed . . . a separate LUI number is determined . . . for each site area. A combined LUI number is also found for the total area. To find the combined LUI number, add the maximum floor areas for the separate site areas and divide the resulting total floor area by the total land area. . . . At the discretion of the Chief Underwriter, FHA gives the Sponsor an LUI number for each site area or the combined LUI number.

As I read these Instructions, they suggest the following: (a) FHA still believes that the most marketable project is the one confined to a single housing type—preferably the type prevalent in the "neighborhood"; (b) If several housing types are envisaged, these are assumed best distributed in discrete sections of the project. The Instructions suggest to me that FHA entertains substantial doubts about the marketability of a "mix"—hence all of the obvious ambiguities of the above quoted portions.

67 See note 68 infra.
This brings me to the second alternative which the courts might take.

(b) Courts might simply stop worrying about whether a relaxation of regulations represents a rational and honest judgment on the part of local authorities so long as nobody is individually and seriously injured thereby. They might go back to the old standby developed in the direct challenge cases, which is to balance a presumption of validity against the challenger's loss. I think the Pennsylvania court has moved in this direction in a series of cases since *Eves.* The New York court took that view years ago.

There is another alternative.

(c) It is time that we re-examined our belief that planning controls are capable of recognizing Cinderella by fashioning a shoe for her sight unseen, or more accurately, if I may be pardoned such levity, site unseen. To get better quality residential developments, planning controls must be capable of adjusting sensitively to the particular site and to the particular demand for housing existing at the time of development. To make this possible, the courts must abandon the idea that the only way to guarantee honest and impartial planning administration is to limit all progress to crude categories. Moreover, the courts cannot rely entirely on the planner for such a guarantee.

I am not suggesting, however, that the courts need give up. If sensitive adjustments make it hard for the courts to judge the honesty of the decisions made by the merits, surely something ought to be done to strengthen the procedures so as to allow the courts at least to determine whether the *conditions* for rational and impartial decision making were present. In this respect, our system is totally inadequate. If a record is made, it is frequently a collection of miscellanea that contains everything but the kitchen sink. Evidence is excluded that ought to be included and vice versa. If findings are made and conclusions

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68 Cleaver v. Board of Adjustment, 414 Pa. 367, 200 A.2d 408 (1964); Donahue v. Zoning Bd. of Adjustment, 412 Pa. 332, 194 A.2d 610 (1963); Pumo v. Borough of Norristown, 404 Pa. 475, 172 A.2d 828 (1961) (discussed at note 46 supra). A case frequently mentioned in conjunction with these is Key Realty Co. Zoning Case, 408 Pa. 98, 182 A.2d 187 (1962). Although *Key* foreshadowed the court's adoption of a diluted version of the "comprehensive plan" requirement, it was a case where the local authority had rezoned to exclude the plaintiff's proposed use and was, therefore, a case dealing with the "No" side of zoning rather than the "Yes" side. For the implications of this distinction, see text at notes 42-54 supra. A much more significant case was Cheltenham Township Appeal, 413 Pa. 379, 196 A.2d 363 (1964), which involved a two-step rezoning for a planned unit (apartment and shopping center complex). The lower court held the rezoning invalid citing *Eves.* The supreme court held in favor of the developer on the ground that plaintiff (a civic association) stood by while the developer proceeded to construct the early sections of the development and was therefore estopped. The opinion of the court carefully refrains from reaching the *Eves* issue—therein lies its significance.

stated, it is frequently impossible to relate the findings to the record or the conclusions to either. That the courts have permitted this state of affairs to continue is, I think, understandable. Of the decisions traditionally left to administrative agencies, the courts would not come across many that were both favorable to the applicant and would not yield to review by simple appearances. Now matters are changing, and the courts should realize that they cannot judge favorable administrative action by appearances alone. It is true that insisting on more decorous local procedures and a better record may not make the courts any the wiser on the merits of the controversy. But would they not feel more comfortable if there was evidence that local officials charged with dispensing this wisdom had all of the facts before them and made an effort to relate their conclusions to the facts? 

There is still another problem. Because of the current statutory limitations on the administrative function, many of the items for decision in a planned unit development may have to be left to the legislative body. Here there will be no record, no findings of fact, and no conclusions for the courts to review. If we are to have a better system for making sensitive adjustments to the particular site and the particular housing needs existing at the time development occurs, the way to begin is to work out a better procedural setting for all those adjustments that are best left to final determination at the time the project proposal is presented.

Some Practical Problems for Planned Unit Development

In the introductory part of this paper, I noted a number of practical problems that must be solved if planned unit development is to be

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70 The decision that is most likely to have these characteristics is the grant of a special exception, and in these cases the courts have shown signs of concern for their ability to review. The Illinois court warned that it would not countenance "unlimited application of the special use technique to land uses that can readily be accommodated within the customary categories." Kotrich v. County of Du Page, 19 Ill. 2d 181, 185, 166 N.E.2d 601, 604 (1960). The reasoning seems to be that the special exception technique must not be allowed to make inroads on the salutary principle that all progress must be by crude categories or we are lost. Perhaps my translation of what the court intended to say is unfair but, in any event, the point is that until recently local authorities showed no disposition to make such inroads through the special exception technique.

71 See, e.g., Summ v. Zoning Comm'n of Town of Ridgefield, 150 Conn. 79, 186 A.2d 160 (1962); Huff v. Board of Appeals of Baltimore County, 211 Md. 48, 133 A.2d 83 (1957).

72 It is interesting to note that Connecticut has adopted a unique provision requiring that all evidence presented before the zoning commission and the board of appeals be recorded either stenographically or by a sound recording device. Conn. Gen. Stat. § 8-7a (1958). That requirement, I would suggest, has a good deal to do with the favorable attitude of the Connecticut court towards flexible development control. See, e.g., Summ v. Zoning Comm'n of Town of Ridgefield, supra note 71.

73 The reaction of the Eves court is worth noting. See text accompanying notes 52-54 supra.
encouraged. At this point I want to discuss some of them in greater detail.

**Project Approval.** Approval of a project by the local public authorities should involve a simple unified procedure before a single agency authorized to pass upon all of the elements of the project. The draftsmen of our early enabling legislation, as I noted, did not overlook the need for such a procedure, and, in fact, incorporated it in section 12 of the model planning law of 1925.\(^7^4\) Under section 12, the local legislative body could extend to its planning board the power to approve subdivision plans "indicating lots where group houses for residence or apartment houses or local stores and shops are proposed to be built." Section 12 went on to make clear that "[s]uch plan, if approved by the planning board, shall modify, change or supplement the zoning regulations of the land shown on the plat." Two general standards were provided for the guidance of the board. First, "there shall be no greater average density of population or cover of the land with buildings than is permitted in the district wherein such land lies"; second, that no such plan shall be approved by the board "unless in its judgment the appropriate use of adjoining land is reasonably safeguarded and such plan is consistent with public welfare."

The draftsmen's discussion of section 12 leaves no doubt as to what was intended. The provision, says Bassett, would allow the developer to suggest, for instance, the location of a suitable business district on his plat. Perhaps he will want to surround it with a buffer multi-family house district. This balancing of street locations and widths, plazas and small parks, and zoning interchanges can best be made by the developer.\(^7^6\)

Nor is there any suggestion in section 12, or in the contemporary discussion of it, that the planning board would have no power to act on a proposal unless every detail of it conforms to standards set forth by the legislative body in advance. Section 12 was incorporated verbatim into the New York planning legislation in 1926 and 1927. Although section 12 was adopted without change only in New York\(^7^8\) and

\(^7^4\) See text accompanying note 4 supra.


Indiana, its significance is not confined to those states. The very fact that a provision of this sort was conceived by the men who are responsible for most of our planning legislation challenges us to reconsider the interpretation that we have been giving to that legislation. For section 12 not only reveals that Bassett, Williams and others were aware of project residential development, it also reveals that these men, otherwise so careful to meet the demands of the Constitution as they read it, saw no serious objection to a provision that would enable the planning board to pass on all matters presented, including the location, design, and distribution of different housing types and of "local stores and shops" upon the site.

I have had occasion to note earlier that this provision remained in the New York laws virtually unnoticed for over thirty years. The simple explanation of this neglect is that the provision was written years in advance of the time when developers or local authorities were ready to experiment with such a concept of residential development.

Although section 12 was ahead of its time, it did not solve all the problems that concern a developer today. For example, section 12 made no provision for handling the development of the larger project by stages. On the contrary, it provided that the power to approve the project was to be exercised "simultaneously with the approval of" the final subdivision plat. On the one hand the developer could not obtain approval for the entire project without filing a final subdivision plat for the whole site—something he could not afford to do for the larger project. On the other hand, the planning board might well have doubted that it had the power to approve a portion of the project because section 12 contained no authority or procedure for considering the rest of the project at the same time.

Moreover, there was a fundamental defect in the philosophy of section 12: the assumption that densities established for lot by lot development are appropriate for project development. Any enabling legislation or any local ordinance that assumes there will be no increase in density, will automatically limit planned residential development to occasional clustering of the single housing type already allowed under the standard district regulations. We cannot afford to overlook the fact that, for most developers, planned unit development represents a way of persuading local authorities to some relaxation of the exclu-

77 Indiana adopted the provision in 1951. IND. ANN. STAT. § 53-756(7) (1964) (added by Ind. Laws 1951 ch. 297, § 1).
78 It is significant that the 1963 amendment of Town Law § 281 (N.Y. Sess. Laws 1963, ch. 963) specifically limits the device to residential uses.
79 For recent changes in New York, allowing for section by section recording of a finally approved plat and section by section bonding of subdivision improvements, see note 129 infra.
SIONARY DENSITIES NOW PREVAILING THROUGHOUT THE SUBURBS. SO FAR AS I AM CONCERNED, THIS WOULD BE A DESIRABLE BY-PRODUCT OF A NEW APPROACH TO RESIDENTIAL DEVELOPMENT, NOT ONLY FROM THE PLANNING BUT FROM THE SOCIAL POINT OF VIEW.

SECTION 12 RECEIVED ITS FIRST AND ONLY TEST IN THE COURTS TO DATE IN HISCOX V. LEVINE.\(^8^0\) THE DEVELOPER, PROCEEDING UNDER SECTION 12, ENACTED AS SECTION 281 OF NEW YORK TOWN LAW (AS IT WAS BEFORE AMENDMENT), PRESENTED TO THE PLANNING BOARD A SUBDIVISION PLAT UNDER WHICH HE PROPOSED TO CLUSTER THE SINGLE FAMILY DETACHED HOMES ALREADY ALLOWED IN THE DISTRICT ON LOTS OF ONE HALF ACRE, RATHER THAN ON LOTS OF ONE ACRE AS REQUIRED BY EXISTING DISTRICT REGULATIONS. HE PROPOSED TO DEDICATE THE BALANCE OF THE TRACT FOR A PUBLIC PARK. SIX YEARS PRIOR TO HIS APPLICATION, THE LOCAL LEGISLATIVE BODY HAD PASSED A RESOLUTION AUTHORIZING THE PLANNING BOARD TO EXERCISE THE POWERS PROVIDED FOR UNDER SECTION 281 OF THE TOWN LAW. THE RESOLUTION WAS BRIEF AND CONFINE ITSELF TO A SIMPLE DIRECTIVE: "MAINTAIN [THE] AVERAGE DENSITY OF POPULATION," AND, IN ALL RESPECTS, PROCEED IN "STRICT CONFORMITY WITH § 281 OF THE TOWN LAW."\(^8^1\)

ACTING UNDER THIS AUTHORIZATION, THE PLANNING BOARD APPROVED THE DEVELOPER'S PLAT AND DEED OF DEDICATION FOR THE PARK. THE ACTION WAS CHALLENGED BY NEIGHBORS. THERE WAS SOME SUPPORT FOR THEIR ARGUMENT THAT THE NUMBER OF DWELLING UNITS THE DEVELOPER PROPOSED TO BUILD UNDER THE CLUSTER PLAN EXCEEDED THE NUMBER OF DWELLING UNITS THAT HE COULD HAVE BUILT HAD THE ONE ACRE MINIMUM LOT SIZE BEEN PRESERVED.\(^8^2\) IN HOLDING THE BOARD'S ACTION INVALID, HOWEVER, THE COURT PAID NO ATTENTION TO THIS POINT. RATHER, THE COURT DECIDED THAT THE ACTION OF THE BOARD ALLOWING REDUCIONS IN THE PRESCRIBED LOT SIZE ON SO LARGE A TRACT (ONE HUNDRED ACRES IN ALL), "ENCROACHES ON THE LEGISLATIVE AUTHORITY TO MAKE ZONING CHANGES (SECTION 265 OF THE TOWN LAW) [AND SO] . . . CANNOT BE UPHELD."\(^8^3\) AS A MAKEWIGHT, THE COURT ADDED THAT SECTION 281 OF THE TOWN LAW DID NOT PERMIT THE AREA DEDICATED OR SET ASIDE FOR OPEN SPACE TO BE COUNTED IN COMPUTING THE AVERAGE DENSITY THAT IS TO BE MAINTAINED ON THE BALANCE OF THE TRACT.\(^8^4\) ON BOTH POINTS THE COURT'S

\(^8^0\) 31 Misc. 2d 151, 216 N.Y.S.2d 801 (Sup. Ct. 1961).
\(^8^1\) Id. at 153, 216 N.Y.S.2d at 804.
\(^8^2\) The gross acreage involved was 100.8. The developer proposed to dedicate 37.5 acres of this for a park. On the remaining 63.4 acres he planned to build 79 dwelling units. It is possible that 100.8 acres would not have accommodated 79 units at a one acre minimum. The builder must allow approximately 20-25% of the gross acreage for streets, depending upon the site plan and topography. In addition, it is not always possible or practical to develop all of the remaining land in exact units of one acre.

\(^8^3\) 31 Misc. 2d at 154, 216 N.Y.S.2d at 806.
\(^8^4\) Id. at 155, 216 N.Y.S.2d at 806-07.
construction flies in the face of the language and history of the statute.\(^8^5\)

In most states, of course, statutory support for attempting to consolidate the approval of a planned unit development in the hands of a single agency is slight. Nowhere, perhaps, is it slighter than in New Jersey. It is interesting to note that in 1930 the New Jersey legislature did adopt Bassett's model planning law, including section 12.\(^8^6\) But in the process of adoption, section 12 was materially altered. Instead of allowing the planning board to approve the plan of development, the New Jersey version left it with only the power to recommend approval to the governing body. The cautious view taken of the powers of the planning board in New Jersey extended also to the powers of the board of adjustment. Except for a brief period, the New Jersey statutes have taken a restrictive view of the board's power to grant variances.\(^8^7\) The 1953 revision\(^8^8\) of the New Jersey laws further tightened the scope of the administrative functions. What remained of Bassett's section 12 was dropped. A provision was added which suggests that the planning board cannot make any determinations that involve lot sizes,\(^8^9\) creating doubt whether the planning board can be permitted to administer a simple cluster ordinance. That doubt has not been dispelled by the New Jersey courts. In *Swimming River*,\(^9^0\) for example, the court suggests that the power to grant reductions in lot sizes, though limited to a definite schedule set forth in the governing ordinance, is a "special exception" power which cannot be given to the planning board but belongs exclusively to the board of adjustment.

\(^8^5\) It is possible the court believed that its narrow reading of §281 was constitutionally compelled. If so, it did not articulate this thought. Indeed, there is little authority to support it. It has been held that the separation of powers doctrine does not prevent a state legislature from delegating authority over local matters to any appropriate local agency. As one court stated "[J]ust how much power is granted by a particular statute is a question of statutory construction . . . not a constitutional question." Baltimore County v. Missouri Realty, Inc., 219 Md. 155, 162, 148 A.2d 424, 428 (1959). The authorities are reviewed in *Legal Aspects of Planned Unit Residential Development* § 3.3.

Constitutional doctrines, I would suggest, have very little to do with the tendency to construe narrowly the powers of local administrative agencies. Nonetheless, the tendency will persist both so long as the courts fail to reexamine their fear of progress by sensitive adjustment to particular conditions and so long as they fail to identify and weigh the interests that ought to be protected. In *Hiscox*, there was no indication why the neighboring owners were complaining. But the principal plaintiff was a private club, and I am tempted to suggest that the concern was for the "tone" of the neighborhood.


SYMPOSIUM: A LAW PROFESSOR'S VIEW

The court, however, had previously recognized that the planning board has special competence in site planning matters and that the line between site planning and decisions affecting uses and structures is sufficiently flexible to respond to the exigencies of the situation.\textsuperscript{91} Swimming River, moreover, did not involve cluster development. The court there was dealing with an ordinance that sought to make scheduled reductions available on an individual lot basis.\textsuperscript{92} Surely, decisions as to lot size, when set in the context of subdivision plan approval, can readily be characterized as "site planning" decisions. Indeed, this appears to have been the view of the lower New Jersey court in Chrinko\textsuperscript{93} when it approved a cluster procedure that utilized the planning board (although Swimming River was not cited). But if there remains a question whether the planning board can be authorized to exercise discretion as to lot size—even when the range of this discretion is confined to a definite schedule set forth in the original ordinance—one cannot speak encouragingly of the chances that New Jersey courts would approve planning board discretion on such matters as the number, location, and distribution of various housing types. The conclusion that these are matters for the board of adjustment is equally untenable. The idea that the board should perform a significant function in planned unit residential development has to be rejected, both because it has no support in history and because it is wholly impractical. How would the planned unit development procedure work when the site plan has to be approved by the planning board and the distribution of the housing on the site has to be approved by the board of adjustment? When one is dealing with planned unit development, distinctions between site planning powers, special exception powers and legislative powers are untenable unless one is prepared to deny the "unit" characteristics of the project. Bassett and others recognized this when they drafted section 12 of the model planning law of 1925. That section 12 was not more widely adopted is due to the fact that few legislatures sensed the need for it in the late twenties. But Bassett did not give up his idea. In the Standard City Planning Enabling Act of 1928\textsuperscript{94} he included some provisions which, if read carefully, can do most of the job done by section 12. For instance, in

\textsuperscript{91} Kozesnik v. Township of Montgomery, 24 N.J. 154, 186, 131 A.2d 1, 18 (1957).
\textsuperscript{94} (U.S. Dep't of Commerce 1928).
section 15 of the 1928 act Bassett inserted a paragraph which provides (as part of the subdivision approval function) that the planning board shall have the power to agree with the applicant upon use, height, area or bulk requirements or restrictions governing buildings and premises within the subdivision, provided such requirements or restrictions do not authorize the violation of the then effective zoning ordinance of the municipality.

Will this do the job of section 12? Certainly it will, if the zoning ordinance is silent on the details and is confined to setting out the broad limits within which the planning board's discretion must operate. Furthermore, Bassett envisaged that the ordinance would be silent on the details. In section 14 of the 1928 act, he demanded that the planning board adopt subdivision regulations as a condition of the exercise of its powers, and he provided that:

Such regulations may provide for the proper arrangement of streets . . . for adequate and convenient open spaces for traffic, utilities, access of fire-fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots. (Emphasis added.)

Clearly then, Bassett anticipated that the zoning ordinance would not prescribe lot sizes. Nor can this provision be read to require the board to adopt regulations which leave no room for substantial adjustments when the subdivision plan is presented. Otherwise, the provision allowing agreement on "use, height, area and bulk requirements" in the next section, section 15, would become nonsensical.

Many lawyers and public officials, I suspect, are unaware that both sections 14 and 15 are in force in at least six states. Moreover, a large number of states that did not adopt section 15, did adopt section 14. Section 15, of course, is particularly helpful in supporting an approach to planned unit development entirely through the planning board. It is possible, however, that section 14 alone may be sufficient, because the subject matter which the board is authorized to cover by


its own subdivision regulations is extremely broad. The problem, of course, is that planned unit development is far more difficult in any state whose enabling laws have no specific provisions which might support an argument that the planning board may perform more than a bare site planning function. In those states, there are the following alternatives: (1) the courts must be prepared to read the enabling legislation more expansively, or (2) planned unit development will have to be wholly preregulated (leaving no discretion to the planning board except on pure site planning matters), or (3) planned unit development will be exposed to a patchwork procedure, involving both the planning board and the local legislative body, and perhaps even the board of adjustment.

**Hearings.** A requirement that the approval of more than one agency is necessary is not calculated to encourage planned unit development, particularly if the developer will be forced through several public hearings before he can complete his project. The problem of repetitious hearings, however, is not confined to planned unit development.

Existing enabling legislation emphasizes the distinction between zoning and subdivision control by requiring that public hearings be held on each, although Bassett and others recognized that the distinction could not be maintained when applied to the larger project. The assumption, of course, is that the legislative zoning function will be exhausted long before the developer arrives on the scene, leaving only site planning questions to be determined on consideration of his specific proposal. When this assumption proves false, as it often does, the developer will have to present his proposal at a public hearing for a rezoning. After obtaining the necessary rezoning, he may then be shunted to the planning board for further hearings on each subdivision approval. Local governing bodies frequently favor further hearings

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97 Although Pittsburgh did not appear to rely upon §14 in establishing its planned unit districts, see Craig, *Planned Unit Development As Seen From City Hall*, 114 U. Pa. L. Rev. 127, 130-32 (1965), it is interesting to note that it is the only political subdivision of the state that has this provision—a curious reflection on the fragmented condition of the Pennsylvania enabling legislation.


99 See text accompanying notes 4, 74-77, 94-97 supra.

100 Zoning requirements are not so much rules under which future development will occur as they are rules under which development cannot readily occur—rules to be bargained away against concessions by the developer when he chances along. I think one could demonstrate that most development today does not occur under existing zoning but rather by way of some change or relaxation in the existing zoning undertaken as part of a bargaining process between the developer and the local authority.
in order to emphasize the planning board's responsibility for what was done.

The purpose of public hearings is to afford the public notice of, and an opportunity to object to, the proposed project. The fact that the enabling legislation requires a public hearing on subdivision approval, in and of itself, should not be read to require that separate hearings be held if essentially the same proposal has already been presented at a hearing on the application for rezoning. The fundamental question is at what stage in the evolution of a specific project should the hearings be held? It appears that the draftsmen of current enabling legislation did not give this question enough thought.

Generally, the provision made for public hearings in the current enabling legislation reflects an assumption that the hearings should be held at the last hour, when the proposed project has crystallized in every detail. Although the hearings prescribed for subdivision approval are frequently referred to as hearings which must be held before final subdivision approval is given, the location of this reference in the statutes strongly suggests that the hearings must be held on the final subdivision plan.\textsuperscript{101} If this suggestion is taken seriously, the developer who embarks on a larger project will have to face a number of public hearings because, as I have noted, he cannot afford to proceed to final subdivision approval on the entire project at one time.

The point I am making here can be best illustrated by reference to New Jersey, one of the few states where an attempt has been made to revise the original procedure so as to reflect more closely the needs of modern development. Prior to 1953, the New Jersey legislation, in common with other legislation which had its origins in the standard enabling acts, simply provided that final subdivision approval should be given "after a hearing."\textsuperscript{102} There was no provision for tentative approval, as there was none in the standard acts. It is clear that an orderly process toward final approval on a larger project requires at least one intermediate step—a presentation at which the larger lines and more important features of the project can be settled, so that the developer knows what will be required of him on final approval before he embarks on further expenditures in the preparation of detailed plans. A tentative approval procedure is now incorporated in all of the better ordinances, and has been given recognition in a number of enabling acts. But very few of the legislative provisions offer to the developer any assurance that the plan as tentatively approved will be honored by the local public authority when the time comes for final

\textsuperscript{101} See statutory provisions cited in note 98 \textit{supra}.

approval. The New Jersey Municipal Planning Act of 1953 carries forward the old provision that final approval must be "after a hearing," but it does not mention hearings in the new provision that deals with tentative approval. This represents something of an hiatus. If the old provision is read to require a hearing on the final subdivision plat, the new provision makes nonsense of it because, under the new provision, the developer is entitled to final approval in accordance with the "general terms and conditions" established at tentative approval, for a period of three years. Obviously, if public participation is to have any meaning, it must take place at the tentative approval stage. How the hiatus will be bridged by the New Jersey courts is not clear, although the supreme court has intimated that the developer cannot claim the statutory protection for tentative approval unless there has been a hearing at this stage. Does the court mean that a second hearing may be required at final approval?

The purpose of a tentative approval procedure, as I mentioned above, is to fix the broad outlines of the proposed project so that the developer may know where he stands before he undertakes substantial expenditures and commitments associated with the preparation of detailed plans. One of the reasons why developers find it necessary to proceed to final approval for the larger project by sections is that it enables them to limit the period during which substantial investments in the project are carried without a return. The proposal presented at tentative approval, therefore, cannot be required to contain all the detail which is required at final approval, otherwise much of the purpose of a two stage (tentative-final) approval procedure is compromised. So the question whether public hearings ought to be held on tentative or final approval (or both) is not as simple a question as might at first appear. A fundamental question of policy is involved, as well as technical questions which ought to be resolved by appropriate legislation. The policy question is whether the purpose of a public hearing is fairly met by confining it to the larger lines of the proposed project, considering the discouraging effect which repetitious hearings (otherwise likely to result) may have on better, more ambitious forms of residential development. If the answer is that a hearing

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103 See notes 124-31 infra.
104 See text accompanying notes 128-30 infra.
107 Ibid.
at tentative approval is adequate protection to the public, there remain
some further questions that ought to be resolved by legislation. If
the developer proposes modifications in the terms of the tentatively
approved plan (for example, because experience in the early stages
shows them to be necessary), should the local public authority be
allowed some leeway to approve such proposals without further public
hearings? If so, how should that discretion be defined? Suggested
answers to these questions will be found in the model enabling legisla-
tion, discussed by Richard Babcock in this symposium. I will merely
remark here that the failure of current enabling legislation to address
itself to these questions is inexcusable, considering their importance
both from the policy and practical points of view.

Development by Stages. Some of the problems associated with
the development of a larger unit by stages have already been men-
tioned. It is important to note that development by stages does not
so much reflect the need to time construction as it reflects the need
to time final approval. In standard development, final approval is
obtained when the subdivision plat is approved and recorded. There
is no requirement that the developer proceed to construct the homes
immediately or that he complete construction by a certain date. If he
cannot proceed to the final approval for an entire project it is not
because construction and marketing will take several years but because,
if construction and marketing will take several years, he cannot afford
the costs and consequences of obtaining final approval for the entire
project. Before final approval, he must make detailed engineering
studies and surveys, prepare the site plan (subdivision plat), and
furnish bonds for public improvements. For standard development
these are not necessarily substantial expenses. But the consequences
of obtaining final approval and recording the plat are troublesome.
In many localities the recording of a subdivision plat is the signal for
an increase in taxes—each lot being assessed separately on the basis
that it is about to be developed. More importantly, changes in the
plan of development become more difficult. Public streets shown on
the plat will have to be dedicated at the time of approval. Indeed,
under both common law and statute, the mere recording of a plat will
have this effect. Furthermore, the courts have been expanding the

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109 See text accompanying notes 6-16 supra.
doctrine that purchasers who buy lots by reference to a recorded plat acquire rights in those areas which appear intended for common use and enjoyment. Thus, after the recording of a plat and certainly after the sale of lots, the site plan may become substantially frozen and changes in it will require both public proceedings and private releases.

In standard development, the factors that force the developer to proceed to final approval of the larger project by stages present few problems of public concern. Although the developer may tender a tentative plan for the whole project, final approval of a stage will not be seriously affected by what is shown in the rest of the plan except for the street patterns. This is not wholly surprising when we consider that standard development responds to planning controls which focus on the lot, not the project.

Even in the case of a simple cluster, which merely involves a reduction in lot size in exchange for offsetting common open space, the situation is changed—perhaps not materially, but it is changed. The location of the common open space ought to be related to the whole project, not to each stage. This is true, of course, of street patterns in standard development. But in the cluster development, open space also controls the density.

If the density (or land use intensity) prescribed for the whole project must be preserved within each finally approved section, builders may be forced to distribute open space in a manner that responds more to the need for stage by stage development than to good site planning. On the other hand, if there is no requirement that the overall density (or land use intensity) be preserved within each finally approved section, the developer will probably start with the higher density portions of his project first in order to recoup his initial investment as rapidly as possible. This is particularly true in the full-fledged planned unit, where various housing types are involved, since various housing types represent different potential densities.

The local authority may not be satisfied simply with the thought that by overloading the earlier sections of his development the developer is exhausting the density available for the whole project. It will want some assurance that density borrowed from subsequent stages of the project will find its way into usable open space. The fact that the density available for the whole project is being exhausted by develop-

ment in the early stages guarantees only that there will be usable open space if the subsequent stages are completed. If development stops for any reason, all that is assured is that there is some land left in private hands that cannot be developed unless a certain proportion of it is devoted to open space—and even this assurance may wear thin with time.

It seems clear that the concern of the local authorities is based upon a realistic fear. But when the developer proposes to exceed the average density prescribed for the whole project with respect to any section of development, it is unwise to require that he set aside and locate the necessary open space immediately. On the one hand, if development is discontinued, there is a possibility that the housing may be in one section while the open space is in another. On the other hand, even if development continues as projected, experience with the earlier stages may call for substantial changes in the site plan for the rest of the project. If some or all of the proposed open space is definitely located by deed of dedication or other recorded instrument, relocation to accommodate a change in site plan may become difficult because of the rights that may be implied in favor of the early purchasers. Instead, the developer should be required to provide appropriate assurance that the necessary open space will be set aside at the proper time, whether development progresses or is discontinued, in a location which makes the best sense in the light of the facts as they then appear.

This assurance can be obtained with the help of a floating open space easement. Such an easement might be employed in the following manner: As a condition to the final approval of any section which (taken together with prior completed sections) exceeds the density prescribed for the whole project, the developer will be required to execute a deed running in favor of the local public authority, giving it the right to have a certain amount of open space located in accordance with a tentative plan (or any subsequent modifications of it) as long as development progresses; if development is discontinued, the developer will be required to locate the open space where it will make the most sense in relationship to the completed sections.

A floating easement, an easement that is to be located in the future in accordance with conditions prescribed in the deed, is nothing new in the law. Moreover, there should be no doubt today that the

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112 See note 111 supra.
113 The details of such a deed are discussed in Legal Aspects of Planned Unit Residential Development § 6.3.
local public authority has the power to accept and enforce such an easement.\footnote{See \textit{Urban Land Institute}, \textit{Homes Association Handbook} § 21.7 (Tech. Bull. 50, 1964); \textit{N. Williams, Land Acquisition for Outdoor Recreation—Analysis of Selected Legal Problems} (Outdoor Recreation Resources Review Comm’n Rep. 16, 1962).}

The proposed floating open space easement provides a solution to only one problem presented by sectioned development of a planned unit. It allows a planned unit to be developed in sections containing different densities without prejudicing the best location for the offsetting open space.

An objection may be made that I have assumed the developer should be allowed to carve up the planned unit in any manner that is convenient to him and proceed to the development of any portion with no more guarantee for the integrity of the entire project than what is furnished by an assurance that a certain amount of open space will be located if development is discontinued. Indeed, the thought that development might be discontinued conflicts with the idea of the planned unit itself—which is that all housing types and all elements of the site plan are placed in relationship to each other so that no part of the project can readily stand on its own. This has led to a frequent suggestion that final approval should not be given for any section of such a project unless completion of the whole is guaranteed by the developer. It is important to understand where that suggestion leads us.

Contrary to popular belief, the developer of a new residential project does not undertake to complete it. Assurance of completion depends partly upon the character and financial responsibility of the developer himself and partly upon the investment he is required to make in the project prior to final approval of any section. The level of his investment in the project is controlled by what he is required to do in terms of engineering work, surveys, site planning, architectural design and bonding of public improvements prior to final subdivision approval. When he requests final approval by sections, he is asking the local public authority to let him defer some of these investments so that they may be related more closely to actual construction and marketing. If this request raises a question of the developer's commitment to the entire project, the public interest in completion suggests that it ought to be denied. But the request also raises a question of cost and of flexibility in the development plan. Suppose, for example, that subdivision improvements such as sewers, streets, water lines, landscaping and so forth that will have to be provided in some future sections of the development will cost three hundred thou-
sand dollars. Let us assume further that none of these improvements are necessary to serve a current section of the development. To assure completion of the project, however, the local authority requires the developer to provide them immediately or, in the alternative, to bond them. Whether he borrows to cover the cost of these improvements or invests his own capital or obtains surety, there is added to their cost (three hundred thousand dollars) another cost: the profit lost to the developer on the money (if he has used his own capital) put into the improvements during the period before he reaches the area which they service and begins to market the homes; the interest paid to a lender over this period (if he has borrowed the money); the cost of the bonds (if the improvements must be bonded rather than made immediately).

As long as expenditures on basic improvements do not come out of interest free borrowing, a requirement that the developer make the improvements before they are needed adds to the cost of development—so, of course, does a requirement that he bond them. Thus, the decision to force the developer to make these investments for the entire project involves more than a question of commitment. It may discourage planned unit development entirely. Alternatively, it may add to the cost of housing for the consumer.

The Administration sponsored housing bill of 1964 contained provisions designed to aid developers in obtaining reasonable financing for basic improvements in the development of "new communities." The way "new communities" was defined suggested that the program would be confined to very large projects in the nature of new towns. Under this program the FHA would have been authorized to insure loans for basic improvements. But the program envisaged interest rates up to six percent and contained other limitations and conditions. It was not too broadly supported by the building industry—largely because of fears that it would put smaller builders at a competitive disadvantage. The bill was not enacted as part of the Housing Act of 1964, but a modified version was enacted in 1965. The most important changes were designed to eliminate any suggestion that the program was confined to large "new town" projects.

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119 The original bill, S. 1354, H.R. 5840, 89th Cong., 1st Sess. (1965), described the program as one available to "extensive new developments." This language was
program of this sort is badly needed. But financing for basic improvements at reasonable rates, or even interest free will not solve the whole problem of section by section development. Section by section development not only represents the need to hold costs at a minimum, it also represents the need to retain flexibility in the plan of development so that it can respond to changing circumstances and to experience when development is extended over a substantial period of time. A community that requires basic improvements for the whole project to be made at one time is forgetting what such haste has done in the past to establish conditions of blight.\textsuperscript{120} If assurances on future sections of a project are needed, they should, as far as practicable, be taken in the form of security rather than in the form of actual improvement. But the question remains whether this added cost of development is justified—indeed, whether either form of assurance adds significantly to the certainty of completion. It should be recalled that the investment the developer is forced to make in preparation for planned unit development—on site planning, architectural and engineering work, market analysis, legal and financing arrangements and so forth—is already quite considerable. It is questionable, therefore, whether public requirements that force upon him a greater level of investment add much to the assurance that he will complete if he can.

My discussion so far has been confined to the question whether the developer should be required to make or bond improvements or set aside open space in future sections of his development. As to each section that has been finally platted and approved, there can be little question that the developer must provide adequate assurances that the necessary public improvements will be made. Nor can there be any doubt that the common areas shown on a final subdivision plat must be definitely set aside by dedication to the public or to an appropriate organization for the benefit of the home owners.\textsuperscript{121} However, when the developer plans to make substantial improvements upon the common areas (for example, to build a swimming pool or other community facility), we again encounter problems of timing and financing. Ideally, perhaps, these improvements should be completed before the

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\textsuperscript{120} The evils of premature subdivision, prevalent in the twenties are discussed in Cornick, \textit{Premature Subdivision of Urban Lands} (1938).

\textsuperscript{121} \textit{Urban Land Institute, Homes Association Handbook} § 12.23 (Tech. Bull. 50, 1964).
first home is sold. From the developer's point of view, the added costs of such an early investment may be partially offset by their value in sales promotion. Many developers, however, are hard pressed to find the capital or to secure the necessary financing for the improvements. Therefore, they would prefer to delay until a substantial number of sales have been closed. Responsible developers recognize, of course, that they must place in escrow an appropriate sum out of the sale price of each home. In addition they are prepared to give their personal assurance that the improvement will be made. From the home purchaser's point of view, neither of these safeguards will serve as a complete substitute for the improvement itself because there is always the possibility that the developer will become insolvent and that development will be discontinued before the accumulated escrow is adequate to cover the promised improvement. On the other hand, even if the developer furnishes the improvements before sales begin, their presence will not guarantee the early purchasers' enjoyment against the adverse effects of a discontinuance. Normally, adequate maintenance requires the participation of all the homeowners in the proposed development. Thus it remains questionable whether the early completion of improvements adds anything to the protection of the home purchaser which is not supplied by the escrow approach. Moreover, the escrow approach has the definite advantage of being less costly, and the savings, hopefully, will be passed on to the consumer.

The timing of improvements on the common areas and the method used to finance them involves not only the developer and the home buyer but the mortgage lenders as well. FHA, for example, has traditionally taken the position that it will give no credence in its appraisals to off-site (neighborhood) improvements unless they are in place and free and clear of all liens before the sale of the first home, or unless the developer deposits in escrow an amount which is not less than 150 percent of the FHA's estimate of their cost.\textsuperscript{122} Although these requirements were established for standard residential developments, where costly off-site improvements are more likely to fall in the essential category, there is little indication that FHA plans to change its policy on appraisals in the planned unit context.\textsuperscript{123} It is

\textsuperscript{122} FHA, Underwriter's HANDBOOK: HOME MORTGAGES §§71706.1-.8 (1959) (§71706.4 provides that in certain special cases the escrow need only be 100%). FHA Forms 2606 and 2606a depict the escrow agreement.

\textsuperscript{123} See FHA & VA, SUGGESTED LEGAL DOCUMENTS FOR PLANNED-UNIT DEVELOPMENTS, FHA Forms 1400-03, VA Forms 26-8200-26-8203 (1965). The forms represent a suggested declaration of covenants, articles of incorporation, and by-laws to establish a home owners' association for the maintenance of common areas. For the most part, the documents suggested by the FHA and VA follow the model forms
arguable that a more liberal policy—one that would make room for
the cumulative escrow arrangement, for example, at least for improve-
ments that might be described as nonessential—would lend great
encouragement to the provision of more amenities in new residential
developments.

Assurance Against Change in the Public Requirements. Because
planned unit development demands a larger initial investment on
the part of the developer, an obvious way of encouraging such
development without restricting it to the high price range would be to
reduce the risk to which his initial investment is exposed. This can be
accomplished by extending to the developer greater assurance that the
public requirements and specifications established at the time of initial
approval of the project, or at least at the time of final approval of a
section of it, will not be subject to capricious change by the public
authority. The significance of this point cannot be overemphasized.
Presently the developer is left uncertain as to what basic subdivision
improvements will be required of him if the regulations are changed.
Contrary to popular belief, a large part of the cost of development—
indeed, of the cost of housing—depends on the specifications for basic
subdivision improvements.

Very few jurisdictions have statutory provisions designed to offer
some assurance that the local public authority will honor an approved
plan of development. Furthermore, most of these statutes are am-
biguous and, therefore, fail to encourage substantial investment in
ambitious projects. In Massachusetts, for example, the statutory as-
surance is so framed that it remains unclear whether it extends to the
preliminary plan as well as to those sections of the project which have
been finally platted and approved. The finally platted sections are
clearly given protection for a period of five years, but the statute

prepared by the Urban Land Institute and published in URBAN LAND INSTITUTE,
HOMES ASSOCIATION HANDBOOK 382-402 (Tech. Bull. 50, 1964). One point of de-
parture material to the observation made in the text is that the FHA-VA suggested
coventants, in effect, prevent the retention or creation of any liens or encumbrances
on the common areas after the sale of the first lot. FHA Form 1401, VA Form
26-8201 (coventants) Article V, §§1(c), 4. Thus, if the developer plans to finance
improvements on the common areas, he will have to persuade the construction lender
to confine his security to the building lots. The position taken in the forms suggests
that FHA and VA will not be satisfied with any financing method on the common
facilities which carries a risk, however slight, that the enjoyment of such facilities
might be disrupted by failure of the project.

124 MASS. GEN. LAWS ch. 40A, §7A (Supp. 1964). This provision was added
in Massachusetts, suggest that a finally approved plat is not protected against uni-
lateral change by the local public authority except when the developer can show
that he has "changed his position or made expenditures in reliance upon such approval,"
MASS. GEN. LAWS ch. 41, §§81W, 81DD (1961). If these provisions continue to
have force after enactment of MASS. GEN. LAWS ch. 40A, §7A (Supp. 1964), the
developer may still be exposed to the uncertainties inherent in the common-law
estoppel concept, see note 131 infra.
is far from clear when it attempts to extend protection to the preliminary plan. If read literally, the Massachusetts statute assures the developer that the preliminary plan will not be affected by subsequent changes in the zoning or subdivision requirements if a final plan, evolved from the preliminary plan, is given approval.\(^{125}\) Read in this way, the Massachusetts provision is not entirely nonsensical, but then all it says is that the local authority may waive compliance with intervening changes in the requirements—not that it must do so. Nor is this limited reading of the provision entirely fanciful. The Massachusetts statute calls for a public hearing prior to the approval of the final ("definitive") plan.\(^{126}\) Thus the statutory language strongly suggests that this hearing is to be held on the final plan, which would mean that the developer acquired no right to rely on the preliminary plan. It may be that the ambiguities in the Massachusetts statute have been resolved practically and sensibly on the local level, but the matter is much too serious to be treated to a perfunctory or ambiguous solution in the statutes.\(^{127}\) Adequate statutory solutions must respond to the fact that final platting of a large project is not practical from the developer’s point of view or wise from the public’s point of view.

If early investment in site planning, architectural design, and overall project improvements is to be encouraged, assurances against change in the requirements must come before final platting—at the tentative plan stage. The need for assurances at that stage has been given its clearest legislative recognition in New Jersey\(^ {128}\) and more recently in New York.\(^ {129}\) But the statutory assurance has been limited to changes affecting lot sizes (in New Jersey, by the courts),\(^ {130}\) and it is available only over a period of three years or less. This period is certainly inadequate for the larger planned unit.


\(^{127}\) Much the same ambiguity is found in the Connecticut statute. It contains two provisions, both adopted in the same year, one of which clearly extends protection only to areas finally platted and approved. Conn. Gen. Stat. Rev. §§ 8-25a, 8-26 (Supp. 1963). The other, equally clearly, protects both the final and the tentative plan. Conn. Gen. Stat. Rev. §§ 8-28a, 8-28b (Supp. 1963). The inconsistency has not been judicially resolved, unless at the local, unreported level, but two reported opinions suggest, obiter, that the developer is entitled to no protection until final approval. Harris v. Planning Comm'n of Town of Ridgefield, 151 Conn. 95, 100-01, 193 A.2d 499, 502 (1963); Corsino v. Grover, 148 Conn. 299, 314, 170 A.2d 267, 274 (1961). The Connecticut statute does not, however, present any problem with hearings inasmuch as hearings are discretionary with the planning commission. Conn. Gen. Stat. Rev. § 8-26 (Supp. 1963).


\(^{129}\) N.Y. Town Law §§ 265-a, 276(3), 277(1).

In the absence of a statute, the courts have been even more reluctant to protect the developer unless he has made very substantial expenditures on the faith of a local approval. Obviously, a test that requires the developer to venture his capital against the uncertain chance that a court might find his outlay sufficiently "substantial" to warrant protection is hardly designed to encourage daring.