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IMPROVED STATE ENABLING LEGISLATION FOR THE NINETEEN-SIXTIES: NEW PROPOSALS FOR THE STATE OF NEW MEXICO

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As in many states, the pattern of New Mexico enabling legislation relating to city, county and regional planning has been essentially a haphazard accretion of specific responses to an historical series of *ad hoc* needs. At no point has there been a comprehensive attempt to assess the development problems that the State must face in the coming decades and to formulate a complete pattern of legislation capable of permitting a wide and effective variety of local responses to problems of growth.

For example, municipalities were given the power to zone in 1927.[1] The right to create municipal planning commissions, however, was not established until 1947.[2] Thus, for twenty years a hiatus existed between the implementation of land-use controls, and provision for an adequate agency to formulate the basic policies toward which such controls should be directed. Similarly, in 1959 the zoning power was extended to counties,[3] yet these jurisdictions still are not enabled to create planning commissions.[4] Nor have boards of adjustment yet been provided for. In addition, county subdivision platting controls have never been tied to any specific procedures to assure coordination with an overall policy, or perhaps more important, with the subdivision controls of the municipalities.[5] Again, Section 14-2-25 [5a] of the New Mexico statutes refers to an "official map," but no other section of the enabling acts explains what constitutes such a map, how it is to be prepared, or its legal effect.[6]

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1. N.M. Laws 1927, ch. 27, §§1-10, at 31-35 (now N.M. Stat. Ann. §§14-28-9 to 14-28-18 (Supp. 1961)).

2. N.M. Laws 1947, ch. 204, §§1-20, at 444-53 (now N.M. Stat. Ann. §§14-2-14 to 14-2-33 (1953), as amended, N.M. Stat. Ann. §14-1-15 (Supp. 1961)).

3. N.M. Laws 1959, ch. 271, §§1-10, at 767-74 (now N.M. Stat. Ann. §§14-28-9 to 14-28-18 (Supp. 1961)).

4. An act enabling counties to establish planning commissions was voted by the legislature in 1959, but failed because of clerical omission of an enacting clause.

5. N.M. Stat. Ann. §§14-2-9 to 14-2-13 (1953) (enacted in 1939). Where a single subdivision lies partly within an incorporated city, town, or village and partly outside, both the municipality and the county must approve. N.M. Stat. Ann. §14-2-13 (1953). This, however, is the only kind of municipal-county coordination called for, and has itself become ambiguous since advent of extraterritorial municipal subdivision control in 1947. N.M. Stat. Ann. §14-2-23 (1953). See [1957-1958] Rep. N.M. Att'y Gen. Op. No. 58-245.

5a. N.M. Stat. Ann. § 14-2-25 (1953).

6. Section 14-2-33 speaks of the preparation of detailed maps for future streets, but in no way relates itself to the previous section.

In the meantime, the state continues to grow at an increasing rate. During the decade from 1950 to 1960 only six of the forty-nine other states gained proportionately more population than New Mexico.[7] The degree of urbanization in the state has been even more marked: 62% of New Mexicans lived in urban areas in 1960 as compared to only 25% in 1930.[8] The figure may reach 75% by 1970.[9]

From an objective point of view, then, there can be little argument that the present system of enabling legislation in the state contains major omissions and is inadequate to deal with either the general growth of the state or the rapid urbanization that will surely mark the decade of the nineteen-sixties.

New Mexico, however, is not unique in this respect, and many states are currently showing active interest in major revision of enabling legislation.[10] The problem received recognition in New Mexico in 1959, when the State Planning Office was created within the Department of Finance and Administration.[11] Among others, a stated purpose of the Office was to "submit recommended legislation to the legislature or any of its committees in connection with studies relevant to state planning and development. . . ."[12] Under the terms of the act, the State Planning Office contracted with the present author to review existing New Mexico enabling legislation in the light of contemporary thinking and experience in other states and in the planning profession and to prepare a report on the planning laws needed to establish a comprehensive framework for regional, county and municipal planning in New Mexico. Drafted during the summer of 1960, the report presented preliminary drafts of a comprehensive set of new enabling acts, together with explanatory notes, a consideration of relevant constitutional questions, and a review of similar legislation in other states.[13]

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7. Bureau of the Census, U.S. Dep't. of Commerce, Census of Population, 1960, Final Report PC (1)-1A, Table 16. In 1950-1960, the population of New Mexico jumped 39%, as compared to 28% in 1940-1950. *Id.*, Figures 22 and 23.

8. *Id.*, Table 20. Both of the numbers cited are based on the old definition of urban population. Under the current definition, the urban population of New Mexico is considered to be 66%.

9. University of New Mexico, Projections by Bureau of Business Research (Oct. 19, 1959), at 9. The projected figure is based on the current urban definition. See note 8, *supra.*

10. The matter has become of sufficient concern that the American Institute of Planners in 1960 created a national standing committee to help coordinate professional effort in this field. At a working meeting in Philadelphia on October 25-26, 1960, representatives of fifteen states were present. Particularly thorough studies have been undertaken by the Illinois Planning Policy Committee, 72 West Adams Street, Chicago 3, Illinois.

11. N.M. Laws 1959, ch. 255, §§1-7, at 722-26. In 1961, these sections were amended to make the State Planning Office a direct staff agency of the Governor, no longer under the Department of Finance and Administration. N.M. Laws 1961, ch. 237, §§1-7, at 747-50 (now N.M. Stat. Ann. §§4-20-1 to 4-20-7 (Supp. 1961)).

12. N.M. Stat. Ann. §4-20-3(3) (Supp. 1961). See also N.M. Laws 1959, ch. 255, §2(B), at 723.

13. Original report on file at the State Planning Office, State Capitol Building, Santa Fe. A limited number of copies have been produced and circulated by the State Planning

A number of elements of the New Mexico report relate directly to specific problems of that state. On the other hand, the fundamental questions of land-use control in a democratic society are common to all states, thus some of the recommendations may be of wider interest than others. The present article attempts to summarize these portions of the New Mexico report.

* * * *

Several basic premises were applied throughout the New Mexico study. Most important, it was felt that in a state with such a variety of population distribution and natural conditions, enabling legislation should be permissive. This implies, (a) that there should be a minimum of *required* actions by any local jurisdiction, and, (b) that wherever possible, a choice of methods of local action should be allowed—choices of sufficient range to cover planning and land-use control measures suitable to a wide number of contexts, from those of very rural areas to those of the highest urban concentrations.

In format, the new proposals conform to existing state legislation. In New Mexico, as in most states, the basic planning enabling acts are adaptions of the Standard State Zoning Enabling Act and Standard City Planning Enabling Act, published under the auspices of the U.S. Department of Commerce in 1924 and 1928 respectively.[14] While it may be argued that the time has arrived for a revision of these acts from the ground up, the limitations of the study and need for action in New Mexico demanded that as much of the new material as possible be woven into the framework of existing legislation. On the other hand, many clarifications and new sections were proposed, and, where the old framework seemed particularly outdated, as, for example, in the definition and organization of the master plan, a whole new set of provisions was recommended.

The report to the State Planning Office contained discussion drafts of some sixteen acts which together with existing statutes were intended to constitute the basic working material for a comprehensive up-dating of the state's legislation. These included:

* (1) Enabling legislation for regional planning;
(2) Enabling legislation for county planning commissions;
* (3) An act defining the content and preparation of the master plan;
* (4) An act clarifying county and municipal subdivision control powers;
* (5) A subdivision prospectus act;
* (6) Enabling legislation for extraterritorial zoning;

Office. It must be emphasized that the legislation, in its present form, is a working document—a discussion draft for circulation and comment. Its intention was not to provide a finished or "model" code, but a report which could serve as the basis for state-wide consideration and refinement.

14. U.S. Dep't Commerce, a Standard State Zoning Enabling Act (1924, rev. ed. 1926), Advisory Com. on Zoning; U.S. Dep't. Commerce, a Standard City Planning Enabling Act (1928), Advisory Comm. on City Plannnig and Zoning.

* (7) Enabling legislation for the preservation of historical areas through zoning or through acquisition of property interests;[15]
(8) An act clarifying the right of neighboring property owners to enforce zoning regulations;
(9) An act to permit counties to zone less than their entire area;
(10) Enabling legislation permitting "official maps" for the purpose of reserving land designated for subsequent public acquisition;
(11) Enabling legislation for boards of adjustment;
(12) Enabling legislation relating to non-conforming uses of land, structures, and signs;
(13) An act relating to the disclosure of real estate holdings by public officials;
(14) Enabling legislation for county building codes;
(15) An act relating to public utility easements;
*(16) Enabling legislation to permit acquisition of public conservation and other easements.

Certain elements of the seven starred items (1, 3, 4, 5, 6, 7 and 16) touch on matters of sufficient general concern to warrant discussion in this article. In particular, attention is drawn to the statutes on the general plan (item 3) and the subdivision prospectus (item 7), which are attempts at relatively new and different approaches in enabling legislation.

I. THE REGIONAL PLANNING COMMISSION[16]

Unlike zoning, proposals in the 1920's for a standard regional planning act[17] had relatively slight impact on state legislation. As a result, there are almost as many varieties of regional planning enabling acts in the United States as there are jurisdictions.[18] Existing statutes range from detailed legislation imposed on specific metropolitan areas,[19] to cryptic provisions permitting various types of

15. This proposal was enacted into law by the 1961 Session of the New Mexico Legislature, N.M. Laws 1961, ch. 92, §§1-5, at 172-74. It now appears at N.M. Stat. Ann. §§14-50-1 to 14-50-5 (Supp. 1961). A discussion of its principal features follows in this article.

16. The definition of regional planning is inevitably a slippery matter. A respectable argument can be made that the phrase itself has no real meaning *per se*, but like "reasonable man" or "police power" can only be given significient content in terms of actual applications. In the present context, it is convenient to consider regional planning as any planning involving an integrated and on-going process between or among two or more local governmental jurisdictions which are otherwise discreet units.

17. Such as the Standard City Planning Enabling Act, §§ 26-29. See note 14, *supra*.

18. As of 1957, about 33 American jurisdictions provided for something called regional planning in their enabling acts. See Housing and Home Finance Agency, Planning Laws: A comparative digest (2d ed. 1957); Tex. Rev. Civ. Stat. Ann. art. 11011 (Supp. 1961).

19. See, *e.g.*, Del. Code Ann. tit. 9, §§ 2501-2517 (1953) (New Castle County); Minn. Stat. Ann. §§473.01 to 473.11 (Supp. 1961) (Minneapolis-St. Paul metropolitan area);

local governments to cooperate for planning purposes.[20] Either extreme seems open to criticism. While there is much to be said in the abstract for legislation carefully designed and tailored for a specific major metropolitan area, in a number of states there may not only be constitutional limits to special legislation,[21] but long-standing historical reasons why such legislation is politically difficult to obtain. On the other hand, vague and general enabling acts (many of which have come into being since the federal subsidies of the so-called "701 Program" became available)[22] give no real guidance to officials genuinely concerned with regional problems. Recognition of the need for regional planning commonly does not come at the same time to all of the local governments in a region. Rather the officials or a group of citizens in one municipality in the region will be first to press for the idea. Where no formal channels to express this impulse exist, the effort easily may dissipate in fruitless attempts to overcome the natural inertia of the other jurisdictions concerned. If, however, a formal channel can be furnished, in the enabling act itself, by which this interest can be transmitted to the other local governments, and in such a manner that they must respond, the whole undertaking is given a vitality which does not exist where no formal channels have been created. On the other hand, there is generally little to be gained by establishing procedures that will, in effect, force any local jurisdiction into a regional planning organization without its affirmative approval.

Where the enabling acts of other states have been generally too specific or too vague, the proposals for New Mexico attempt to find a middle course. The organizational framework is spelled out in some detail, but the substance of the final arrangement for regional planning is left largely to the local jurisdictions.[23] The suggested act prescribes that any local unit desiring the formation of such an organization may make a written proposal setting forth certain basic elements of the scheme to each of the other local jurisdictions with whom the initiating body feels cooperation would be mutually useful. The recipient governing bodies have a sixty-day period in which to accept, reject, or propose alternatives, with inaction being judged as rejection. Where counter-proposals are made, however,

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N.C. Gen. Stat. §§ 153-267 to 153-271 (Supp. 1961) (Western North Carolina Regional Planning Commission).

20. See, e.g., Cal. Gov't. Code §§65090-65094, as amended, Cal. Gov't. Code §65092 (Supp. 1961) (Area Planning Commissions); Idaho Code Ann. § 50-2706 (1957) (Joint Planning Commissions); Vt. Stat. Ann. tit. 24, §§2919-2922 (1959) (Regional Planning Commissions).

21. See 1 McQuillin, Municipal Corporations §3.08 (3rd ed. 1949).

22. Section 701 of Housing Act of 1954, 68 Stat. 640 (1954), 40 U.S.C. §461 (1958), permitted the Administration of H.H.F.A. to make federal planning grants of up to 50% of the cost of the work to metropolitan or regional planning agencies empowered under State or local laws to do planning for such areas. In Housing Act of 1961 §310, 75 Stat. 149 (1961), federal grants were increased to 66 2/3% and the amount appropriated raised from $20,000,000 to $75,000,000.

23. Proposed N.M. Regional Planning Act, §5.

they must in turn be accepted, rejected or countered by other jurisdictions, and so on until a common agreement or a deadlock is reached. This simple process of legally established channels for written proposals and counter proposals does not, of course, in any way insure agreement where basic divergencies of interest or of philosophy exist. But what it does do is to force all parties concerned to put their positions and proposals into written form, so that everyone can act in reference to a specific document rather than disembodied concepts. Perhaps more important, it serves to identify, with some precision, just where and how the breakdown in negotiations occurred, so that political responsibility and accountability at the polls can become operative. Furthermore, where any of the local governments concerned feels it has used due diligence to arrive at an agreement without success, petition may be made to the Governor to appoint an investigatory commission to report on the need, feasibility, and possible organization for regional planning in the area in question. Again, the method is non-coercive and generally dependent both on the Governor's interest in regional planning and the political alignments involved. However, it does at least open the possibility of using the prestige of the Governor's office to encourace regional planning where a significant amount of local support exists, and it furnishes a factual background against which political responsibility may be defined.

While the proposed act thus carefully defines the *procedural* steps for regional planning, it leaves the utmost flexibility in *substantive* content for determination by the local units concerned. Thus the statute offers a wide range of optional powers for a regional planning commission from which the localities concerned, through the process of negotiation and bargaining, may select those powers (and only those) which seem most suited to locally-felt needs.[24] Some regional planning commissions may be expected to develop fairly rapidly, while others will wish to limit themselves, at least in the beginning, to one or two simple functions, such as the unification of subdivision control administration throughout the area or the coordination of zoning.[25]

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24. Proposed N.M. Regional Planning Act, §7. An alternative method of handling the question of regional planning commission powers is to enable local units to transfer such of their planning powers to the regional body as they may mutually agree. See, *e.g.*, N.J. Stat. Ann. §§27-9 to 27-11 (1940); S.C. Code §14-359 (1952); Utah Code Ann. § 10-9-27 (1953); Wash. Rev. Code § 35.63.070 (Supp. 1959). However, where counties and cities, or cities of different classes are involved, the planning powers of each may not be granted in the same terms, thus making mutual agreement difficult. For this reason there are advantages in a state statute which specifically regrants all powers and combinations of powers which it might be useful for local units to select in establishing regional planning bodies. The New Mexico proposal permits a delegation of local planning powers to the regional body and in addition sets forth a specific listing of powers from which cooperating local units draw in creating a regional commission.

25. The pattern in a number of states [*e.g.*, Ark. Stat. Ann §19-2821 (1956); Cal. Gov't. Code § 66241 (Supp. 1961); Me. Rev. Stat. ch. 90-A, § 64 (III) (C) (Supp. 1961); Pa. Stat. Ann. tit. 53, § 496 (1957); Wash. Rev. Code § 36.70.320 (Supp. 1959)], is for the regional planning commission to be *established* by voluntary agreement of the local units, but once formed, a regional plan *must* be prepared. Such a plan, however, is

II. THE CONTENT OF THE GENERAL (OR "MASTER") PLAN

Among the most interesting of the New Mexico proposals is a new act setting forth the content and method of adoption for the general or master plan.[26] The present definition of the master plan and its preparation, as established in the state's enabling legislation, is taken from Sections 6 to 9 of the Standard City Planning Enabling Act of 1928 and is substantially similar to the provisions found in the majority of American states. That definition, however, is out of accord with the best current thinking of the planning profession on the subject and is legally ambiguous as well. These faults spring principally from the fact that the master plan concept was first evolved in the 1920's. During this period the profession of city and regional planning was in an early stage of development, and was concerned principally with zoning and other immediately practical matters.[27] The theory and practice of long-range planning had yet

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often not binding until adopted by the various constituent units as their own county or municipal plan, as the case may be. While the preparation of a long-range regional plan is undoubtedly the most important eventual function of any regional planning agency (and probably a prerequisite to its receipt of federal planning assistance), it may not be wise for state legislation to force such a task when the participating units themselves do not assign it to the regional commission by mutual agreement. At least in some states, a more modest beginning—the coordination of subdivision or zoning administration —may later lead the participants themselves to see the need for long-range over-all policy. This approach seems particularly relevant in in those states, like New Mexico, where the idea of public physical planning itself does not yet have wide popular acceptance.

26. The Standard City Planning Enabling Act of 1928 (see note 14, *supra*) uses the term "master plan" to describe the long-range document to be prepared by the Planning Commission to guide the implementation of planning controls, and it is this that has come into common usage in most of the United States. In the proposed statute, the name for this long-range plan has been changed to "general plan." This difference in language was introduced to differentiate between the old and new concepts of what such a plan should contain. Where the old "master plan" was conceived of as a document to control in detail certain aspects of community growth and development (see Bassett, THE MASTER PLAN (1938)), the "general plan" is intended as a broad indication of the direction of public policy rather than an emphasis on specific location. In addition, there would seem to be semantic advantages in a term which has less flavor of rigid and totalitarian control. *Cf.*, The Federal Housing Act of 1954, 68 Stat. 590 (1954), 42 U.S.C. 1451 (1958), which makes as a prerequisite for federal urban renewal assistance the preparation of a "workable program," which the HHFA Administrator has interpretated to encompass "a comprehensive general plan for the community as a whole." Housing and Home Finance Agency, How Localities Can Develop A Workable Program For Urban Renewal, at 7 (Dec. 1957).

27. Edward M. Bassett, who wrote the most definite description of the early concept of the master plan, and whose thinking most influenced the drafting of the Standard City Planning Enabling Act on this point, conceived of the plan as a detailed map showing the thinking of the planning commission (as opposed to the governing body) for the coordination of seven elements: the location of streets, parks, sites of public buildings, reservations (airports, and other such publicly-owned lands), zoning districts, routes for public utilities (whether public or private in ownership), and pierhead and bulkhead lines. See Bassett, THE MASTER PLAN (1938), ch. II. For a critique of this concept, see Haar, *The Content of the General Plan: A Glance at History,* 21 J. Am. Institute of Planners 66 (1955).

to be developed. Today, enough experience with long-range comprehensive planning exists to permit a restatement of enabling legislation in clearer and more effective terms. The New Mexico proposals, therefore, are an attempt to put down, in statutory form, a definition and method of adoption for the general or master plan that embodies this experience.[28]

The proposals begin by making the preparation, adoption, and periodic revision of a comprehensive, long-range, general plan for physical development "the primary function and duty of every county or municipal planning commission."[29] The purpose of the plan is set forth in the following terms:

> The purpose of the general plan shall be to foresee the future growth and development of the community and area concerned to the greatest extent feasible, to provide in a recorded form a statement of the objectives, principles, policies, and standards which will guide such growth and development in the most desirable patterns for the physical, economic, and social well-being of the community and area concerned, to become the basis for public actions and decisions with respect to such future growth and development, and to assist private persons in developing their own property in the most appropriate relationships to future growth and development as contemplated and set forth in such plan.[30]

It will be noted that this language calls for the plan to perform three functions: (a) to give to public officials and private developers alike as accurate a forecast of future development as possible,[31] (b) to provide a recorded framework for the making of public policy with respect to growth,[32] and (c) to assist private

28. California, Indiana, Washington and several other states have made efforts in recent years to revise and improve enabling legislation with respect to the master plan. The New Mexico recommendations are, however, rather different in concept from any others presently known to exist. See Cal. Gov't. Code §§65460-65652 (Supp. 1961); Ind. Ann. Stat. §§ 53-938, 53-939 and 53-1045, 53-1046 (Supp. 1961); Wash. Rev. Code § 36.70.720 (Supp. 1959).

29. Proposed N.M. Act Defining The Content And Preparation Of The General Plan § 3.

30. Proposed N.M. Act § 4, *supra* note 29.

31. This function of the master plan was well-expressed in the Introduction to the recent Toronto (Canada) "Official Plan":

> "The image of the Planning Area in 1980, presented in this plan, does not claim to be an exact *prediction of what will be,* nor is it intended to be a binding *prescription of what shall be.* It is an image of *what is likely to be* if the public and private individuals and organizations, responsible for the development of the area, pursue their interests in a rational way within the framework of existing institutions. It seems a working hypothesis of desirable development which seems possible of achievement on the basis of presently known trends. As such, it serves as a frame of reference for all detailed planning, both public and private. . . . "

Metropolitan Toronto Planning Board, The Official Plan of the Metropolitan Toronto Planning Area (1959), p. I (emphasis in original text).

32. Proposed N.M. Act § 5, *supra* note 29.

developers in coordinating their own efforts with public decisions affecting development. These purposes have been detailed in the New Mexico act to preclude what often has been used as a major argument *against* the preparation of a long-range general plan, namely, that to state publicly the policies which will be followed by public agencies is to encourage undesirable land speculation and profit-making from projected public improvements. The proposed statute is based on a different hypothesis, that is, where public intentions are known and available to all, and, most important, integrated with long-range policy rather than immediate expediency, land values will tend to stabilize. Speculation is by its nature a function of ignorance. The more that public knowledge of governmental actions is spread, the more effectively can the market mechanism adjust itself to such actions with a minimum of sudden and inequitable dislocations of previous value. In a certain sense, the general plan acts somewhat like zoning—it lends predictability to what is likely to occur in a given area.

Those charged with preparing and adopting the plan should have these considerations in mind from the beginning of the planning process, and it is therefore appropriate that such a statement of purposes occur at the outset of the enabling legislation.

The next significant concept in the proposed legislation is that the preparation of the general plan be split into two distinct steps, each with its own special function:

(1) The "Preliminary General Plan Report"—a presentation of problems, opportunities, and major choices of directions of development; and

(2) The "Final General Plan Report"—a correlated but more detailed study of past, present and future development, and a presentation of how the future pattern may be improved by the plan.

A. The Preliminary General Plan Report: The function of the Preliminary General Plan Report is to require that the community begin its planning by striking a broad balance sheet of its present position—its liabilities, its assets, and the basic choices for future development that are reasonably available to it.[33]

This emphasis on fundamentals is quite deliberate, and serves a number of purposes: First, it lifts the eyes of staff, commission, governing body and the general public from the day-to-day arguments about zoning, parking, street widenings, and the like, that occupy so much of the time ostensibly devoted to

33. The specific language of the proposal is ". . . the major opportunities and advantages for sound and full growth and development not yet fully utilized . . .". Most contemporary master plans over-emphasize problems and do not, in my opinion, give adequate attention to a systematic exploration of development potentials. As far as is known, the only other enabling act which specifically mentions this important aspect of master plan preparation is that of Georgia (Ga. Code Ann. § 69-1206 (1952)), which states: "The master plan shall be based upon and include appropriate studies of the location and extent of present and anticipated population, social and economic resources and problems, and other useful data."

planning in most cities today. Second, it injects at the initial, and most malleable point in the planning process, a consideration of basic choices that, for the most part, lie inchoate below the surface of community thought and hence are seldom adequately considered.

In all too many cases local governing bodies in the United States have failed to capitalize upon the potential for creating municipal individualization that the American system of local self-government can provide.[34] The objective of the Preliminary General Plan Report is to let each community examine the real choices that may exist—the uniquenesses that the community can preserve, the opportunities that still lie before it, the various roles it may play in its metropolitan area, in its state, or even in national life. In so doing, a town, city, or county may well find that it possesses, in the long run, far more control over its character and development than it ever before thought.[35] The Preliminary General Plan Report requires that formal attention, at least, be given to these questions.

To implement this process, the proposed enabling act requires that the planning commission announce the completion of the Preliminary General Plan Report in a newspaper of general circulation, make a copy or copies available to the public, and set a date for public hearing thereon. The hearing itself is to be attended by the members of the governing body, and presided over by the chief executive or legislative official. The chairman or other representative of the planning commission is to present the substance of the report, and adequate time is to be permitted for questions and discussion in the usual manner of a public hearing. At the conclusion of the meeting, the governing body must vote: (a) to adopt the report,[36] (b) to adopt it with specified amendments, or (c)

34. The "fragmented structure of local government in the United States" has become a standard whipping boy in the literature of public administration. While the negative point deserves being made, the more positive possibilities of municipal independence too often have been neglected entirely.

35. The Planning Commission, while instructed to pose major alternative directions for future growth, is further instructed by the Act to make "recommendations as to the direction it believes is in the best interests of the community, and its reasons therefor." Proposed N.M. Act § 5, supra note 29.

36. The question of whether a master or general plan should be adopted by the legislative body or only by the planning commission was a matter of considerable discussion among early legislative draftsmen. The Standard City Planning Enabling Act, and the great majority of states today, specify adoption only by the commission. The basic argument against legislative adoption has been that the plan would become inflexible, or, in Bassett's term, "ossified," if every change in its substance would have to be approved by a legislative body. However, the early conception of a plan was far more detailed than is defined in the proposed New Mexico act. When the emphasis is shifted from a *map* to *policy*, the problem of flexibility yields before the more important consideration of having a full and recorded political commitment by the central source of governing power in the community. The question of revision can then be handled by a required periodic review, as will be discussed shortly. See Bassett, The Master Plan 61-64 (1938); Haar, THE MASTER PLAN: *An Impermanent Constitution*, 20 Law & Contemp. Prob. 353, 373-76 (1955).

to reject it and submit it to the planning commission for further study and preparation of a revised report to be considered according to the same procedures used for the first.

Thus, at a defined moment, the legislative body, the public, and the commission presumably will have reached fundamental agreement as to what the essential facts of the community situation are and the general direction in which further development should proceed. Once this step is taken, a sound foundation is present for all future planning.

B. The Final General Plan Report: The Planning Commission and its staff next are to prepare the "Final General Plan Report," which:

> . . . shall be correlated with said Preliminary General Plan Report, and shall be based on as careful and complete studies as are feasible of the past growth and development of the area concerned, the present state of its development, and the probable future pattern of its growth and development as such is likely to occur if existing trends continue, and as such future pattern may be affected and improved by application of the objectives, principles, policies and standards for future development set forth in the general plan.[37]

It will be noted that this language imposes three conditions on the commission and its staff: (a) that their work be correlated with the adopted Preliminary General Plan Report, (b) that the "momentum" of the present trends in development be explored to draw a picture of what will occur if no action is taken,[38] and (c) to indicate what the future development of the area can be if a recommended set of public policies is carried out. These conditions serve to impose, as in the case of the Preliminary Plan, a more rigorous discipline on plan preparation than is required in any state today. The Planning Commission and its staff are required to take a hard look at what trends are already casting the mold of the future, and then, separately, to assess what public policies and actions might lead to a more desirable or harmonious pattern—encouraging those existing elements that are beneficial while discouraging those that appear to be destructive of orderly growth. This approach, it is submitted, is a considerable improvement over many current general plans, which all too often are a confusing melange of fact, prediction, exhortation, and policy—a condition that makes them not only difficult to comprehend, but of limited value as a policy document for a busy local legislature pressed with a difficult immediate problem. Under the suggested procedure, the community, by means of an interplay between its planning body, its legislative body, and the public, first deter-

37. Proposed N.M. Act, § 6, *supra* note 29.

38. Or, more accurately, what will occur if the existing combination of private and public actions is continued unaltered.

mines its problems and opportunities; second, its possible choices, and the most desirable among these; third, its actual present direction of development, and finally, a set of public policies to correct whatever discrepancies exist between the desired direction and the actual trend of events. This sequence, as roughly sketched in the preceding sentence, gives a clarity, order and rationality to the local planning process in a fashion never before expressed in enabling legislation.

* * * * *

Within the general framework already described, the Final General Plan Report must specifically contain:

(1) A statement (which may be in words, maps, graphics, or other form) of the objectives, principles, policies and standards which are to constitute the guidelines for future development; and
(2) A presentation of certain specified elements intended "to illustrate and suggest in general terms, and in a manner intelligible to the general public, how such objectives, principles, policies and standards might be applied to improve or accelerate the development"[39] of the jurisdiction.

The emphasis in both points is on objectives, principles, policies and standards, first in the abstract, and then as applied to particular development policy. It will be noted that, unlike the Standard City Planning Enabling Act, the provisions do not require the preparation of a map showing locations of specific activities. However, for those jurisdictions that feel a fairly specific map is a desirable way to represent planning policy, the New Mexico proposals would permit such a map to be incorporated.

On the other hand, the proposal does require that certain elements be covered by the plan. These include land-use, population and building intensity, circulation and transportation, economic and fiscal matters, optional elements on water availability, urban renewal, conservation of natural resources, and other relevant matters.[40] Each of these is to be developed in a specified manner and in relationship to each of the other elements. For example, the land-use element is defined as an

> ... analysis of the past and present general location, extent and relationships of the use of land for agriculture, housing, business, industry, recreation, education, public buildings and grounds, major utility facilities (whether public or private), and any other categories of land use which may be appropriate to the area concerned, and a projection, based on the best information available and the objectives, principles, policies and standards set forth in the plan of a probable or possible

39. Proposed N.M. Act, § 6, *supra* note 29. Cf. Cal. Gov't. Code § 65463.

40. See the listing of required elements in the Standard City Planning Enabling Act, *supra* note 14.

> pattern (or alternative patterns) of the general location, extent and relationship of land uses at a specified time as far in the future as it appears reasonable to foresee, and at such other intermediate future times, if any, as it may appear desirable to present, . . .[41]

There must first be an *analysis* of past and present land uses, and their relationships with one another, followed by a *projection* "as far in the future as it appears reasonable to foresee" of future land uses and their relationships with one another, as based on existing trends *and* the effect of the objectives, principles, policies and standards of the plan. Thus, each element is to contain the three essential ingredients: knowledge of the present, projection of an unplanned future, and assessment of the impact of the application of public planning policy on what is to come.

Furthermore, the proposal prevents the plan from becoming what has been called a mere "letter to Santa Claus"[42] by requiring an economic and fiscal element. This consists of an anlysis of the major *existing* economic activities (public and private) and the major *existing* sources of public revenue and expenditures. Complementing this is a projection of *future* economic activities and expenditures based on trends and on the application of the plan. Thus, the principal proposals of the plan can be given a price-tag, an indispensible ingredient to effective public consideration of the plan itself.[43]

C. Public Hearings and Adoption Procedures: After the studies and projections specified for inclusion in the Final General Plan Report are completed, the fact of completion is again to be announced in a general newspaper, and a copy or copies made available to the public. A public hearing is to be held, at a reasonable time thereafter, before the Planning Commission. After the hearing, the Commission may re-study the plan if it feels that such is indicated by public reaction, or the plan may be adopted without such re-study. In either case, when the Commission is sufficiently satisfied, adoption is to take place, and the result certified to the governing body of the jurisdiction. It then becomes incumbent on that body to call a second public hearing, at which both the Planning Commission and members of the public may present their views on the plan. At any

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41. Proposed N.M. Act § 6, *supra* note 29.

42. Phrase from Pomeroy, *The Planning Process and Public Participation*, in An Approach to Urban Planning, at 20. (Breese and Whiteman, eds. 1953).

43. Bassett specifically rejected such considerations as a part of the master plan, Bassett, The Master Plan, at 51 (1938). On the other hand, New Jersey has had a somewhat similar requirement since 1953 (N.J. Stat. Ann. § 40:55-1.13 (Supp. 1961)). It is optional in Georgia (Ga. Code Ann. § 69-1206 (1957)), Indiana (Ind. Ann. Stat. § 53-735 (1951)), and Nevada (Nev. Rev. Stat. § 278.160(c) (1959). Since 1955, California specifies that such matters may be considered *after* the master plan has been adopted by the legislative body, a provision which seems to put that body in the position of buying a pig in a poke—a set of policies without accurate information as to costs (Cal. Gov't. Code § 65540).

time following the hearing, the governing body may adopt the plan, do nothing (in which case the plan is considered to be adopted after thirty days), or return the plan to the Commission for revision with a written statement of why such revision is considered necessary. In the latter case the Commission is to revise the plan, hold its own hearing, and then certify a new adopted plan to the governing body, thus repeating the whole process until a majority of both the Planning Commission and governing body agree on a single plan for the jurisdiction.[44] When agreement exists, the Final General Plan Report and the Preliminary General Plan Report are to be considered together as one document (the General Plan of the area concerned) and as the official statement of public objectives, principles, policies and standards for its growth and improvement.

It is believed that the language of this proposed enabling legislation sets forth more completely than any existing state statute, a method of systematically presenting to the planning commission and governing body all of the important issues regarding physical development. Each issue is related to present needs and circumstances, to the momentum of events as they move into the future, and to the possibility for rational policy intervention to improve the course of development. At each stage, procedural safeguards in the form of notice and public hearings have been inserted. Furthermore, the conception of the plan as essentially a two-step process not only permits public discussion at any early (and hence more effective) stage, but gives the community as a whole a valuable, if general, policy guide to assist in the formation of public and private policy even while the more detailed Final General Plan Report is in preparation.

To assure further continuity in policy, the proposed New Mexico statute calls for periodic review of the General Plan, such review to occur as the local jurisdictions may determine, but in no event at longer periods than five years.[45]

Once the over-all framework has been established by the general plan, the proposed enabling act permits the preparation of "development plans" for a lesser area or a lesser time period than the general plan.[46] This device permits the planning commission to "focus-in" on specific aspects of the general plan that may need more elaboration. Notice and a public hearing are required before the planning commission may officially adopt such a plan. Since the development plan is fairly detailed, it is established as being advisory to the governing body only. Its adoption by the governing power might imply legal obligations and restrictions that should be expressed only in orthodox legislative forms. However, in passing on specific pieces of legislation, with respect to budgets, public improvements, zoning, subdivision controls, reservation of streets and highways,

44. In the case of the Preliminary General Plan Report, a broadly stated and relatively short document, a single public hearing was deemed to be sufficient. The Final General Plan Report will be a document of some complexity and factual detail. For this reason a dual system of hearings has been proposed for its adoption. Two public hearings are not inappropriate for a policy matter of this importance.

45. Proposed N.M. Act § 10, *supra* note 29.

46. Proposed N.M. Act § 11, *supra* note 29.

urban renewal projects,[47] and similar governmental functions, such a plan might be an invaluable policy guide to the governing body—indeed, this is its intention.

At a still more specific level, the proposed enabling act permits the preparation of "project plans." These are quite detailed, and may be adopted by both the planning commission and the governing body. Such plans would normally relate either to public capital projects or matters like a particular urban renewal project where the public has retained a high degree of control over reconstruction.[48]

The preparation of plans is thus conceived of as at least a two-layer, and potentially a four-layer process, beginning with a consideration of general community problems, opportunities, and choices, and concluding with project plans only slightly removed from architectural and engineering specifications.

By attempting to clarify some of the principal kinds of plans which should be made, and putting them each into a proper procedural format and in sequence with one another, the whole planning mechanism becomes clearer and easier for the participation of the professional planner, the lay planning commission, the politically sensitive governing body, and the general public.

D. Relation of general plan to implementing ordinances: The proper relationship between the general plan—which is a policy document—and zoning, subdivision platting controls, the "official map," and other implementing ordinances—which are specific regulation of the use of property—has always been difficult to define. The Standard State Zoning Enabling Act of 1924 specified that zoning should be "in accordance with a comprehensive plan" but did not define the meaning either of "comprehensive plan" or "in accordance with."[49] The Standard City Planning Enabling Act of 1928 states that among many other elements, the "master plan" should include a "zoning plan," but defines the latter term by referring back to the Standard State Zoning Enabling Act.[50] With respect to subdivision platting controls, the Standard City Planning Enabling Act requires that the planning commission shall have adopted a "major street plan" before exercising controls over subdivision at all, but specifically indicates that a "comprehensive plan" is not required.[51] Similarly, with respect to "official maps" of future street beds, a major street plan is a prerequisite to the exercise of the power, but any relationship to the rest of the master or comprehensive plan is not defined.[52]

47. For existing New Mexico provisions on the relation between urban renewal and the general plans, see N.M. Stat. Ann. § 14-49-7 (B) and (D)(2) (Supp. 1961). The proposals would not change the effect of these provisions.

48. Proposed N.M. Act § 12, *supra* note 29.

49. See Haar, *"In Accordance with a Comprehensive Plan,"* 69 Harv. L. Rev. 1154 (1955).

50. Standard City Planning Enabling Act § 6, and n. 38, *supra* note 14.

51. Stanadard City Planning Enabling Act § 13, and n. 66, *supra* note 14.

52. Standard City Planning Enabling Act § 21, *supra* note 14.

In the case of zoning, the courts have placed a very narrow interpretation on the phrase "in accordance with a comprehensive plan," saying, in effect, that the phrase merely means that a zoning ordinance must be comprehensive in its scope and show internal evidence of considering the zoning problem on a community-wide, rather than piece-meal basis. This position has caused academic criticism,[53] and as a result, two recent state statutes specifically make a master plan a condition precedent to valid zoning,[54] a position which itself has been subjected to critical comment.[55]

The New Mexico proposals approach this question from a different point of view. Rather than taking either extreme position with respect to the relationship between the general plan and implementing ordinances, the proposal states:

> Whenever the governing authority shall have adopted a General Plan . . . and shall have adopted a zoning ordinance and/or subdivision platting control ordinance . . . which has been correlated with said General Plan, the adoption of said General Plan and said correlation shall be admitted in any litigation or dispute concerning said zoning or subdivision platting control ordinance as evidence supporting the reasonableness of said ordinance in any judicial or administrative proceeding to determine the validity of said ordinance or any part thereof, and a correspondingly greater burden of proof of unreasonableness shall be required of any party seeking to establish the invalidity of said ordinance in said proceeding.[56]

This language avoids the rigidity of the requirement that a general or master plan *must* be prepared prior to the preparation of a zoning ordinance, while at the same time furnishing a clear linkage between policy planning and the implementation process in a form which will itself provide an incentive for communities to prepare and adopt such plans. Where community change and growth are slow, and zoning and subdivision controls are very conservative, there is less need for declaration of long-range planning to justify the exercise of the controls.[57] Where, however, growth and change are rapid, and the community

53. Haar, *supra* note 49.

54. Ind. Ann. Stat §§ 53-938, 53-939, 53-1045, 53-1046 (Supp. 1961); Wash. Rev. Code §36.70.720 (Supp. 1959). The Indiana act applies only to Marion County and Area Plan Commissions. The Washington act applies to county and regional planning and zoning.

55. McBride & Babcock, *The "Master Plan"—A Statutory Prerequisite to a Zoning Ordinance,* 12 Zoning Digest 353 (1960). (For criticisms of this criticism, see Haar & Mytelka, *Planning and Zoning,* 13 Zoning Digest 33 (1961) and Doebele, *Horse Sense about Zoning and the Master Plan,* 13 Zoning Digest 209 (1961).

56. Proposed N.M. Act § 14, *supra* note 14. For a more complete discussion of the section and its meaning; see Doebele, *Horse Sense about Zoning and the Master Plan,* 13 Zoning Digest 209 (1961).

57. To prevent a conservative community from neglecting the general plan altogether, a final deadline might be imposed—say ten years—after which implementing legislation

wishes to exercise greater land use controls, the need for a declared and publicly approved long-range policy is correspondingly greater. The more restrictive the community's regulations, the more need it has for a general plan which will buttress its ordinances in a court test. Thus, the shifting burden of proof offers a reasonable and self-adjusting method of relating the restriction of private rights with a well-thought out community policy as to why such restrictions are imperative for the public good.[58] The New Mexico proposal, by establishing a "sliding scale," as it were, with respect to the burden of unreasonableness, sets forth a logical and reasonable correlation between the state of public policy and the legitmacy of regulation on the use of private property.[59]

III. SUBDIVISION PLATTING CONTROLS

Many of the New Mexico proposals with respect to subdivision regulation are corrective in nature, and not of general interest. However, three aspects deserve some comment:

A. Change of zoning requirements simultaneously with subdivision approval:

Zoning is primarily concerned with controlling the development of single lots, each considered as a unit unto itself. Zoning controls, consequently, are geared to one individual erecting one building on one parcel of land. Subdivisions, by their nature, generally involve the construction of a number of buildings at about the same time. The problem of controlling the individual building in the context of a total subdivision plan, therefore, is frequently of a different nature from the controls normally exercised by the zoning ordinance. For example, modern residential subdividing practice often calls for a certain amount of commercial space to be included with a certain number of residential units, generally in the form of a shopping center designed to serve the needs of the persons in the new residential area. Similarly, where a number of resi-

would become void if no general plan had been adopted. Such a provision seemed premature in New Mexico. Furthermore, any statute requiring a general plan prior to zoning or other implementation always raises the question of what agency is to say whether a true general plan has been prepared or not. The requirement would become meaningless if, for example, a city were to take a zoning map and simply retitle it "General Plan," or some other *pro forma* action.

58. For a narrower act using the concept of presumption in connection with the master plan, see Ind. Ann. Stat. § 53-936 (Supp. 1961), upheld in *Mogilner v. Metropolitan Plan Comm'n,* 236 Ind. 298, 140 N.E.2d 220 (1957).

59. In the case of reservation of the beds of mapped streets, the New Mexico proposals require either a prior general plan, or long-range (ten years or more) studies of population, land-use, and their relationships to the street system before such an "official map" can become binding. This requirement, which is spelled out in some detail in the proposal, goes considerably further than the requirement of the Standard City Planning Enabling Act (Section 21), which merely required a major street plan as a prerequisite, without stating what studies and procedures were required to arrive at a meaningful plan of this type. See, Proposed N.M. Enabling Act For The Preservation Of The Beds Of Streets And Other Public Sites § 4.

dential sites are being designed as an integrated development, it may be desirable to assign smaller lots to each house and use the excess area for a large park or play-space available to all. Or, again, controls on walls, fences, and the height and location of buildings may be necessary to prevent the cutting off of light and air in the "individual lot" situation, but may be over-restrictive where a group of buildings in the patio-style can be designed with high walls and irregular spacing of houses so as to give privacy and architectural interest without damage to anyone's light and air. By the same token, the layout of modern industrial subdivisions and commercial complexes also calls for more flexibility in design than the ordinary zoning ordinance can provide.

As early as the Standard City Planning Enabling Act, some recognition was given to this problem by Section 15, which states that:

> The planning commission may, from time to time, recommend to council amendments of the zoning ordinance or map or additions thereto to conform to the commission's recommendations for the zoning regulation of the territory comprised within approved subdivisions. The commission 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 do not authorize the violation of the then effective zoning ordinance of the municipality. Such requirements or restrictions shall be stated upon the plat prior to approval and recording thereof and shall have the same force of law and be enforceable in the same manner . . . as though set out as a part of the zoning ordinance or map of the municipality.

This provision gives the planning commission two separate powers: (1) the power to recommend that the existing zoning categories in area to be subdivided be changed to some other category or categories, and (2) the power to itself enter an agreement with the subdivider for *higher* requirements than the zoning ordinance to be applied to the subdivision, which after approval and recording shall have the force of law.

The New Mexico proposal takes this one step further by providing that a planning commission may by agreement with the developer establish regulations both as to use and dimensions which may also be "lower" than existing zoning, but tailored to the requirements of the site and the developer's plan, provided that the governing body specifically ratify such an agreement and enter it as a part of the zoning ordinance and map for the area concerned.[60] In addition,

60. A similar provision may be found in N.Y. Gen. City Law §37 (1951), as amended, N.Y. Gen. City Law § 37. (Supp. 1961), N.Y. Town Law § 281 (1951), and N.Y. Village Law § 179-p (1951). These acts permit the planning commission itself to vary zoning in connection with a plan submitted with a subdivision plat, subject to four conditions: (1) express delegation of such power from the local legislative body, (2) a public hearing, (3) that the changes do not permit an average population density greater than provided

the proposal requires that the terms of the agreement be recorded and included in every contract of sale and in every deed to any lot in the subdivision, so that all purchasers may be given notice of its terms. Where such is not done, a contract or transfer of deed may be voidable by the purchaser.[61]

This broadened enabling legislation potentially permits any subdivider to produce more imaginative and integrated patterns of buildings and land development that under present law, and at the same time it subjects such arrangements to a double public scrutiny. It is not without its dangers of favoritism and abuse, and it is hoped that local ordinances would define the limits of powers with more precision than it is possible to do at the level of state enabling legislation. However, some protection is provided at the state level by the requirement that the agreement be set forth in contracts of sale and in deeds. Thus, the forces of the market are injected into the situation, and where the agreed-to regulations in fact produced a land-use or building pattern lacking basic standards of amenity, sales in the subdivision presumably would be correspondingly affected. In any event, the proposal does set the stage from which local communities may begin experimenting with this type of control. Local ordinances fair to the applicant, yet protective of the public and purchaser's interest, reasonably may be expected to evolve as experience is gained.[62]

B. The question of required dedications of land for public purposes in connection with subdivision plat approval: New subdivisions which involve a considerable number of residential units create an immediate demand for public sites, chiefly for parks, playgrounds, and schools. The local government is consequently often forced to acquire such sites in the neighborhood, sometimes at high prices, or on locations not especially well-suited to serve the new needs effectively. Where the subdivider can be required to furnish such parcels within the subdivision, sites of proper location and size can be integrated with the whole development. Consequently, there has been considerable interest in New Mexico and other states to work out provisions of this type which fall within the constitutional limits of the police power. At stake is not only the principle of the taking of private property without just compensation, but—since the costs

in the zoning ordinance or greater land coverage by buildings, and (4) that adjoining owners must be reasonably safeguarded and the plan found to be consistent with public welfare. In 1951, the same provision was adopted in Indiana for cities over 400,000. Ind. Ann. Stat. § 53-756 (7) (Supp. 1962). Aside from the constitutional question raised by such statutes, it was felt unwise to vest such powers solely in the planning commission in New Mexico at this time, since planning itself is a relatively new function.

61. See Proposed N.M. Act Clarifying County And Municipal Subdivision Control Powers §5. The clause regarding voidability is, of course, a matter which must be carefully reviewed by the local bar as to its implications for conveyancing, mortgage relationships and so on. It may be that another form of sanction would be more appropriate.

62. Experimentation with this type of local ordinance has already begun, even in the absence of specific state enabling legislation. See Amer. Soc. of Planning Officials, *Cluster Subdivisions* (Planning Advisory Service Information Report No. 135, 1960).

of such sites will normally be passed on by the developer to individual purchasers in the subdivision—the even more basic question of whether the costs of community growth should fall on new residents or on the taxpayers of the existing community.

The constitutionality of ordinances requiring dedications of lands for public purposes in subdivisions, or cash payments in lieu thereof, is still in a very unsettled state. A lower New York court in 1931 held that such requirements were valid, but California courts have held that its subdivision control statute did not authorize cash payments for these purposes.[63] Oregon seems to agree with New York, while Pennsylvania has taken the California view.[64] In addition to the general constitutional questions, the courts considering this matter have been bothered by (1) the lack of clear language in the state enabling legislation on this point, (2) the reasonableness of a specific local ordinance or application, and (3) whether the police power is in fact being improperly used to raise revenue.[65] Clarification of these three points in state and local legislation should add considerably to the likelihood that this type of ordinance will be held to be constitutional. Furthermore, it is worth considering that outright required dedication is only one (and, indeed, the most drastic) method by which a community may secure land in subdivisions for public purposes.

Consequently, the New Mexico proposals have attempted a rather different approach. In the first place, the section of the enabling act dealing with such matters clearly specifies that it is a revenue measure:

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63. *In re Lake Secor Development Co.*, 141 Misc. 913, 252 N.Y.S. 809 (1931), aff'd without op. 235 App. Div. 627, 255 N.Y.S. 853 (1932); *Kelber v. City of Upland*, 155 Cal. 2d 631, 318 P.2d 561 (4th Dist. Ct. App. 1957). Cf. *Reggs Homes, Inc. v. Dickerson*, 179 N.Y.S.2d 771 (Sup. Ct. 1958).

64. *Huagen v. Gleason* (Ore., Nov. 20, 1958), not officially reported, but noted in Amer. Soc. of Planning Officials *Newsletter*, April 1959; *Miller v. City of Beaver Falls*, 368 Pa. 189, A.2d 34 (1951). In general, see Siegal, The Law Of Open Space, Regional Plan Assoc., N.Y., 1960, p. 16-17. The Attorney General of Ohio, in a brief opinion, has stated that a county or regional planning commission could require the dedication of a reasonable amount of land for park purposes as a condition precedent to approval of a plat, on the basis of a general statement in the Ohio enabling act permitting such planning commissions to regulate plats to provide for "recreation, light, air and for the avoidance of congestion of population." [1956] Ohio Att'y. Gen. Ops. 679, 684. See, also, *Pizarro v. Planning Board*, 69 Puerto Rico 27 (1848) and *Ayres v. City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1, 11 A.L.R.2d 508 (1949). *Cf.*, 22 Cal. Att'y. Gen. Ops. 168 (1953). In Massachusetts, state law specifically prohibits required dedications without compensation but permits a requirement that a subdivider reserve park and playground areas from development for up to three years. Mass. Gen. Laws Ann. ch. 41, § 81Q and 81U (1958). *Cf.*, Mont. Rev. Codes Ann. § 11-602 (1947), and N.J. Stat. Ann. § 40:55-1.20 (Supp. 1960). For general comment and criticism of the *Miller* case, see Antieau, Mun. Corp. Law § 8.04 (1958). A recent case on this subject is *Pioneer Trust & S. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961). In this case the Illinois court held invalid a required dedication for a school site where the need for the site could not be "specifically and uniquely attributed to the addition of the subdivision." It will be noted that the New Mexico proposals contain careful language on this point. See note 66 *infra*.

65. See, *e.g.*, *Merrelli v. St. Clair Shores*, 355 Mich. 575, 96 N.W.2d 144 (1959).

> Any county or municipality is hereby authorized, within the requirements and limitations of this section, to levy and impose a tax or fee upon the privilege of subdividing and recording plats within its jurisdiction . . . , said tax or fee to be used for the acquisition of land and/or the construction of parks, playgrounds, schools, or other public facilities or the enlargement thereof which may be required and made necessary by said subdivision. Any tax or fee so collected shall be appropriately earmarked . . . for the acquisition of land and/or the construction of parks, playgrounds, schools and other public facilities . . . in a place within or sufficiently close to said subdivision to be of direct benefit to it and its inhabitants.
>
> . . . As used in this section the term "required and necessary" shall mean and be limited to the amount of lands required and necessary in proportion to the number of persons or families, if any, proposed to be resident in such subdivision, computed according to the needs and requirements as set forth in an official publication of a national association concerned with such matters, an official communication from the State Planning Office, or an official communication from any other State or Federal agency concerned with such matters setting forth such needs and requirements with such reasonable and appropriate modifications as may be necessary in each case to adapt such standards to the conditions of the southwestern United States and to the particular locality concerned.[66]

This language constitutes a declaration by the state that the cost of land and capital improvements in public facilities for new residential growth are a proper responsibility of the new residents, and provides for a collection of a tax or fee to cover such costs, with, however, the limitation that the facilities to be so provided do not exceed certain standards promulgated by outside bodies as to actual needs.[67]

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66. Proposed N.M. Act. § 6, *supra* note 61.

67. The legal problem with subdivision fees which exceeded costs of inspection, administration, etc., has frequently been the absence of state enabling legislation permitting the collection of such specifically as a revenue-raising measure. Thus, where a borough imposed a heavy fee on building permits to defray the costs of additional government services, the Supreme Court of New Jersey declared the ordinance invalid, but concluded:

> Admittedly, these fiscal problems confronting many of our rapidly growing municipalities are grave ones and would seem to call for legislative action; the remedy must come not from the municipalities nor from the courts but from the Legislature. *Daniels v. Point Pleasant,* 23 N.J. 357, 129 A.2d 265, 268 (1957).

However, the state's own powers of raising revenue by imposing a tax on various trades, occupations and activities is very broad, and in the absence of constitutional limits, may be delegated to local jurisdictions. See McQuillen, Municipal Corporations §§ 26.18, 26.22 and 26.28. (3rd ed. 1959). The provision of the New Mexico Constitution

The proposal then goes on to declare that no locality need collect such a tax or fee, but may in its place put any one of three lesser obligations on the subdivider: (1) that he *sell*, for "the appropriate proportion of the market price for the entire plat as undivided land, all such lands, sites, and locations as may be required and necessary for park, playground and/or school purposes in said subdivision," or (2) that he *reserve*, but for no longer than one year after actual construction on at least 75% of the residential units has commenced, such sites for public purchase according to the undivided plat price formula,[68] or (3) that he *dedicate* such sites outright.[69]

Thus, under the proposal, any community has four strings to its bow in dealing with this problem, each imposing varying degrees of obligation (presumably, therefore, having varying degrees of likelihood of being held constitutional). The subdivider may merely have to give the community the right to buy, at the current "raw land" price, the sites which it needs for the new demands that subdivision will create; he may have to reserve such sites for one year after he undertakes the major part of his construction program, thus giving the community time in which to raise the money to purchase; or he may be required to dedicate the sites outright; or he may be taxed to a degree necessary both to acquire sites and/or construct those facilities attributable to increase in demand caused by his subdivision.

As indicated above, the case law on this subject is so indefinite that no firm prediction can be made as to the constitutionality of any of these provisions. However, it is submitted that the choices proposed are all related to reasonable definitions of public policy in this area (which, after all, is the final test of constitutionality), and in addition, give the utmost flexibility to varying local needs and conditions in dealing with the problem.

IV. THE SUBDIVISION PROSPECTUS ACT

To date, planning controls in the United States have been almost entirely of the type that require some degree of direct governmental intervention over land-

(Art. VII, Sec. 1) on uniformity of taxation would not, as it has been interpreted, appear to limit the exercise or delegation of such revenue powers if done in a reasonable manner, nor would other state constitutional provisions (*e.g.*, Art. II, Sec. 18 & 20, Art. IV, Sec. 24). The critical question is whether subdivision of land is an activity or occupation subject to an excise tax. *Ridgefield Land Co. v. Detroit*, 241 Mich. 468, 217 N.W. 58, 59 (1928), points in this direction but no case seems to have been specifically decided under a state enabling act which clearly attempted to make it so (as the proposed New Mexico statute does). While a substantial case can, in the author's opinion, be made for the constitutionality of such fees *within* the municipal jurisdiction, extra-territorial application probably presents a more difficult constitutional question. See McQuillen, *supra*, § 26.41. For a listing of expenses to subdividers which have already been judicially upheld, see Antieau, Municipal Corporation Law § 8.05 (1959) ed.).

68. Similar legislation exists in New Jersey and Massachusetts, although declared to be unconstitutional in Pennsylvania. See note 64 *supra*.

69. Proposed N.M. Subdivision Act, *supra* note 61.

use to protect the public interest. Virtually no attention has been given to the possibility of using the powers of government in another form, namely, to decrease the pattern of ignorance which so often accompanies real estate transactions, and after thus improving the operation of the market itself, to rely on the ordinary self-interest of purchasers to prevent the ills which are sought to be forestalled. Why not, in other words, use more regulation of the Securities Exchange Commission type to handle problems of the urban land market?

A few statutes have moved tentatively in this direction,[70] but much imaginative thinking could still be applied profitably. Among the fields which might be most susceptible to this sort of legal treatment is that of subdivision, and it is interesting to note that the state with the greatest subdivision problems—California—has, indeed, enacted a statute designed to a certain extent along these lines.[71]

Under the California system, every subdivider, in addition to complying with local subdivision controls, must file with the state Real Estate Commissioner a "notice of intention" to sell or lease subdivided lands. This notice contains seven major items:

1. Name and address of owner
2. Name and address of subdivider
3. Legal description of lands
4. Statement of condition of title, including encumbrances
5. Terms and contracts to be used in selling parcels
6. Provisions made for public utilities on the site
7. Other information the owner or subdivider wishes to present.

The Real Estate Commissioner may request additional information by questionnaire. Once the subdivider has made his statements, the setup of the subdivision cannot be changed without notifying the Commissioner. This official also has extensive investigatory powers, the costs of which may be charged to the subdivider, and he has the right to issue a public report of such investigation, which the subdivider must furnish to every potential buyer. The Commissioner also may issue an order prohibiting sale or lease in cases where such actions would constitute "misrepresentation to or deceit or fraud of the purchasers of such lots or parcels." At the same time, the interests of the subdivider are protected by the requirement of a hearing prior to a stop-order, and a provision for judicial review. However, in the ordinary cases where the Commissioner is satisfied that things are in order apparently no notice of the information furnished to the Commissioner need be given to the purchaser.

70. *E.g.*, Cal. Bus. & Prof. Code §§ 11000-11021, discussed herein; and Pa. Stat. Ann. tit. 21, § 611-615, (Supp. 1959), requiring sellers of real property in first and second-class cities to furnish purchasers at or before time of settlement or "use registration permit" showing zoning classification and existing use, and the agreement of sale must show whether present use is in compliance with zoning laws.

71. Cal. Bus. & Prof. Code §§ 11000-11021.

The New Mexico proposal follows the general framework of the California act, but with much more comprehensive provisions for information about water availability and flooding dangers, either of which can be an acute problem under New Mexican conditions.[72] On the other hand, where California requires that the subdivider disclose all the terms of his contract for disposing of the lots, presumably so that the state can be satisfied that the purchaser will get clear title at the end of his payments, the New Mexico proposal merely requires that encumbrances be stated, leaving it to the purchaser to obtain a contractual arrangement which will protect his own interest in securing marketable title. Thus, there are three major differences between the California and New Mexico approaches: (1) Where California requires a statement only as to the availability of public utilities, New Mexico additionally requires very specific information with respect to water availability and flooding dangers. (2) Where California provides that the state undertake its own review with respect to the financial aspects of the transaction, New Mexico only requires a statement of encumbrances .(3) Whereas there appears to be no assurance in California that in all cases the individual purchaser will see the statement on file with the Commissioner, in New Mexico every purchaser must be given individual access to

72. The required statement as to water availability runs as follows:

A true statement of the water which will be available on each parcel, lot or land within the subdivision according to the terms of the sale or leases proposed, including the following specific information:

(1) Approximate distance to the nearest possible connection with a piped public water system;

(2) Amount of surface water available on or near to said parcel, lot or land, including the approximate amount of such water available per year, the rights of any other person or persons, land or lands to the use of said water, and the legal and physical provisions, if any, for assuring the use of said water, or any part thereof to each parcel, lot or land;

(3) The availability of subsurface or underground water to each of said parcels, lots or lands, including the approximate depth of said water if known; the results of all drillings for water within the area of the subdivision or near its boundaries at any time in the present or past, insofar as known; the amounts of such water likely to be available; the rights of any other person or persons, land or lands to the use of said water; and the legal and physical provisions, if any, for assuring the use of said water or any part thereof to each of said parcels, lot or land;

(4) Such other information regarding the availability of water which the person preparing such notice may wish to present;

Provided, however, where each of said parcels, lots or lands is to be furnished with an adequate supply of water for the purposes intended in the sale or lease from a piped public water supply, the information in items (2) and (3) need not be given; and where a parcel, lot or land will have assured availability to a supply of water adequate for the purposes intended in the sale or lease from surface water, the information in item (3) need not be given. In all cases, however, where any water described in said notice shall be known to be unfit for human or animal consumption, or for any other purposes intended in connection with the sale or lease of said parcels, lots or lands, the same shall be recorded upon said notice.

Proposed N.M. Subdivision Prospectus Act, § 5.

the information. In short, the California legislation is a system relying on the state taking direct responsibility. The New Mexico proposals reject this much reliance on the state, and instead utilize its powers only to get essential information into the hands of the prospective purchaser, and from that point on let the market operate. There were several reasons for these modifications. California has emphasized too much the legal-financial aspects of the problem, while giving less attention to the possibility of poor physical conditions (water availability and flooding). In New Mexico it has appeared that the most serious abuses in subdivision land sales have come from the latter causes rather than the former. With respect to state scrutiny of the legal phase of the transaction, it seemed much better not to burden the Real Estate Commission with this type of detail in the beginning. Furthermore, as a matter of principle, it would seem that the state should not review private purchase and sale agreements unless it is absolutely necessary to do so. It was judged that disclosure could meet the problem with a minimum of public intervention. In short, the same basic philosophy was used as lies behind the Securities Exchange Commission.

In New Mexico, as in California, the Real Estate Commission may request additional information, or conduct an investigation.[73] However, to protect the subdivider, actions on such matters in New Mexico must be initiated within five working days of receiving the subdivider's prospectus; furthermore, right of appeal is provided from any action of the Commission or its staff to the district court of the county in which the subdivision lies.[74]

In the normal case, however, where such supplemental information or investigation is not necessary, the application would simply be accepted for filing by the Real Estate Commission, and stamped with a legend as follows:

> Accepted for filing by the New Mexico Real Estate Commission. This prospectus is issued for the information of prospective purchasers or lessees of the lands indicated, and approval for filing does not constitute verification by this Commission of any statement contained herein, or recommendation or approval of the Commission of the subdivision . . . . This filing does *not* constitute approval of this subdivision by any county, municipal or other agency or authority the approval of which may be legally required.[75]

At a nominal fee, copies of the filed prospectus would be furnished to the sub-

73. In order to prevent "fishing expeditions," the scope of additional information which may be required is limited. According to Sec. 6 of the proposed act, it ". . . shall be within the general framework of the items set forth in the preceding section, and shall not go beyond them into other aspects of the subdivision or sale or lease thereof."

74. Because the Real Estate Commission in New Mexico is a group, while the California Commissioner is a single person, the New Mexico procedures on these matters are somewhat complex, but well-defined in the proposed statute. See proposed N.M. Subdivision Act §§ 6-9.

75. Proposed N.M. Act §§ 6-9, *supra* note 74.

divider, who must give the same to every prospective purchaser or lessee "sufficiently prior to the execution of a binding contract or agreement . . . to permit said purchaser or lessee to read the contents thereof, if he so desires, before signing said binding contract or agreement."[76]

To assist local subdivision control, the proposal also provides for an automatic furnishing of prospectuses within their respective jurisdictions to all planning commissions which request them.[77]

While the spelling-out of the mechanics of the proposed act gives the appearance of a cumbersome process, the information required is, in fact, only what any responsible subdivider should know and furnish to his buyers in any case. The New Mexico proposals (unlike California) have the additional advantage of the limit of five working days to prevent any serious delay in the legitimate marketing of subdivided land.

V. EXTRATERRITORIAL EXERCISE OF POLICE POWERS

The spilling of suburbanization beyond municipal boundaries has raised (together with many other problems) the question of the extraterritorial extension of the planning, zoning, subdivision, and official mapping powers of the municipality. The traditional, and perhaps most satisfactory, method of dealing with this problem is by means of regular annexation as areas begin to have a clear potential for urbanization. However, for a variety of political and economic causes, annexation has failed as an adequate solution, in recent decades.[78] The next best way for dealing with extra-municipal growth is to secure the close coordination of municipal and county planning and land-use controls through a regional planning commission encompassing all the jurisdictions involved. Where this, too, is impossible of achievement, the case for extraterritorial powers becomes more compelling.

A. Validity of extraterritorial exercise of land-use controls: It is well established in American law that municipalities may exercise a broad range of extraterritorial police powers when properly authorized by state enabling legislation to do so.[79] At least seven states have some form of extra-territorial *zoning,* and in a few states it has been operating successfully for more than thirty years.[80] At least two cities in states that have no provision for extra-

76. *Ibid.,* For statutes using the same mechanism, see the Pennsylvania acts cited in note 70 *supra.*

77. Proposed N.M. Act § 11, *supra* note 72.

78. See, Jones, *Local Government Organization in Metropolitan Areas,* ch. V, in The Future of Cities and Urban Redevelopment 550-72. (Woodbury ed. 1953).

79. See, Maddox, Extraterritorial Powers of Municipalities in the United States (1955); Anderson, *Extraterritorial Powers of Cities,* 10 Minn. L. Rev. 475 (1926); McQuillen, Municipal Corporations § 10.07 (3rd ed. 1949).

80. Ala. Code tit. 37, § 9 (1953), see also Ala. Code Appendix §§ 970 and 974; Ind. Stat. Ann. §§ 53-734, 53-735 and 53-753 (1951 ed. and Supp. 1960); Md. Code Ann. art. 66B, § 21(g) (1957) (applicable only to Tabbot County); Neb. Rev. Stat.

territorial zoning have felt the need for such control strongly enough to attempt a compromise solution: without actual jurisdiction, they "pre-zone" surrounding fringe areas into various suitable categories, thus informing all property owners what zones will be applied if and when the area is subdivided and annexed.[81]

Some academic commentators have raised the point that extraterritorial zoning constitutes "legislation without representation," since it involves the controlling of property owned by persons who have no political representation on the municipal governing body which does the zoning.[82] However, examination of the cases appears to indicate the following:

(a) Extraterritorial zoning seems to have enough popular acceptance that few persons affected have chosen to litigate constitutionality.

(b) The two cases which have held extraterritorial zoning to be invalid have done so on the ground that there was no adequate state enabling legislation in effect at the time the ordinances were enacted.[83]

(c) One case has specifically upheld this type of zoning,[84] and two others have approved it *sub silentio* by validating such regulations without specifically passing on the point of constitutionality.[85] (In another case where the issue was raised, the plaintiff was precluded from arguing it on technical grounds.)[86]

(d) Research has revealed no case where extraterritorial zoning based on appropriate enabling legislation has been declared invalid or unconstitutional.

Even academic commentators agree that if some method of county participation or representation from the affected area is included in the procedures leading to

§§ 14-418, 15-902 to 15-904, 16-901 to 16-904, and 17-1001 to 17-1003 (1954 ed. & Supp. 1959); N.C. Gen. Stat. § 160.181.2 (Supp. 1959) (certain counties not included); Okla. Stat. ch. 19, § 863.19 (Supp. 1960) (applicable to Tulsa only); Tenn. Code Ann. § 13-711 to 13-715 (Supp. 1960). Up until 1959, West Virginia granted such powers, W.Va. Code § 523 (1955), but in that year new enabling legislation substituted a new system of having cross-representation between city and county planning commissions instead (§§ 517, 523, and 525k, Supp. 1960). South Carolina gives such powers to Sumter, S.C. Code § 47-1072 (1952), but to no other city (§ 47-1055). A summary of major provisions in the states discussed above is contained in an Appendix to the New Mexico report. For further infomation, see also Amer. Soc. of Planning Officials, Extraterritorial Zoning (Planning Advisory Service Information Report No. 42, 1952).

81. The cities are Glendora (Calif.) and Carleton (Mich.). For discussion, see Melli and Devoy, *Extraterritorial Planning and Urban Growth,* 1959 Wisc. L. Rev. 55, 65 (1959).

82. Bouwsma, *The Validity of Extraterritorial Municipal Zoning,* 8 Vand. L. Rev. 806, 814 (1955), and Haar, *Regionalism and Realism in Land-Use Planning,* 105 U. Pa. L. Rev. 515, 528-9 (1957).

83. *State v. Owen,* 242 N.C. 528, 88 S.E.2d 832 (1955), and *American Sign Corp. v. Fowler,* 276, S.W.2d 651 (1955).

84. *City of Raleigh v. Moreland,* 247 N.C. 363, 100 S.E.2d 870 (1957).

85. *City of Omaha v. Glissman,* 151 Neb. 895, 39 N.W.2d 828 (1949), *appeal dismissed* 339 U.S. 960 (1950) and *Hatch v. Fiscal Court of Fayette County,* 242 S.W.2d 1018 (Ky. 1951).

86. *Peterson v. Vasak,* 162 Neb. 498, 76 N.W.2d 420 (1956).

extraterritorial zoning, the objection of lack of representation disappears.[87] With this principle in mind, a number of states recently have provided for such representation.[88]

Turning from zoning to *subdivision control,* it is interesting to note that extraterritorial powers have been suggested since the Standard City Planning Enabling Act of 1928[89] and that "the courts have had little difficulty in supporting such intrastate extraterritorial jurisdiction."[90] Extension of the *official map* to such areas also seems to have been accepted with little or no specific litigation as to constitutionality, and it is noteworthy that when Wisconsin specifically permitted extraterritorial exercise of he official map power in 1951, nineteen municipalities availed themselves of the new enabling legislation in the ensuing five years.[91]

B. Proposals for New Mexico: A premise of the New Mexico proposals has been that coordinated regional planning is preferred to extraterritorial exercise of land-use controls. Therefore, as a condition precedent to the exercise of any extraterritorial land-use powers, a municipality first must make a bona fide attempt to establish a regional planning body with the county or counties concerned. Such an attempt is defined as the making of one original and one revised proposal for establishing such a body which, in good faith, suggests a regional commission that would be fair, reasonable and acceptable to the jurisdictions concerned. Thus, responsible attention must be given to the possibility of regional planning before extraterritorial powers may come into affect. Furthermore, the proposal provides that if at a later time a regional planning commission should be created, then when its recommendations begin taking effect as land-use controls in the affected areas, extraterritorial powers shall simultaneously cease.[92]

In addition, it is provided that the county may always supersede the extraterritorial municipal controls by passing ordinances imposing higher requirements. Thus, a kind of concurrent jurisdiction may exist in fringe areas, with the higher regulations of each government prevailing in the various categories

87. See Bouwsma, *supra* note 70, at 814, and Amer. Soc. of Planning Officials, cited *supra* note 80 at 7-8.

88. States incorporating representation from fringe areas into procedures for extraterritorial zoning include: Nebraska Acts, 1959, ch. 40, § 4. (Cities of a primary class.); Indiana Acts, 1949, ch. 380; North Carolina Sess. Laws, 1959, ch. 1204; and Oklahoma Laws, 1955, § 5, p. 165.

89. *Supra* note 14, § 12.

90. Note, *Land Subdivision,* 65 Harv. L. Rev. 1226, 1228 (1952). See also, Etter, *Some Legal Approaches to Problems of the Rural-Urban Fringe,* 22 Ore. L. Rev. 268 (1943). Three states have provisions for dual control (both city and county) in such areas: Mich. Stat. Ann. §§ 26.446 to 26.459, espec. 26.456 & 26.459 (1953 ed. & Supp. 1959); N.D. Rev. Code § 40-4818 (1943); N.M. Stat. Ann. § 14-2-1.3 (1953).

91. *See* Melli and Devoy, *supra* note 81, at 63.

92. Proposed N.M. Act Clarifying County and Municipal Subdivision Control Powers § 12; proposed N.M. Enabling Legislation for Extraterritorial Zoning § 1; and proposed N.M. Enabling Legislation Permitting "Official Maps" § 15.

of control.[93] And, to ease the administration in such a case, the act permits unification of administration and enforcement.[94]

On the question of representation, the New Mexico proposals specify that two representatives appointed by the county commissioners, at least one of whom is to come from the affected area, shall be fully participating and voting members of the municipal planning commission in any matter affecting extraterritorial controls, and that they shall also sit on the Board of Adjustments as voting members on matters concerning such area. While it would blur jurisdictional lines to give the representatives actual voting powers on the municipal governing body, the act provides that they are to be advisors to such governing body, with an official right to be heard before any vote is taken on extraterritorial controls.[95] The proposals thus give protection against "legislation without representation."

VI. THE PROTECTION AND PRESERVATION OF HISTORIC DISTRICTS

Because of the rich historical heritage of New Mexico, a short but comprehensive enabling act on the protection of historic areas was included in the proposals and was adopted by the New Mexico legislature in 1961.[96] The new statute first states a general intent to grant all possible powers to local jurisdictions to act in such matters, subject only to constitutional limitations and the powers already granted to other agencies.[97] The act then grants the right to all counties and municipalities to create zoning districts (patterned after the Massachusetts acts, which already have been upheld)[98] for the protection of external features

93. In the case of *subdivisions,* the county may always impose review to assure (a) that proposed streets are in conformity with the width, courses and angles of adjoining streets, (b) proposed streets are defined by permanent monuments and (c) that the subdivision boundaries are defined by permanent monuments. In addition, any county regulations as to land *use* predominate over municipal designations to the contrary. On the other hand, with respect to other subdivision requirements (dimensional standards and required installations of facilities), either the city or county regulations are to be applicable, depending on which is higher. In the case of *zoning,* a similar division is established. Where use designations conflict, the county prevails. Where dimensional requirements conflict, the higher standard prevails. In the case of the *official map,* to the extent that required street beds, etc., are supplementary to each other, both apply, but to the extent of their inconsistency, the county official map prevails. The New Mexico proposals also require a six-months notice to the county governing body before any municipality can begin exercising extraterritorial powers. See sections of proposals cited in previous note.

94. See proposed N.M. acts, *supra* note 92, § 17, § 4, and § 18, respectively.

95. *Id.,* § 15, § 2, and § 16, respectively. Such representation is not required where the fringe area concerned contains fifty residents or less, or where the county governing body has failed to make appointments.

96. N.M. Stat. Ann. §§ 14-50-1 to 14-50-5 (Supp. 1961).

97. N.M. Stat. Ann. § 14-50-2 (Supp. 1961).

98. Mass. Acts & Resolves, 1955, ch. 601 and 616 (relating to the Town of Nantucket and the Beacon Hill area in Boston, respectively). The first was upheld in principle in *In re Opinion of the Justices,* 333 Mass. 773, 128. N.E.2d 557 (1955), and the second in

in historic areas.[99] It also establieshes a broad range of different methods by which a locality may enter into contracts with the owners of historic properties to acquire easements permitting public control over their development,[100] or to acquire a right of purchase superior to that of any private person offering an equal price, and, if necessary, by which it may use eminent domain to acquire such rights as the public may need for their preservation and protection.[101] Thus, in addition to the police power, the recommendations would authorize the use of two other great powers of government—the spending power and the power of eminent domain—to implement protection of historic areas. In cases where it would be inequitable, or otherwise difficult because of constitutional or practical reasons, to use the zoning power, methods which involve the payment of compensation may be employed to protect a legitimate public interest in an irreplaceable community resource. The 1961 New Mexico statute now gives, in larger measure than is known to exist in any other state, a range of legal tools to be applied as local conditions and needs indicate.[102]

VII. THE ACQUISITION OF CONSERVATION EASEMENTS.

During recent years there has been a considerable amount of discussion concerning public acquisition of "conservation easements" or "development rights" as a means of obtaining certain public interests in land for less than the full fee.[103] Public easements[104] can be useful in state, regional, county and municipal planning, recreation, and conservation activities in at least four important ways:

In re Opinion of the Justices, 333 Mass. 783, 128 N.E.2d 563 (1955). See also *State v. Wieland,* 269 Wis. 262, 69 N.W.2d 217 (1955), and *Berman v. Parker,* 348 U.S. 26 (1954). Although the latter case involved the power of eminent domain, because of its references to police power, it has often been cited in support of the use of uncompensated police power control over matters of aesthetics. *See, e.g.,* the opinions cited herein.

99. N.M. Stat. Ann. § 14-50-3 (Supp. 1961).

100. See also Pa. Stat. Ann. tit. 16, §§ 1995, 2002 (Supp. 1959), allowing counties, with the review of the planning commission, to acquire by purchase or gift, and to maintain, historical properties. Tit. 16, § 37403 (62) extends the same right to third class cities in Pennsylvania. Note that both these statutes are limited to purchase or gift, and do not, like New Mexico, permit the use of eminent domain.

101. N.M. Stat. Ann. § 14-50-4 (Supp. 1961).

102. For general discussions of aesthetic and historic area zoning, see Joint Committee of Amer. Instit. of Architects and Amer. Instit. of Planners, Planning and Community Appearance (1958); Amer. Soc. of Planning Officials, *Architectural Control,* and *New Developments in Architectural Control,* (Planning Advisory Service Information Report Nos. 6 and 96, 1949 and 1957, respectively); McQuillen, Municipal Corporations § 25.31 (3rd ed. 1950); and Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal,* 20 Law & Contemp. Prob. 218 (1955).

103. *Eg.,* Whyte, *A Plan to Save Vanishing U.S. Countryside,* Life Magazine, 88-102 (Aug. 17, 1959); Whyte, *Securing Open Space for Urban America* (Urban Land Inst. Tech. Bull. No. 36, 1959); and *The City's Threat to Open Land,* 108 Arch. Forum 87 (1958).

104. For convenience in the present discussion, all public less-than-fee interests will be generically referred to as "easements," although not all the relationships contemplated may be "easements" in the strict legal sense.

(1) In the control of advertising and other types of land-uses which can become nuisances along roads and highways;
(2) In the preservation of first-class farming, grazing or timber lands from premature residential subdivision or other types of development which will be wasteful of these resources;
(3) In the preservation of spectacular scenic views; and
(4) In the securing of major areas for hunting, fishing, and other types of recreation without actual acquisition of complete fee ownership.

Control of nuisances along the highways has gotten a considerable boost from the Federal Interstate and Defense Highway Act of 1958,[105] which provides for subsidies where advertising signs are regulated either by the police power or the acquisition of easements within 660 or more feet on either side of the right-of-way. In the year 1959 alone, ten states enacted legislation tightening controls on highway advertising, five of which were in terms to fulfill the federal statute.[106] Three states specifically authorized the acquisition of easements for this purpose in 1959,[107] and other enabling acts on the subject go back as far as 1919.[108]

The New Mexico proposal suggests that in all four categories the state, counties and municipalities should enjoy the power to receive gifts of easements and to expend public funds to acquire the easements by voluntary purchase.[109] Such agreement may include the obligation of the government to perform certain services and agree to various limits as may be appropriate to the acquisition. For example, in the case of an easement to use certain lands for hunting, the agreement may limit the hunting to certain months of the year and provide, in return that the State stock the lands, furnish special fire surveillance while the easement is in use, or require similar arrangements. It may be that powers of

105. 23 U.S.C. § 131 (1958).

106. National Highway Users Conference, Highway Transportation Legislation in 1959, p. 14 (Washington, D.C., 1960).

107. Conn. Pub. Acts, 1959, No. 526, § 6; Md. Laws, 1959, ch. 130; N.D. Laws, 1959, ch. 229. The Maryland act in particular is interesting in that it permits condemnation of existing leases for advertising purposes.

108. Mass. Laws Ann. ch. 92, § 79 (1954) (relating to areas near parks, first enacted 1919); 45 Stat. 1070, 40 U.S.C. § 72(a) (relating to areas near parks in the District of Columbia, first enacted 1928); Md. Code Ann. art. 89B, § 8 (1957) (relating to areas near highways, first enacted 1951); and Cal. Govt. Code § 6950-6954 (Supp. 1960) (relating to the preservation of urban open space, first enacted 1959). For a discussion of the last statute, see Note, *Preservation of Open Spaces Through Scenic Easements and Greenbelt Zoning,* 12 Stan. L. Rev. 638 (1960). In general, see Siegal, the Law of Open Space, ch. 3, § C. (N.Y. Regional Plan Assoc. 1960). All of these authorize acquiring of less-than-fee interests by eminent domain, except California, which is limited to voluntary transfers.

109. Proposed N.M. Enabling Legislation to Permit Acquisition of Public Conservation and Other Easements § 1.

this type are implied in the general powers of the various state, county and municipal agencies, and in some cases, easements may already exist. However, there is still value in having specific enabling language to cover these matters in a comprehensive way, to clarify beyond doubt the legal position of any public body wishing to engage in such acquisitions, and to bring to the attention of the public the fact that such powers exist so that political interest in their more widespread use may be generated.[110]

In the case of advertising signs and other commercial uses along highways, and the particularly acute potentiality of blight which they present, the proposed legislation goes further than in the other three categories, and extends to the state, counties, and municipalities the right to acquire such easements by eminent domain.[111] Such acquisitions are, of course, subject to the payment of just compensation to the owners for the interest taken.[112] In order to lend flexibility to the proposal, the public bodies mentioned are permitted to lease or license the use of such rights, *i.e.,* to permit certain types of advertising and commercial uses, subject to such regulations and conditions as the public body may impose in granting the lease or license.[113] The advantage of the proposal is to grant to the state and local levels of government, if they wish to use it, an alternative to police power controls. Thus, where under existing legislation any control of advertising and commercial activity must be exercised through the police power, with all the constitutional and practical limitations involved, the proposal would increase the range and flexibility of controls in those situations where the political organs concerned determine that the benefits are worth the monetary costs of just compensation.

VIII. SUMMARY AND CONCLUSIONS

The problems of urban planning and land-use controls of the 1960's unquestionably demand reconsideration of the legal context in which society strikes the balance between private right and public interest. New technologies, increasing urban pressures, shifting demands in the American living pattern,

110. While based on California legislation (see note 108 *supra*), the New Mexican proposal is more specific and comprehensive than any other act known to have been enacted to date.

111. See statutes cited in note 107, 108 *supra,* except California.

112. Proposed N.M. Act *supra* note 109, at §§ 2-4.

113. *Id.* The State Highway Commission may also dispose completely of such rights where it becomes in the public interest to do so. While this might be a useful provision at the State level, it was felt that there might be a risk of political favoritism if the smaller local units were given powers of acquisition and disposal. Therefore, they are limited to leases and licenses (although there is no limit imposed upon the length of these). Powers of this general type are now familiar in the urban renewal acts of many states, under which a redevelopment authority, municipality or other government may acquire blighted areas by eminent domain, and after total or partial clearance, lease, license or resell the land to private persons subject to limitations on the use in the public interest to prevent further blighting. See note, *Urban Renewal: Problems of Eliminating and Preventing Urban Deterioration,* 72 Harv. L. Rev. 504, 538 (1959).

and the need to conserve natural resources have all contributed to making the enabling legislation of an earlier generation obsolete. In some cases, existing controls are overly rigid and constrictive, and in others, extension of legitimate public interest is essential.

The proposed legislation for New Mexico summarized herein attempts to suggest innovations and new directions in a number of fields. In the area of regional planning, it is submitted that the proper arena of state action is to prescribe the forms for the legal creation of regional bodies, but to leave purposes and substance to local agreement.

With respect to the master or general plan, it has been proposed that a comprehensive new approach is required. Among other things, a suggestion has been that the general plan could be considered, to advantage, as a two, three or four-stage process, each state having its own *raison d'être* and specifications for adoption. The elements of the general plan have been set forth with more precision than in any other known act, and a unique criterion for relating the general plan to implementing legislation has been established.

With respect to subdivision control, a closer integration with zoning has been suggested, the question of required dedications has been handled in a relatively new way, and, perhaps most significant, a system of public participation based on information rather than direct control has been put forth.

The question of extraterritoriality has been explored, and proposals made for its implementations in a fashion that will respect the rights of city, county, and property owners while at the same time encouraging installation of a superior method of dealing with the problem through true regional planning.

The problem of protecting historical resources has been handled by extending to local jurisdictions not only police power controls, but the right to purchase, and, if necessary, to use eminent domain to assure the safety of the state's heritage.

Broad powers have been recommended to permit the acquisition of easements and other less-than-fee interests in real property by purchase or gift in order to limit advertising and commercial abuses along highways, to protect scenic views, to prevent wastage of the land resource (including premature subdivision), and to broaden the scope of arrangements which can be made for public recreation. In the case of advertising and commerical highway uses, powers of eminent domain are also extended to those local units which may wish to use them.

Almost none of the suggestions have imposed any new mandatory duties on any village, town, city or county. All have enlarged the ability of these jurisdictions, where there is popular political support for wider action, to improve the over-all pattern of development. While the police power has been clarified where it seemed necessary to do so, perhaps the greatest emphasis has been to explore avenues of public action beyond this power—in the fields of public expenditure, eminent domain, and in the improvement of the operation of the private real estate market itself.

At all stages a fundamental consideration has been to strengthen the role of

local discretion and responsibility, while at the same time underlining the critical relationship between long-range planning and the implementation process.

In closing, it must be emphasized that at the date of this writing, the proposals for New Mexico are still in a very preliminary stage, and must be subjected to careful review and discussion before enactment as legislation. However, it is hoped that the report—in spite of the limitations of time under which it was produced—will serve as a benchmark for future legislative activity in this field in New Mexico, and possibly may prove stimulating to sister jurisdictions as well.