PROBLEM ON THE FRINGE: CONFLICT IN URBAN-RURAL TRANSITION AREAS

Much has been written and spoken concerning the revolution in the central portions of American cities. But another, albeit subtler and less violent, revolution is in progress on the outskirts of those same cities. The point of conflict is where the expanding urban centers meet the resistance of rural America, and there the lines of battle have been drawn. The city dweller, seeking to escape the crowding and decay of the city's core, has taken flight to suburbia. The growth of the suburb has led to confrontation between the urban dweller and his country cousin and conflict—not the violent conflict of the city's core, but the quiet conflict of life styles—has resulted.

The sprawl of the cities has raised many questions which must be answered. Inner-city problems are most certainly pressing and deserving of solutions, but attention must also be given to the "outer-city" or we will one day find outselves with one set of solutions, only to be faced by a completely new set of problems. The sickness of the city must be treated at all its sources or the patient may die of one disease while another is being cured. This note will explore some of the areas of conflict in the urban-rural fringe, as well as the qualifications of various governmental bodies to cope with the problem.

I. Development of the Urban-Rural Fringe

From a loose confederation of thirteen agrarian states, the United States has gradually developed into an increasingly urban nation. In the 1920 census, a milestone of demography was passed—more Americans were recorded to be living in the cities than on the farm.[1] Urbanization as the wave of the future is a part of the American scene. This does not only mean that more and more people are being crowded into the existing city limits; the city itself has been expanding into land that was once exclusively rural. So what is taking place today is actually a step beyond urbanization, the phenomenon of sub-urbanization.[2]

A home in the suburbs is more today than just a desirable goal. It is becoming a social imperative.[3]

> The happy family of TV commercials, of magazine covers and ads, lives in suburbia. . . . Here is the place to enjoy the new leisure. . . . It is not merely that hundreds of thousands have been moving to suburbia, here

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[1] Information Please Almanac 624 (1968). Source of the figure is the United States Bureau of the Census. In 1960, the United States was 69.9% urban in population.

[2] W. White, *Introduction* to Editors of Fortune, The Exploding Metropolis at ix (1968). [Hereinafter cited as Fortune.]

[3] *Id.*

> they are breeding a whole generation that will never have known the city at all.[4]

But living in the suburb is not all the dream-like, idyllic existance portrayed in television commercials. Few trip destinations are within walking distance and two cars, with the corresponding increase in costs such as fuel, insurance and maintenance, are almost a necessity.[5] Time spent in commuting has grown at rapid rates as the suburbs have moved farther and farther from the central business district of the city.[6] The physical tasks associated with maintaining the suburban home and lot can be bothersome, even to the weekend gardener. Still a higher proportion of the central cities have been experiencing a decrease in population, and nearly all have portions with lower population than just a few years ago.[7]

Perhaps the single factor most responsible for the growth of suburbia is the automobile. In fifteen of the nation's twenty-five largest cities, sixty per cent or more of all commuters entering the downtown business district arrive by automobile.[8] These people are coming, largely, from the suburbs. But the automobile alone as a positive, enabling factor, never would have been sufficient stimulus for suburban growth—negative or compelling factors had to exist as well. Increasing density, age and general disorganization at the city's core all played a part in starting the centrifugal movement that still continues today.

But the land to which the suburbanite moves is not uninhabited; awaiting him, not with any great enthusiasm, is the rural farm dweller. The farmer's life, when undisturbed, is not an easy one—he is caught in a cost-price squeeze that is making life most difficult for him. In order to survive the farmer must become more efficient; he must use machinery, fertilizers and insecticides, and he must keep his livestock in close confinement.[9] As will be seen later, these facts are a source of growing conflict on the urban-rural fringe.

Solutions to the nation's urban problems will require the understanding and cooperation of all the people. Continuing antagonism between groups can only lead to polarization and disruption, rather than peaceful pluralism. It is therefore essential that problems in the urban-rural fringe be dealt with, not only because of the disruption to the lives of the indi-

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[4] *Id.* at x.

[5] W. M. DOBRINER, THE SUBURBAN COMMUNITY, 375-80 (1958).

[6] R. Dickson, *The Journey to Work*, in METROPOLIS ON THE MOVE 71 (ed. J. Gottman & R. Harper 1967).

[7] D. Grant, *Trends in Urban Government and Administration*, in URBAN PROBLEMS AND PROSPECTS 37 (ed. R. Everett & R. Leach 1965).

[8] FORTUNE, note 2, *supra*, at 37.

[9] C. P. Streeter, *The Rural Dilemma and Challenge*, RURAL URBAN FRINGE CONFERENCE PROCEEDINGS 3 (Sponsored by the University of Illinois ed., J. Quinn & N. Krausz, held on November 9, 10, 1967) [Hereinafter cited as Streeter.]

viduals directly involved, but also because of the greater societal need for understanding and cooperation.

II. Clash of Life Styles

Setting out to buy his piece of land and build his suburban home, the urban dweller may well have an idealized picture firmly planted in his mind. In the country the grass is green and the air is sweet and clean; his children can play by the brook as he lounges in his back yard, cocktail in hand, and surveys the open fields. His suburban home is to be his refuge from the hustle-bustle of the city, far away from his job, urban congestion and air pollution. When he wants to see a show, attend a concert or catch a ball game, he can simply jump into the car and go into town for a night of recreation. He is a man of two orientations—he depends on the city to provide him with necessities and cultural stimulation, a job and public services; he looks to his suburban bedroom home as a shelter, free from annoyances.

While today's farmers are not the country bumpkins of a few decades ago, their view of their rural homes differs from that of the suburban dweller. The farmer's home is his livelihood as well as a place to keep his furniture under roof. He has a financial interest in his property stretching beyond an investment in a home—he has placed his capital in land as a resource, not only as a refuge from the city.

Today, in the rural-urban fringe, these two life styles are in conflict. And many farmers feel that suburban ways of life and farming practices do not mix:

> Town people will pay extra for a lot facing a farmer's pasture so they can see those pretty cows, . . . but when a dairyman spreads manure or a hog farmer builds a manure lagoon, they want to sue him. When city people move out here, a farmer is in trouble immediately if he hires an airplane to spray his crops, or if he has to run his diesel engine on the irrigation pump at night.[10]

Sights, sounds and smells are not the only sources of trouble. The increasing population demands more schools with a corresponding increase in tax burden, land prices escalate putting new acreage out of reach of the farmer's budget, and traffic increases.[11]

Other problems are of a less tangible nature. For example farm people may feel that the moral behavior of the new neighbors is suspect:

> We pay more attention to religion than these folks from town do. . . . Our kids get into less trouble because they're busier. . . . A country doctor wrote that there had been a noticeable increase in syphilis. . . .[12]

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[10] *Id.* at 4-5.

[11] *Id.* at 5.

[12] *Id.*

The farmer also resents the gradual crowding of his open land, and is perhaps more than a little jealous of the material possessions of the newcomers.[13]

Of course, not all farmers hate all suburbanites, or vice versa. The farmer stands to benefit, at least as his capital appreciates as land values in the area go up.[14] Some farm dwellers have seen and articulated true benefits from having their new neighbors move in: "interesting new people," "different points of view" and "new stability" have been infused into the rural community.[15] However it is the extremely rare suburbanite who welcomes the first whiff of decaying manure that drifts across the pasture into his livingroom and begins to shatter the myth of rural living he expected to see fulfilled when he moved next to the bucolic pasture.

III. Areas of Conflict

Courts and government are likely to become involved in the conflict in the urban-rural fringe in three general areas: annexation and incorporation, zoning, and the tort law of nuisance. Each of these areas has its own features and failings in regard to fringe problems. Often the governmental agencies are brought into the picture after tempers are already frayed and often flaring, with the issues and rights of the respective sides of the controversy fogged with rhetoric and emotion. Some action has begun or is about to be undertaken and the differences in orientation and outlook of the farmer and the suburbanite are brought into sharp focus.

Each of these three areas of governmental intervention has unique features and must be examined in turn and an evaluation of their respective effectiveness made.

A. Annexation and Incorporation

Accustomed to the services and conveniences of the city, the suburbanite, although wishing to preserve the "rural" setting to which he has moved, may soon begin to miss some of the urban conveniences, such as sewers, garbage collection and police protection. A seemingly simple solution to him is annexation—simply attach the newer community with its rural atmosphere to the city with its services and, by grafting the branch to the tree, obtain the desired amenities. The rural resident in the area may view things differently however—for him annexation means higher taxes for unneeded services and more city people moving into his area. He may also fear the destruction of his local school district and

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[13] *Id.*

[14] FORTUNE, note 2, *supra*, at 118.

[15] Streeter, note 9, *supra*, at 5.

have a general mistrust of interference from a city hall that is remote and will not understand his problems.[16]

Another alternative open to the fringe area is incorporation. Wishing to preserve the rural atmosphere of his home and substantial control of his community, the suburbanite may urge incorporation of the fringe area as a municipal corporation or a village. In this manner the suburbanite may feel that he can insure his independence, preserve his financial freedom from the city, and avoid the problems which annexation may cause. Incorporation provides a unifying force in the fringe, making it easier to get cooperation among the citizens to solve urban problems.[17] The rural dweller may not, however, see incorporation in the same light. He is generally satisfied with things as they are and may fail to see the need for change. A major objection that he might raise is the possibility of increased taxation, particularly if the area is to be primarily residential.

> Without substantial revenues from industrial and commercial properties, residential property taxes are likely to be unreasonable because of the need of a newly incorporated city to make heavy capital outlays for plant and equipment.[18]

Annexation to an existing municipality may be instigated in Ohio by an application of a majority of the freeholders living in the area proposed for annexation. Because suburban dwellers normally occupy smaller plots of land than farmers, rural-oriented people often become a freeholder minority in a relatively short period of time. Once the procedural formalities have been followed, the board of county commissioners determines the advisability of the proposed annexation.[19] Acceptance of the proposed annexation by the existing municipal corporation is necessary for completion.[20] The board is vested with both the statutory power to arrive at this decision and wide discretion in its exercise.

Following a decision by the board which approves of the annexation, any interested party may petition the court of common pleas for an injunction restraining the action necessary to complete the annexation.[21] The petition must show:

> (1) How the proposed annexation adversely affects the legal rights or interests of the petitioner;
>
> (2) The nature of the error in the proceedings before the board of county

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[16] JANS, THE URBAN FRINGE PROBLEM: SOLUTIONS UNDER MICHIGAN LAW 30 (1957).

[17] *Id.* at 10-11.

[18] *Id.* at 12.

[19] OHIO REV. CODE ANN. § 709.02 (Page Supp. 1968).

[20] OHIO REV. CODE ANN. § 709.04 (Page Supp. 1968).

[21] OHIO REV. CODE ANN. §§ 709.03-709.033 (Page Supp. 1969).

> commissioners . . . or how the findings of the board are unreasonable or unlawful.[22]

Both factors must be proven, or the injunction will not issue.

The process of incorporation is similar to that for annexation.[23] Application for incorporation as a village or municipal corporation is made by a petition addressed to the board of county commissioners,[24] signed by a majority of the adult freeholders residing in the territory for which incorporation is proposed.[25] If the board of county commissioners finds that any part of the area proposed is within three miles of the boundaries of any municipal corporation the incorporation proceeding is stayed and the board must inform the neighboring municipality of the annexation proceedings.[26] The board then holds a hearing on the proposed incorporation at which time appearances may be made either in support of or opposition to the petition.[27] The petition will be granted if the formal requisites are met and if the board finds that:

> The territory included in the proposed municipal corporation is compact and is not unreasonably large; municipal services . . . are capable of being financed by the proposed municipal corporation with a reasonable local tax . . . and the general good of the community, including both the proposed municipal corporation and the surrounding area, will be served if the incorporation petition is granted.[28]

After the board so finds, a certified transcript of the proceedings and all other papers are forwarded to the county recorder[29] for filing in his office and, after a sixty day waiting period, with the secretary of state to complete the incorporation.[30]

As in the annexation procedure, provision is made for an action to enjoin the incorporation by any person interested, setting forth the errors complained of or that the decision of the board is unlawful or unreasonable.[31] The remainder of this section will discuss annexation and incor-

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[22] OHIO REV. CODE ANN. § 709.07 (Page Supp. 1968). The injunction restrains the presentation of the approved annexation petition to the legislative authority of the municipality for appropriate action to complete the annexation.

[23] OHIO REV. CODE ANN. §§ 707.01-707.14 (Page Supp. 1968).

[24] OHIO REV. CODE ANN. § 707.01 (Page Supp. 1968).

[25] OHIO REV. CODE ANN. § 707.02 (Page Supp. 1968).

[26] OHIO REV. CODE ANN. § 707.05 (Page Supp. 1968). The board may proceed with the incorporation petition only if the neighboring municipality(ies) fails to take steps toward annexation of the territory within 120 days of receipt of notice, or if the same municipality has rejected or failed to act upon a proposed annexation including the same territory within the two years previous, or if the neighboring municipality approves the incorporation petition.

[27] OHIO REV. CODE ANN. § 707.06 (Page Supp. 1968).

[28] OHIO REV. CODE ANN. § 707.07 (Page Supp. 1968).

[29] OHIO REV. CODE ANN. § 707.08 (Page Supp. 1968).

[30] OHIO REV. CODE ANN. § 707.09 (Page Supp. 1968).

[31] OHIO REV. CODE ANN. § 707.11 (Page Supp. 1968).

poration injunction proceedings somewhat indiscriminately because the requirements for both are quite similar.

The requirement that the petitioner be a "person interested" has become a cloudy one under Ohio law, and must be met in actions to enjoin both annexation and incorporation.[32] While the status of resident freeholder qualifies one to sign a petition requesting either annexation or incorporation, the courts are divided over the issue whether or not a resident freeholder is by that status alone a "person interested." The division is not between annexation and incorporation situations. It has been held that such a person is one whose rights will be affected "substantially, but not remotely."[33] Thus the petitioner must show not only that he is interested in the proposed annexation, but the nature of his interest as well,[34] and the status of being a resident freeholder is not necessarily sufficient to establish one as a person interested.[35] Directly opposite to this holding is that in *Hoye v. Schaefer*,[36] wherein the court said that an adult resident freeholder is by that status alone a "person interested." The latter position seems to be the more tenable:

> Inasmuch as it is the adult resident freeholders of the area who are by statute vested with the power to initiate the annexation proceedings, it would seem to follow logically that those of that class . . . would by virtue of that status alone be persons interested within the contemplation of the statute.[37]

Assuming arguendo that the petitioner can mount the threshold problem of establishing himself as a "person interested" he must then meet the statutory requirements for the injunction.[38] The predecessor of the annexation statute now in force did not establish what must be shown by the petitioner[39] and the proceedings thereunder were more similar to a pure action in equity. However, to warrant an injunction, an equitable type of inquiry is required by both statutes now in effect,[40] for the court

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[32] *Id.*

[33] McClintock v. Cain, 74 Ohio L. Abs. 554, 557, 142 N.E.2d 296, 299 (C.P. 1956); Schurtz v. Cain, 75 Ohio L. Abs. 132, 133, 143 N.E.2d 496, 497 (C.P. 1956).

[34] Post v. Cain, 154 N.E.2d 185, 187 (Ohio C.P. 1956); Branson v. Cain, 76 Ohio L. Abs. 21, 23, 146 N.E.2d 892, 893-94 (C.P. 1956).

[35] Geauga Lake Improvement Ass'n v. Lozier, 125 Ohio State 565, 574, 183 N.E. 489, 492 (1932).

[36] 77 Ohio L. Abs. 170, 174, 148 N.E.2d 532 (C.P. 1957), *aff'd* 109 Ohio App. 489, 157 N.E.2d 140 (1959).

[37] Whiteside, *A Critique on Municipal Annexation in Ohio*, 21 OHIO ST. L.J. 364, 381 (1960).

[38] OHIO REV. CODE ANN. § 709.07 (Page Supp. 1968) (annexation) For a statement of requirements for incorporation injunction see text adjacent to note 31, *supra.*

[39] OHIO REV. CODE ANN. § 709.07 (Page 1954). This statute merely provided for filing of a petition in the court of common pleas to enjoin further proceedings. No elements necessary to warrant the injunction were set forth. The new statute became effective on December 1, 1967.

[40] OHIO REV. CODE ANN. § 709.07 (Page Supp. 1968).

must determine if the findings of the board are unreasonable. The court must decide whether the proposed annexation or incorporation is just, right or equitable, considering "the highest interests of all concerned and not only the present situation but the needs and growth of the locality in the future."[41] However, the ability of the city to provide police and fire protection and adequate road service has been held to be a political question and not justiciable.[42] Disarrangement of school districts has been held to be a factor that will not warrant an injunction.[43] All these interests however are precisely those that arouse strong feelings and animosities on the fringe.

The board of county commissioners is a political body and subject to legitimate political pressures. A large percentage of the freeholders in a given area may sign a petition for annexation or incorporation and the commissioners, swayed by what appears to be the will of the public, are then strongly inclined to acquiese to the petition. But the true needs of the public may not be served by the proposed action. As mentioned above farmers are likely to be dispersed over a given area to a much greater extent than suburban dwellers; one "development" may place many suburban freeholders on what was previously one man's farm. However, factors which are not likely to be weighed by a political body should enter into an annexation or incorporation inquiry, and, even if such a body was willing to assess these factors, the farmer minority in many instances cannot exert enough pressure to present viable arguments. Therefore considerations such as the ability of the city to properly service the area, the financial burden to already overburdened farmers and the possible conflict over future planning decisions made by city hall may never be presented to the board. Judicial review of the board's decision is not a workable remedy either. As discussed above, merely qualifying to bring such an action is a difficult task. Judicial review, once achieved, will be limited in scope by the exclusion of political questions. Moreover, it is extremely likely that the court, if it hears the petition for injunction, will affirm the board's decision, for conclusions and findings of the commissioners are favored by the courts, and, in the absence of a showing of a clear abuse of discretion, an injunction will not issue.[44]

B. Zoning

Zoning regulation has been the primary mechanism employed to implement planning for the orderly development of our cities, townships and counties. The administrative organ for the process of zoning

[41] McClintock v. Cain, 74 Ohio L. Abs. 554, 565 142 N.E.2d 296, 305.

[42] *Id.*

[43] *Id.*

[44] Hulbert v. Mason, 29 Ohio St. 562 (1876); Pickelheimer v. Warner, 29 Ohio N.P. (n.s.) 547 (1932).

in the county is the board of county commissioners and the township trustees in the township. The planning commission serves this function in the municipality.[45] The municipal planning commission members are appointed by the legislative authority of the political subdivision. The statute specifically provides for certain designated appointees.[46] If such a planning body is established in a newly incorporated fringe area, or when a newly annexed suburban-rural area comes under the authority of an already established commission, it is once again likely that a preponderance of the decision makers will share an urban viewpoint. Zoning restrictions may then be restrictions only upon the farmer and will serve as protection for the suburbanite. The farmer may well resent the allowance of multi-family dwellings and subdivision of large plots of land into smaller lots. Building codes, permits and other such regulation may appear to be totally unnecessary and an interference with his management of his property. Restricted activities which the urban-oriented individual feels to be obnoxious and noisome may be just those activities which provide the farmer with his livelihood.

The "existing use" doctrine does provide some limited shelter to a farmer who is in operation when the zoning ordinance or regulation prohibiting such activity is adopted. The doctrine has both a statutory and constitutional basis. The Ohio zoning enabling acts all provide that lawful use of land, building or premises existing at the time of enactment may continue without conforming to the requirements of the ordinance.[47] Under Ohio decisions due process also forbids the taking away of a right to a pre-existing use which is considered a vested right of the owner.[48] Retroactive zoning laws have been called unreasonable and confiscatory.[49]

The existing use doctrine is narrow, however. The use must have actually begun prior to the enactment[50] and mere purchase of land with

[45] OHIO REV. CODE ANN. §§ 303.02 (counties), 519.02 (townships) and 713.02 (municipalities), (Page Supp. 1968). Zoning ordinances are valid exercises of the police power, *City of Akron v. Klein*, 171 Ohio St. 207, 212, 168 N.E.2d 564, 568 (1960), and therefore the State of Ohio need not delegate the power to zone, as the state has power to make general laws; that is, those dealing with police regulations applying uniformly throughout the state. Such general laws do not include sections in the Revised Code purporting to grant powers to municipalities, *Village of West Jefferson v. Robinson*, 1 Ohio St. 2d 113, 118, 205 N.E.2d 382, 386 (1965). Of course, this means that restrictions on zoning power appearing in the enabling acts may not be binding.

[46] OHIO REV. CODE ANN. § 713.01 (Page Supp. 1968).

[47] OHIO REV. CODE ANN. §§ 303.19 (counties), 519.19 (townships), and 713.15 (municipalities) (Page Supp. 1968).

[48] Akron v. Chapman, 160 Ohio St. 382, 388, 116 N.E.2d 697, 700 (1953). The court does remark however that the denial of a right to resume a nonconforming use after a period of nonuse, a denial of the right to extend or enlarge an existing use, or to substitute new buildings or add to those existing building can be constitutional exercises of the police power.

[49] Kessler v. Smith, 104 Ohio App. 213, 219, 142 N.E.2d 231, 235 (1957).

[50] *See*, Geauga Lake Improvement Ass'n v. Lozier, 125 Ohio St. 565, 183 N.E. 489 (1932). A "substantial development" comes within the protection of the pre-existing use doctrine.

the intention of so using it is not such a beginning.[51] Thus a farmer who has purchased additional acreage may find his intention to farm it cut off. Temporary discontinuance however is permitted if the enactment should occur during that period.[52] Failure to employ an existing use for two years however is an abandonment which destroys the owner's right to return to that use.[53] A non-conforming use may be extended to an entire tract,[54] but not beyond its limits to newly acquired land,[55] nor across a public highway.[56] Most importantly, the zoning acts allow provisions limiting the right of an owner to repair or rebuild a non-conforming building which has been destroyed, in whole or part.[57] A common limitation of such provisions is that if more than fifty per cent of said structure has been destroyed it may not be rebuilt, but the enabling acts would seem to allow an even lesser percentage of damage. Thus, a chicken farmer whose coops are damaged in a wind storm conceivably may find himself out of business. Finally, a non-conforming use which also constitutes a nuisance does not warrant the protection of the statutes or constitution.[58]

A greater protection for the farmer in township and county land exists for, by state law, no township or county may pass a zoning ordinance forbidding farming or animal husbandry.[59] But annexation or incorporation may destroy this immunity.

C. *Nuisance*

When the wind blows across his farmer-neighbor's pasture on a hot August day, the suburbanite finds that living in the country is not all it

[51] Windsor v. Lane Development Co., 109 Ohio App. 131, 139, 158 N.E.2d 391, 396 (1959); Ohio State Student Trailer Park Co-op. v. Franklin County, 68 Ohio L. Abs. 563, 567, 123 N.E.2d 286, 289 (C.P. 1953).

[52] Cleveland Builders Supply Co. v. Garfield Heights, 102 Ohio App. 69, 73-74, 136 N. E.2d 105, 108-09 (1956). (This is based upon the municipality's statutory definition of abandonment.)

[53] *See*, case cited note 35, *supra*, and accompanying text.

[54] State *ex rel.* Union Limestone, Inc. v. Bumgarner, 110 Ohio App. 173, 176, 168 N.E.2d 901, 903 (1959). (The municipal zoning resolution's definition of "lot" was the basis of the opinion.)

[55] Gwynn v. Trimedge, 158 Ohio St. 307, 310, 109 N.E.2d 1, 3 (1952).

[56] Davis v. Miller, 163 Ohio St. 91, 94, 126 N.E.2d 49, 51 (1955).

[57] *See*, case cited note 35, *supra*, and accompanying text.

[58] State *ex rel.* Ohio Hair Care Products Co. v. Rendigs, 98 Ohio St. 251, 120 N.E. 836 (1918).

[59] OHIO REV. CODE ANN. §§ 303.21 and 519.21 (Page Supp. 1968). At first glance, a problem of overlap seems to arise in the area of zoning because all municipalities and townships are within county boundaries. OHIO REV. CODE ANN. §§ 303.18 and 519.18 (Page Supp. 1968) provide that county and township zoning regulations shall not apply within municipal boundaries, except in two situations when county or township land is newly incorporated, county and township regulations remain in force until election and qualification of the officers of the newly incorporated area, and, when county or township land is annexed to an existing municipality, until the legislative authority of the incorporated area provides zoning regulations for the area annexed.

was advertised to be. He has had enough. The next day he calls his lawyer in the city to see "what can be done about that stinking hog farm down the road?" The attorney has him and his wife stop by the office and sometime thereafter a petition to enjoin a nuisance and for damages to health, property and perhaps olefactory nerves is before the court. The farmer is mad. "I was here first. Who asked him to move out here anyway?" he asks. And perhaps a chuckle: "He wanted 'fresh country air' and now that he's got it, he can't stand it!" But he becomes more serious when he discovers that his neighbor may well have a case.

On the suburbanite's side are a few statutes in Ohio forbidding activities that the farmer considers part of his daily operation. One example is:

> No person shall erect, continue, use, or maintain a building, structure, or place for . . . the keeping or feeding of an animal which, by occasioning noxious exhalations or noisome or offensive smells, becomes injurious to the health, comfort, or property of individuals or of the public.[60]

Ohio law even takes into regard the more tender sensibilities of its urban dwellers; any owner of a stallion who permits it to "service" a mare within thirty feet of a public street or alley in a municipal corporation is subject to a fine.[61] Statutes such as these may not make the activities involved nuisances per se,[62] and equity need not enjoin an activity solely because it is in violation of the criminal law,[63] but their existance does not help the farmer's case and may serve as a make weight in a court's decision.

The law of nuisance comes into play due largely to the conflicting interests of landowners, and some balance is to be struck between the two.

> The defendant's privilege of making a reasonable use of his own property for his own benefit and conducting his affairs in his own way is no less important than the plaintiff's right to use and enjoy his premises.[64]

Therefore, the sound discretion of the court of equity is to be invoked when the question of injunctive relief for an alleged nuisance is before it and factors such as the necessity of the enterprise involved,[65] its location[66] and its very nature[67] are to be considered. When the health and

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[60] OHIO REV. CODE ANN. § 3767.13 (Page 1954).

[61] OHIO REV. CODE ANN. § 959.19 (Page Supp. 1968).

[62] Fisher v. Lakeside Park Hotel & Amusement Co., 4 Ohio N.P. 329, 333 (1897).

[63] *Id.*

[64] PROSSER, THE LAW OF TORTS § 90 at 616 (3d ed. 1964).

[65] DeAlbert v. Novak, 78 Ohio App. 80, 83-84, 69 N.E.2d 73, 75 (1946).

[66] *See* Shaw v. Queen City Forging Co., 7 Ohio N.P. 254, 256 (1900).

[67] McClung v. North Bend Coal & Coke Co., 8 Ohio N.P. 398, 399 (1901). (1894). *See* Bever v. Grever & Twaite Co., 8 Ohio N.P. 398, 399 (1901).

well being of the complainant are at issue the courts may weigh this factor heavily and are more likely to issue the requested injunction.[68]

It is more than a remote possibility then that the court will find the operation of a farmer to be a nuisance, vis-a-vis his suburban neighbors. (See *infra* for a recent example.) Are courts really qualified to make such determinations? Our system of justice necessitates a confrontation of two adversaries and a determination of the issues under dispute. The parties to the nuisance action are interested only in what concerns them—the facts of their situation. There is likely to be no desire on their parts to examine and present to the court the larger societal implications of their problem. Moreover, the expense of gathering relevant data may be great and there is every chance that the rules of evidence would prohibit introduction of such "irrelevant" matters. The traditional law of private nuisance contemplates two landowners, and bound within that structure, the court has considerable difficulties if it is able at all to widen its vistas to the broader implications of what it is about to decide.[69]

When Farmer Brown suddenly finds his hog farming enjoined, and Farmer Green hears about what "those new people" have done to his friend, better relations between the farmer and the suburbanite can hardly be expected to come about as the result.

IV. A Case in Point: Rockhill v. Jordan, Case Number 16915, Court of Common Pleas, Preble County, Ohio, November 8, 1968.

In 1965, Mr. and Mrs. Rockhill completed their home in the country at a cost of $35,000. Shortly thereafter, the Rockhill's neighbor, a hog farmer named Jordan, installed a confinement feeding system for his animals. He remodeled a barn so that the floors sloped to the center in which there was a pit covered by slats through which the droppings of the hogs could fall. Fans were installed in the barn to draw off the resultant odors.

The Rockhills lived in "a beautiful little subdivision," but one day noticed that the beauty was somewhat marred by something in the air and, after exchange of correspondence between attorneys, brought suit to enjoin Mr. Jordan's hog raising operations, claiming harm to health, comfort and property, and seeking damages for an alleged loss of value to their property. The Rockhills claimed that Jordan's operation was in violation of the zoning resolution of Jefferson Township, Article 8, Section 5, and a nuisance.

After explaining that he ". . . was born and raised in the country . . .

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[68] *See* McClung v. North Bend Coal & Coke Co., 1 Ohio Dec. N.P. 247, 253-54 (1894).

[69] *See generally*, Beuscher and Morrison, *Judicial Zoning Through Recent Nuisance Cases*, 155 Wisc. L. Rev. 440, 443.

and . . . [he was] aware of the way of farm life and the odors and smells that come where stock is raised . . ."[70] the trial judge went on to hold that, although not excluded by zoning regulations, the hog operation was a nuisance. He enjoined Jordan from operating in any manner "whereby the use of said system emits noxious and dangerous odors and gases onto the premises of the plaintiff."[71] The court did not allow any damages, primarily for failure of proof.

The test for nuisance cited by the court appears in a Florida case, *Beckman v. Marshall*:[72]

> The test of the permissible use of one's own land is not whether the use or the act causes injury to his neighbor's property, or that the injury was the natural consequence, or that the act is in the nature of a nuisance, but the inquiry is, Was the act or use a reasonable exercise of the dominion which the owner of property has by virtue of his ownership over his property? having regard to all interests affected, his own and those of his neighbors, and having in view, also, public policy.

However the court does not demonstrate how it actually applied this test to the fact pattern presented—the test is merely stated, then left alone.

The opinion states that the method used by Mr. Jordan is "a new and different type of operation," and that if it was the ordinary type of operation it would not be disturbed. Drawing an anology to cases in which water is collected on one's land and discharged onto another's, the court says:

> If one can't collect good water into a ditch and discharge onto another to his damage how much more so would it be true that one cannot collect together the odors and gases and discharge them upon another to the damage of his health and property.[73]

Commending Jordan for a "fine operation,"[74] the court finds that a nuisance had been created that was obnoxious and dangerous and interfered with the plaintiffs in the enjoyment of their property.

In the equitable balance between the interests of the plaintiffs and defendants, the court found the defendants to be wanting. Properly, the court dismissed the zoning objection, stating simply that the regulation did not apply to farming. But the rationale behind the zoning exception did not influence the court's view of the nuisance problem. That is, farming is an extremely vital function deserving of special protection. As defendant stated in his trial brief:

> . . . after having shared for years in the lower relative cost of pork in the supermarket, and being no doubt quite ready to complain about and vote

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[70] Rockhill v. Jordan, No. 16915 (C.P. Preble County, November 8, 1968) at 1.

[71] *Id.* at 4.

[72] Beckman v. Marshall, 85 S.2d 552, 555 (Fla. 1956).

[73] Rockhill v. Jordan, No. 16915 (C.P. Preble County, November 8, 1968) at 3.

[74] *Id.* at 3.

> against "the incumbents" should the cost of pork and other food go up at all, the plaintiffs now sue to put Mr. and Mrs. Jordan out of business. . . .[75]

Mr. Jordan, in establishing his confinement feeding process, was attempting to become more efficient in his operation and he had done a "fine" job. A balance should have been struck then between the interests of the Rockhills in fresh air (they were the only neighbors to complain or file suit) and the interest, not of the Jordans, but of a larger society in promoting efficient farm operation and in encouraging dwellers in the rural-urban fringe to live together in their transition area with understanding and patience, rather than to view one another with disdain and distrust.

V. Possible Resolution: A Proposal

The per centage of farmers in this country dwindles as the phenomenon of urban living increases. But, with an ever-increasing population and corresponding demand for food the importance of each farm increases as their absolute numbers decrease. Moreover, the redistricting of state legislatures has drastically reduced the former influence of rural areas over the law-making body. As a result of proportionate representation, the urban-oriented legislator is in danger of forgetting, in light of the glaring urban problems, the problems of the highly important rural minority. Courts, particularly the lower state courts likely to deal with the problems of the rural-urban fringe, are bound up in form and precedent and unable in many respects to deal with the larger problem areas. The same is true of existing executive and administrative boards which come in contact with the problems of the fringe.

The largest problem facing existing institutions involves their lack of contact and inability to communicate with various factions and assess various factors in the fringe area. To combat this problem a new form must be created—an organization involving those most directly affected, the inhabitants of the rural-urban fringe. Of course the ideal of the New England town meeting is beyond attainment for most parts of the country. But the *principle* is not out of reach.

Consider for a moment a portion of a map of almost any state in the nation. The map is criss-crossed with almost innumerable political or quasi-political boundaries; counties, municipalities, townships, school districts and other such divisions abound. The urban-rural fringe area lies on the outskirts of the municipality, perhaps in two or more counties, two or more school districts. Smaller municipal units may appear. Planning, what there is of it, is done by each of these units as suits its par-

[75] Brief for Defendant at 27, Rockhill v. Jordan, No. 16915 (C.P. Preble County, November 8, 1968).

ticular needs and aims. Coordination is desperately needed for orderly, peaceful, intelligent development.

But what unit is to be used as the bais of this co-operation? The Standard Metropolitan Statistical Areas (SMSA) of the Bureau of the Census can serve as a guide. The SMSA's are economically and demographically integrated units, which have been established for the most part, without regard to existing political boundaries. Regional planning coordination boards can be set up in those areas of the state of sufficient population density and movement to warrant them. These boards would act as ombudsmen for the various political units within their jurisdiction and see that logic and plan guide the growth and reorganization of the area.

Contact with the people involved in the urban growth phenomena should be maintained by the regional board by employment of smaller units within the fringe areas to act as advisory bodies. Serving not to usurp the governmental power of the larger units, but rather as structures within which understanding can be gained, these fringe units can consist of representatives of local grange groups, builders and developers working in the area and interested farmers and suburbanites. The function of the units, in addition to providing data to the regional boards, would be to deal with problems on an interpersonal basis; to discuss annexation possibilities, to submit suggestions to the regional boards and to cool tempers and attempt to work out solutions when the hog manure starts to ferment in the summer's heat.

Through the medium of such units the farmer can come to understand the aspirations and expectations of the suburbanite, and the urban-oriented individual may learn that the rural dweller is not a country bumpkin but a hard working man with complex problems and a business to run. Such informal discussion as these groups can obtain may prevent the fringe from developing into a polarized area characterized by disappointed suburbanites and angry farmers.

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