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## CENTRAL BUSINESS DISTRICT PLANNING AND THE CONTROL OF OUTLYING SHOPPING CENTERS

*CLIFFORD L. WEAVER\**

*CHRISTOPHER J. DUERKSEN\*\**

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### I. REVITALIZING THE CENTRAL BUSINESS DISTRICT

When You're Alone  
And Life is Making You Lonely  
You Can Always Go—Downtown  
—1960's Pop Song

Contrary to the wisdom of Petula Clark's pop hit, the loneliest thing about most American cities in recent years has been their downtowns. In big cities, the nightly rush hour migration to the suburbs leaves the core areas mercury-lit deserts. Central business districts of smaller cities have begun to fray about the edges, with boarded windows and vacancy signs marking the opening of outlying shopping malls.

Suddenly, however, cities are again the "in" thing. The Carter administration promises to pour more money into urban neighborhoods and to emphasize rehabilitation rather than new construction.<sup>1</sup> Urban revitalization is the watchword of the planning profession.

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1. President Carter's Environmental Message to Congress, May 23, 1977 [1977 Policies] 8 ENVIR. REP. (BNA) 132 (1977).

Conferences which only recently mulled over the implications of *Ramapo*<sup>2</sup> and *Petaluma*<sup>3</sup> now feature such topics as recycling of buildings, tax increment financing and central business district (CBD) redevelopment. Trendy young professionals, disenchanted with ranch-house suburbia, snap up the old townhouses and Victorian gingerbread homes found in many inner-city neighborhoods.

City after city has unveiled its version of a CBD revitalization plan. Chicago has proposed a mall for State Street.<sup>4</sup> Pasadena has established a redevelopment agency to work with private developers in a huge downtown scheme including hotels, office buildings, retail businesses and restaurants.<sup>5</sup> The National Trust for Historic Preservation recently announced a Main Street Project in three small midwestern towns.<sup>6</sup> A recent survey of cities and suburbs in northern Illinois found that no less than thirty municipalities have initiated or are contemplating major downtown renewal efforts.<sup>7</sup>

The Urban Land Institute (ULI) reports that for the first time in twenty-five years there is clear evidence that major retailers are showing a renewed interest in downtown, indicating "a basic shift in retail strategies."<sup>8</sup> According to ULI, this shift has been brought about by a slowdown in suburban population growth, environmental pressures and overbuilding, coupled with the basic advantages of downtown including ready access, substantial populations of daytime workers, and, in many locations, reviving neighborhoods close to the CBD.<sup>9</sup>

State and local governments have been quick to facilitate this trend with a variety of laws providing new tools and techniques for CBD redevelopment. Many states have enacted tax increment financing statutes which allow cities to issue bonds to be retired with the in-

2. *Golden v. Planning Bd. of Ramapo*, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138, *appeal dismissed*, 409 U.S. 1003 (1972).

3. *Construction Indus. Ass'n v. City of Petaluma*, 375 F. Supp. 574 (N.D.Cal. 1974), *rev'd*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). *Ramapo* and *Petaluma* are landmark cases involving the validity of municipal ordinances severely restricting future growth of the community. Significant articles discussing these cases and the growth control issue are collected in 2 MANAGEMENT AND CONTROL OF GROWTH 1-210 (R. Scott ed. 1975).

4. *Chicago Daily News*, Sept. 12, 1977, § 1, at 55, col. 6.

5. Trimble, *Regrowth in Pasadena*, 36 URBAN LAND No. 1, at 4 (Jan. 1977).

6. The three towns are Hot Springs, South Dakota; Galesburg, Illinois; and Madison, Indiana. Interview with Robert Boyd Carter, National Trust for Historic Preservation Project Director, in *Chicago* (April 26, 1977).

7. *Chicago Tribune*, Jan. 2, 1977, § 1, at 39.

8. LAND USE DIGEST No. 11, at 1 (Nov. 1976).

9. *Id.*

creased property tax revenues generated by the redevelopment project.<sup>10</sup> Other states have passed special commercial renewal and development acts which facilitate CBD redevelopment projects and permit establishment of development corporations with broad powers to acquire and dispose of property and to oversee downtown development.<sup>11</sup> At the local level, municipalities have adopted flexible zoning controls to promote self-reinforcing mixed-use commercial and residential projects in central areas.<sup>12</sup>

Despite the plethora of legislation and the renewed interest in central business districts, redevelopment efforts are plagued by one serious problem. The regional and community retail trade that has traditionally been the mainstay of a vital CBD is all but impossible to retain in the face of uncontrolled development of outlying shopping centers. In Mount Prospect, Illinois, a Chicago suburb, village officials have hired experts to formulate a downtown improvement plan, but the long-term prospects are bleak as the giant ninety-store Randhurst Shopping Center, which led to the demise of the CBD in the 1960's, continues to lure millions of dollars in retail sales from downtown.<sup>13</sup>

In Sioux City, Iowa, the city fathers are putting the finishing touches on a multi-million dollar CBD revitalization plan while at the same time fighting a court battle against a would-be developer of a large regional shopping center to be located on the periphery of the built-up area.<sup>14</sup> Studies by the city indicate that if the outlying center is built before the CBD scheme is completed, the CBD will have little chance for survival.<sup>15</sup> In a superb case study, Professor A. Dan Tarlock documented the similar plight of Lexington, Kentucky.<sup>16</sup>

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10. See, e.g., ILL. ANN. STAT. ch. 67½, § 86 (Smith-Hurd Supp. 1977).

11. See, e.g., *id.*; Iowa Urban Renewal Law, IOWA CODE ANN. § 403 (West 1976).

12. For discussions of mixed-use developments, see Wilborn, *Perspective on Mixed Use Development*, 32 URBAN LAND No. 9, at 3 (Oct. 1973); Chicago Daily News, April 1, 1977, at 25.

13. Chicago Daily News, April 27, 1977, at 53. In the words of one observer, the effect of the approval of Randhurst on the downtown was like "putting a snake in a cage with a lame mouse." *Id.*

14. General Growth Properties v. City of Sioux City, Equity No. 91992 (D. Iowa, filed Feb. 12, 1975).

15. Commercial Land Use Study, Sioux City, Iowa (prepared by Iowa Appraisal & Research Corp.) (June 23, 1975).

16. The downtown has been deteriorating steadily since the end of World War II, and the first regional shopping center opened in 1966. During this time, a small urban renewal program was formulated, but before it could be determined if this initial effort would lead to a comprehensive re-vitalization of the downtown, the Planning Commission was faced with petitions for three map amendments to permit the construction of three regional shopping centers.

The story has been repeated across the country. It is played out in large and small cities and in the older suburbs that ring them, but its severest impact has perhaps been felt in those small- to medium-sized, basically free-standing cities which provide a focal point for a relatively large rural or semi-rural region. The city fathers recognize that their CBD is slowly deteriorating and that if affirmative action is not taken, the downward trend will continue inexorably. Except where the outlying shopping center battle has already been fought and lost, the CBD of such a city is frequently not only the commercial hub in the area, but also the government, financial and transportation center of its region. In these cities, more than in larger cities where tourism, convention trade or massive office use lends activity and income, regional retail trade is what gives vitality to the CBD. Frequently, however, the regional market will not support more than one major center. Thus, when the city receives a proposal to establish a new outlying shopping center, it is in reality a proposal to abandon or to fundamentally alter the CBD. If the city approves the shopping center development, chances of revitalizing the CBD are all but dead.

A city cannot afford to discard its CBD.<sup>17</sup> If the CBD is abandoned, the city is left with a major concentration of under-utilized public facilities and utility systems. It most assuredly faces the burden of creating new facilities and systems to serve the new concentrations of development that must be expected to spring up at the city's periphery. Just as inevitably, it must look forward to the day when significant portions of its former central business district will be given over to a series of marginal uses. Too often cities have watched helplessly as second-hand stores, second-rate hotels, liquor stores, and pawn and porno shops have crept into what was once part of their retail core. The demise of the old core is complete when this creeping blight spreads into the residential areas surrounding the declining business district.

Beyond obvious physical problems associated with central business district decline, it is reasonable to expect a more intangible loss, that of

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Tarlock, *Not in Accordance with a Comprehensive Plan: A Case Study of Regional Shopping Center Location Conflicts in Lexington, Kentucky*, 3 URBAN L. ANN. 133, 134-35 (1970). The court battle which arose out of efforts to control the outlying centers is discussed at notes 60-64 and accompanying text *infra*.

17. Earlier commentators often disagreed with this conclusion, maintaining that "the courts should continue to assume that the public interest is best served by encouraging new services rather than protecting existing ones of the same type." Tarlock, *supra* note 16, at 181. See Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

public image. Victor Gruen referred to the central business district as the heart of a city.<sup>18</sup> On that analogy, the heart is essential to the vitality of the entire organism. Health and activity in the core support and drive the entire city. But the central business district is also the face of many cities. To travelers, tourists, prospective residents and potential investors, it creates the first and often the most important impression of the entire city. To residents of the city and region, it can be the source of civic pride or civic embarrassment. The existence of a healthy, attractive central area can create a municipal and regional focus and a sense of belonging to a society larger than one's own parochial neighborhood. It provides a place where people can interact with one another. In short, it provides a central place of concentrated and diverse uses, and a focus and structure for the society that revolves around it.

In our opinion this central place function is *per se* important enough to merit protection by both planners and lawyers. Even if that philosophical bent is rejected, however, the danger of abandoning central places where they already exist must be recognized. In a recent article, Professor Brian O'Connell noted that it is impossible to apply a centrist or decentrist model of cities in a vacuum.<sup>19</sup> He aptly pointed out that you must start with what already exists. In his words, "Taking away the southern part of Manhattan would be like taking away the highway system from Los Angeles."<sup>20</sup> Certainly, it would be possible to do either, but neither could be done without producing drastic changes in the whole physical and social make-up of each of those cities.

Similarly, in many small- and medium-sized cities, the central business district represents not only an enormous public and private investment in buildings, transportation systems and utility systems but also a regional focal point. To abandon this investment and this existing structuring influence would involve massive losses. To rebuild it all in outlying areas would require an enormous desecration of both the urban and rural environments in terms of abandonment in the central area, in terms of land and resources consumed in the peripheral areas, and in terms of ever-increasing pressures for private rather than public transportation. The residential sprawl of the past three decades only begins to suggest the problems that will result if, instead of stopping the trend, we accelerate and compound it by taking the diverse and

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18. V. GRUEN, *THE HEART OF OUR CITIES* 83-87 (1964).

19. O'Connell, *Concentration: The Genius of the City: A Critique of "The Plan for New York City,"* 42 J. AM. INST. PLANNERS No. 1, at 64 (Jan. 1976).

20. *Id.* at 66.

mutually supportive uses typically concentrated in a reasonably accessible central business district and spreading them out across the country side at a random assortment of locations convenient neither to each other nor to the population they serve.<sup>21</sup> Maurice Alpert, a former shopping center developer, turned CBD redeveloper, summarized the problem:

I know how major regional shopping centers are developed and I know something about the planning and zoning processes that screen such centers. Among the things I know is that rather than fitting into a logical community master plan, these centers often dictate the community plans. . . . Planted haphazardly as they are in America's suburbs, these centers affect every aspect of American life.<sup>22</sup>

We do not mean to suggest that regional shopping centers should be, or could be, banned. What we do mean to say is that such centers, especially when they pose a serious threat to the continued existence of a city's central business district, constitute a land use that can have most fundamental and shaking influences on the entire fabric of a community's physical and social development. They should, therefore, be subject to more thoughtful comprehensive planning and zoning controls than has been the case to date.

It should be self-evident that municipal planners and officials, when proceeding on the basis of adequate evidence of such possibilities, have the right, if not the responsibility, to decide that they will protect the physical and social investment represented by their central business district. Yet municipal officials and planners almost invariably shy away from exercising any controls to that end.

Some may contend that politicians and planners are helpless to deal with the problem as they are faced with either permitting the outlying shopping center or seeing it locate in the neighboring town. That is, without doubt, a serious problem. Part of the answer to it lies in the trend toward regionalism discussed in the final pages of this Article. However, we are convinced that even where politicians and planners have the power to control shopping centers, they tend not to exercise it. That phenomenon is certainly seen in many of the medium-sized, free standing cities upon which we have just been focusing. In those cases, control over essential municipal services often gives the

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21. See generally COUNCIL ON ENVIRONMENTAL QUALITY, *THE COST OF SPRAWL* (1974); M. CLAWSON, *SUBURBAN LAND CONVERSION IN THE UNITED STATES* 141-65, 319-22 (1971).

22. Speech by Maurice D. Alpert, Sixth International Conference on Urban Transportation, in Pittsburgh (Sept. 10, 1974).

municipality more power to control outlying development than is exercised. It is also seen in some larger cities. In Honolulu, Hawaii, and Jacksonville, Florida, for example, city-county consolidation puts the CBD and the hinterland under the same zoning authority and yet there has been no noticeable effort to implement a rational CBD policy by controlling outlying commercial development.<sup>23</sup>

We think this almost universal failure to protect the CBD by limiting outlying commercial development is due less to a lack of power than to a municipal gut reaction that any such policy involves the city in "controlling competition"—an un-American, if not immoral, undertaking.<sup>24</sup> "And illegal besides," chimes in the developer's attorney, supported by a case or two in which a court said that one businessman did not have standing to challenge his competitor's zoning or that an

23. See Charter of City & County of Honolulu, Hawaii, § 1-102 (1973); FLA. CONST. art. 8, § 6.

24. In his book, *THE ZONING GAME*, Richard Babcock throws light on the schizophrenic attitude of municipal officials and planners toward using zoning for economic planning. One conversation Babcock had with a planner is especially illuminating: "I asked Robert Leary, former Planning Director for Ann Arbor, Michigan (whose municipal client was attempting to manufacture pep pills for an anemic central business district) whether he had faced this problem."

We have [a shopping center] on the east right now—I think about 85,000 square feet of enclosed area which is under construction; and we have another one of about 175,000 square feet under construction on the west side of the city—both are inside the city—and a third one proposed—it's in the process of annexation, and the development plan is on the desk—and the question of zoning is facing the council. When it faces the council it faces us. We have been rather torn by what you might call conflicts of interest because we have been retained by the Chamber of Commerce jointly with the city council for a \$32,000 study of the central business district—what's wrong, what should we do? The planning commission has recommended the development of the shopping center on the east side, the one that's on the west side, and we're in the process of studying the third, which will also be located on the west side. Now we're getting a reaction from the downtown merchants who are questioning our loyalty and our motive. Are you just mouthing support for downtown while doing your best to tear it down as soon as possible? And we had to get up and make ourselves heard on this subject. First of all, a shopping center—as we have told them—is a valid part of the land use and, irrespective of its location inside or outside the corporate limits of the city, is going to have a very definite impact on the downtown area. We believe that shopping centers are pretty much in the category of death and taxes—they're inevitable—and that a properly controlled shopping center within the corporate limits of the city, is better for the city, generally,—the community, generally—than is a shopping center possibly not adequately controlled on the same location, let's say a quarter of a mile from the city limits.

R. BABCOCK, *THE ZONING GAME* 71-72 (1966)

Babcock also relates an exchange which demonstrates that even those planners who admit they consider economic impact, are concerned:

One West Coast planner admitted: "Well, I think it is legitimate and we have made many plans based on the premise that it is legitimate, but it's the one thing which causes me more sleepless nights than anything else we do."

*Id.* at 72.



overabundance of existing gas stations was no reason to prohibit yet another.<sup>25</sup> Developers can exert a great deal of political pressure and as a consequence can make life difficult for planners and politicians who believe there is a distinction between legitimate commercial planning and illegitimate interference with free competition.<sup>26</sup>

In his study of the failure of Lexington's plan to control outlying shopping centers, Professor Tarlock concludes:

[F]undamental value orientation appears to have precluded acceptance of the plan by a majority of [commission] members. Basically, they were unable to reconcile the economic assumptions on which the plan was based with their own deeply engrained values. [E.g.] [t]heir faith in the ability of the free market system to achieve an optimum allocation. . . .<sup>27</sup>

The "moral" issue can be debated as long and as fruitfully as religion or politics. We will content ourselves on that score simply by noting that the essence of every zoning ordinance ever adopted is to limit and restrict the free market and that we see nothing more or less immoral in protecting, preserving and enhancing the character, vitality and value of a central business district than in doing the same thing for a subdivision of detached single family dwellings. With that nod to the basic policy issue, we turn to the central question of whether a municipality's zoning power may legally be employed to foster CBD redevelopment at the expense of would-be competitors desirous of building outlying commercial facilities.

The traditional view is represented by Bassett's solemn pronouncement that: "Neither can distribution of business be forced by zoning . . . . [I]t is not a proper field for zoning."<sup>28</sup> Scores of zoning cases

25. See notes 31-38 and accompanying text *infra*.

26. An example of the type of pressure developers can exert is illustrated by a newspaper ad recently placed by a would-be shopping center developer in Sioux City, Iowa. The full page ad concludes:

**APPEAL TO REASON**

New business, new retail store names, new national tenants. . . scores of them want to locate in Sioux City, Iowa. This is a credit to Sioux City. However, most of these new firms follow national marketing trends and want to locate in regional enclosed malls, shopping centers protected from the weather elements. This is the 20th Century of merchandising. It is not just a trend coming upon us . . . it is here. Now!

Market surveys in Sioux City give overwhelming support for a new enclosed shopping center to be built . . . but, we are sorry to report, this "support" comes mostly from the general public . . . not those elected to represent the populace in official voting positions of the governing body. The public deserves to have its will reflected through the support of its elected officials.

The Sioux City Journal, Sept. 1, 1977, § A, at 28.

27. Tarlock, *supra* note 16, at 169.

28. E. BASSETT, ZONING 53 (1936). As noted by Tarlock, *supra* note 16, at 173, two

can be found to support Bassett's position.<sup>29</sup> In fact legal literature is full of so many cases echoing the Bassett thesis that lawyers and judges tend to generalize their significance in an unwarranted fashion. There is an old adage about hard cases making bad law. It is also true that bad cases make bad law. Typically, in this area broad statements about the impropriety of using zoning to regulate competition are made in cases where the facts certainly justify the result but just as certainly do not justify an extension of those broad statements to other fact situations.

What neither Bassett nor the typical zoning/competition case provides is any real analysis of the fundamental issues involved in adopting a zoning ordinance to implement a community's plans for its commercial growth and development. It is our thesis that such an analysis supports much broader authority to regulate commercial development through zoning than is suggested by an unthinking application of old "rules" to new situations.

## II. ZONING TO PROTECT PRIVATE BUSINESS INTERESTS

The great majority of cases which broadly declare that zoning may not be used to regulate competition<sup>30</sup> can be distinguished and have no proper application to the fundamental issues involved when a community sets out to protect its CBD through commercial zoning policies. Nearly without exception those cases involve situations in which nothing more than a private right to be free of competition was asserted or implicit. No public interest deserving of police power protection was involved. Cases of this type may be grouped into a few broad categories.

First, there are the standing cases. In cases in which one or more cases are cited by Bassett for that proposition, but neither is based on a competition rationale: *Deerfield Realty Co. v. Hague*, 8 N.J. Misc. 637, 151 A. 373 (Sup. Ct. 1930); *Wiegen v. Board of Standards & Appeals*, 229 App. Div. 320, 173 N.E. 883, 241 N.Y.S. 456 (1930).

29. *See, e.g.*, cases discussed at notes 30-39 and accompanying text *infra*.

30. *See* cases discussed at notes 31-39 and accompanying text *infra*. *See e.g.* *City of Miami v. Woolin*, 387 F.2d 893 (5th Cir. 1968); *Exchange Nat'l Bank v. Village of Skokie*, 86 Ill. App. 2d 12, 229 N.E.2d 552 (1967); *Metro 500, Inc. v. City of Brooklyn Park*, 297 Minn. 294, 211 N.W.2d 358 (1973); *In re Appeal of Lieb*, 179 Pa. Super. Ct. 318, 116 A.2d 860 (1955).

For an excellent and prescient early article discussing some of these cases, see Mandelker, *Control of Competition as a Proper Purpose in Zoning*, 14 ZONING DIGEST No. 2, at 33 (Feb. 1962). Mandelker correctly predicted that with increasing land scarcity and changing urban development objectives, the competition issue would become more important.

businessmen have challenged the zoning of a potential competitor, most courts have held, and justifiably so, that increased business competition alone provides no standing to challenge a zoning change.<sup>31</sup>

For example, *Circle Lounge and Grille, Inc. v. Board of Appeal*<sup>32</sup> is frequently cited as barring zoning which limits competition, but a review of its facts demonstrates the irrelevancy of the case to the basic issues involved in zoning to protect a CBD. Essentially, one restaurant owner objected to a zoning change which would permit a competitor to locate across the street. The court held that the competitive injury was insufficient to give the restaurant owner standing to challenge the zoning action. Similarly, in *Waltham Motor Inn, Inc. v. LaCava*,<sup>33</sup> plaintiffs challenged decisions by the city council granting special permits for construction and operation of a motel in a limited commercial zoning district. The court held the plaintiffs had no standing because their only visible interest in contesting the city's actions was protection of their existing motels from anticipated competition. The same principle has been recognized in the federal courts. *Clinton Community Hospital Corp. v. Southern Maryland Medical Center*,<sup>34</sup> involved an action by one hospital to enjoin construction of the defendant's competing hospital which was to be located near Andrews Air Force Base in Prince George's County. The plaintiff argued that construction of a hospital so close to the airbase would create serious dangers for patients and personnel of the proposed facility and for that reason approval of the project by the U.S. Department of Health, Education and Welfare without an environmental impact statement was illegal. The court rejected the claim, commenting that the suit was spurious and holding that the plaintiff hospital was not, as a competitor, within the zone of interest to be protected by the National Environmental Policy Act and thus did not have standing to sue.

A second group of zoning/competition cases involves gas station

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31. *E.g.*, *Whitney Theater Co. v. Zoning Bd. of Appeals*, 150 Conn. 285, 189 A.2d 396 (1963); *Kreatchman v. Ramsburg*, 224 Md. 209, 167 A.2d 345 (1961); *Lehrer v. Board of Adjustment*, 137 N.J.L. 100, 58 A.2d 265 (1948); *Cord Meyer Dev. Co. v. Bell Bay Drugs, Inc.*, 20 N.Y.2d 211, 229 N.E.2d 44 (1967); *In re Appeal of Lieb*, 179 Pa. Super. Ct. 318, 116 A.2d 860 (1955); *Board of Supervisors v. Davis*, 200 Va. 316, 106 S.E.2d 152 (1958). See notes 32-34 and accompanying text *infra*. But see *Hughes v. City of Peoria*, 80 Ill. App. 2d 392, 225 N.E.2d 109 (1967) (Where CBD merchants charged special damage to their businesses and property values they were held to have standing to challenge a proposed rezoning for a regional shopping center three to four miles distant.).

32. 324 Mass. 427, 86 N.E.2d 920 (1949).

33. 326 N.E.2d 348 (Mass. App. Ct. 1975).

34. 374 F. Supp. 450 (D. Md. 1974).

location.<sup>35</sup> The important thing to note in these decisions, as in the standing cases, is that there is seldom any evidence whatever of a legitimate public interest in insulating existing stations from competition. A prime example is *LaSalle National Bank v. Village of Skokie*,<sup>36</sup> in which the court held that proof that fifteen stations already existed in the immediate area and that some stations in the area had been unsuccessful or unprofitable was insufficient to support a zoning ordinance prohibiting additional gas stations. However, the court pointed out that the Village offered no evidence to rebut or contradict the testimony of the property owner and no evidence of any change of conditions that warranted the zoning amendment removing gasoline stations as a permitted use. The Village did claim that the additional gas station would have some adverse impacts on the public health, safety and welfare, but the court found that the Village had not been consistent in applying that theory to other uses permitted in the area.

A similar rationale was employed in *Mobil Oil Corp. v. Board of Adjustment of Newport*.<sup>37</sup> Newport denied the plaintiff's application for a variance from an ordinance provision forbidding construction of a filling station within 200 feet of another filling station. Mobil Oil challenged that decision. While noting that zoning authorities usually have wide and liberal discretion in such matters, the court struck down the spacing limitation, pointing out that the town had introduced no evidence regarding fire hazards, traffic problems, or depreciation of surrounding property value. In fact, the only testimony for the city was given by another gas station owner who felt no more gas stations were needed in the area. The court responded that the town could not rely on that type of economics in making its decision: "[T]he need or lack of need of gasoline filling stations in the area is not relevant. . . . It may be that older gas stations may benefit from the absence of a new modern station in the area but the public interest is not served."<sup>38</sup>

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35. See notes 36-37 and accompanying text *infra*. See, e.g., *Texaco, Inc. v Board of Adjustment*, 73 N.J. Super. 313, 179 A.2d 768 (App. Div. 1962); *Blumenreich Properties, Inc. v. Waters*, 14 Misc. 2d 947, 178 N.Y.S.2d 905 (Sup. Ct. 1957); *Cunningham v. Planning Bd. & Bd. of Appeals*, 157 N.Y.S.2d 698 (Sup. Ct. 1956), *rev'd on other grounds*, 4 App. Div. 2d 313, 164 N.Y.S.2d 601 (1957); *Caudill v. Village of Milford*, 10 Ohio Misc. 1, 225 N.E.2d 301 (1967). See generally Mosher, *Proximity Regulation of the Modern Service Station*, 17 SYRACUSE L. REV. 1 (1965); Annot., 75 A.L.R.2d 168 § 11 (1961).

36. 107 Ill. App. 2d 104, 246 N.E.2d 105 (1969).

37. 283 A.2d 837 (Del. Super. 1971).

38. *Id.* at 840. In contrast, in cases in which the municipality introduced evidence that the public interest would be served, regulation of gas station location has been sustained.

Perhaps the classic case cited for the rule that competition may not be regulated by zoning is *Pearce v. Village of Edina*.<sup>39</sup> It is also a classic example of the kind of situation that has given zoning which limits competition a bad name. At best, it represents a clumsy effort to establish some justifiable allocation of land uses. At worst, it reflects a bad faith effort to protect limited private interests. The property in question was a comparatively small scrap of land completely surrounded by already developed regional shopping facilities, but zoned for multiple-family use. When the Village denied the landowner's request for commercial zoning, he sued. Under court direction to reconsider, the Village rezoned the property, but for office use rather than commercial use, and the owner sued again. There was evidence of two reports from a planner—one original, one doctored. The first referred extensively to zoning the property for uses that would not compete with the existing shopping center. The second, prepared after conferences with the Village attorney, deleted all references to that objective. The court pointed out that all of the alleged public health, safety and welfare factors upon which the Village relied were, if not phoney, at least not proven, and ordered commercial zoning of the property.

*City of New Orleans v. Nancy Dukes*,<sup>40</sup> a recent federal case, also deserves mention here as the kind of case that gives economic regulation a bad name. A New Orleans ordinance prohibited hot dog vendors in the Vieux Carre historic district, but contained a grandfather clause allowing all licensed vendors who had continuously operated in the French Quarter for eight years prior to January 1, 1972, to continue selling. When the ordinance became effective, there were only two hot dog vendors. The plaintiff, Nancy Dukes, had been in business for only one year and thus did not qualify under the grandfather clause. The other pushcart vendor, aptly named Lucky Dogs, Inc., was an eight-year veteran and was thus regulated into a monopoly position.<sup>41</sup>

In reversing a summary judgment for the city, the court of appeals recognized that pushcart vendors could be strictly regulated to preserve the unique charm and beauty of the Vieux Carre, a tourist mecca essential to New Orleans' economic well-being. The court ruled, how-

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*E.g.*, *Stone v. Maitland*, 446 F.2d 83 (5th Cir. 1971); *Etzel v. Zoning Bd. of Appeals*, 155 Conn. 531, 235 A.2d 647 (1967); *Mobil Oil Co. v. Township of Westtown*, 29 Pa. Commw. Ct. 245, 345 A.2d 213 (1975).

39. 263 Minn. 553, 118 N.W.2d 659 (1962).

40. 501 F.2d 706 (5th Cir. 1974), *rev'd*, 427 U.S. 297 (1976).

41. 427 U.S. at 300. There is some confusion on this point as the Supreme Court stated that Lucky Dogs had operated there for 20 years.

ever, that there was no rational basis for the grandfather clause: "The hypothesis that a present eight year veteran of the pushcart hot dog market in the Vieux Carre will continue to operate in a manner more consistent with the traditions of the Quarter than would any other operator is without foundation."<sup>42</sup>

On appeal, the United States Supreme Court reversed, prefacing its decision by noting that the "Vieux Carre . . . is the heart of that city's considerable tourist industry and an integral component of the city's economy. The sector plays a special role in the city's life. . . ."<sup>43</sup> Even though the Court recognized that the ordinance was "solely an economic regulation"<sup>44</sup> which gave one vendor a monopoly position, it sustained the regulation on the basis that the Vieux Carre's importance to the economy of the city justified the use of the police power to preserve and enhance it. The Court rejected the appellate court's conclusion that the grandfather clause so lacked rationality as to constitute a constitutionally impermissible denial of equal protection. The Supreme Court surmised that perhaps newer businesses were less likely to have built up substantial reliance interests, or conceivably that Lucky Dogs had itself become part of the distinctive character and charm that distinguishes the Vieux Carre. Neither of these hypotheses found any support in the record.

*Nancy Dukes* must be viewed with mixed emotion by anyone who believes that there are circumstances under which zoning can legitimately be invoked in support of commercial planning. On the one hand it is of unquestioned importance as a clear statement by the United States Supreme Court that municipalities may invoke the police power to protect their commercial and economic viability, even if the effect is to give one private business a competitive advantage over another. On the other hand, however, one could have hoped for such a pronouncement in a case where the record was more supportive of the theory. The power to regulate commercial competition through land use controls is potentially dangerous and courts and municipalities should not, in recognizing its existence, overlook its limitations. Those interested in seeing the power sustained within its legitimate sphere should take no great comfort from seeing it exercised, and sustained, where there has been insufficient study and planning and no demonstrated public need.

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42. 501 F.2d at 711.

43. 427 U.S. at 299.

44. *Id.* at 303.

### III. CONTROL OF COMPETITION IN THE PUBLIC INTEREST

The decisions discussed in the preceding section, and many others like them, stand in sharp contrast to a small, but growing number of cases where a legitimate public interest in controlling competition has not only been asserted but supported by detailed studies and comprehensive planning. In these instances, courts have sustained zoning ordinances despite their clear impact upon competition.

*Forte v. Borough of Tenaflly*,<sup>45</sup> involved a request to build a supermarket on a parcel that had been rezoned from a general commercial classification to a more restricted classification. The ordinance expressly stated the rezoning was intended to limit the use of the property to "uses which will not have an adverse effect upon the downtown business core."<sup>46</sup> The Borough's comprehensive plan, formulated following a consultant's study, called for preserving and strengthening the decaying CBD as the Borough's retail shopping center and recommended the prohibition of retail businesses in the rest of the Borough. The zoning ordinance was adopted pursuant to that policy. The court noted that on the evidence presented, "the intention to preserve, rehabilitate and improve the central business area"<sup>47</sup> was the only possible justification for the ordinance, and emphasized that there was no evidence that Tenaflly was trying to keep out supermarkets or to benefit any particular business or businesses in the CBD. The court held that Tenaflly "has the right to [elect to preserve its central business district], and the fact that the ordinance may give the central area a virtual monopoly over retail business does not invalidate it."<sup>48</sup>

In *Van Sicklen v. Browne*,<sup>49</sup> the municipality refused to issue a special permit for a service station on the ground that "further proliferation of service stations in the proposed area would be detrimental to the balanced development envisioned by the Master Plan."<sup>50</sup> The court approved the decision saying:

Although cities may not use zoning powers to regulate economic competition . . . , it is also recognized that land use and planning decisions cannot be made in any community without some impact on the economy of the community. . . . [W]e perceive that planning and zoning ordinances traditionally seek to maintain property

45. 106 N.J. Super. 346, 255 A.2d 804 (App. Div. 1969).

46. *Id.* at 349, 255 A.2d at 805.

47. *Id.* at 350, 255 A.2d at 806.

48. *Id.* at 352, 255 A.2d at 807.

49. 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971).

50. *Id.* at 126, 92 Cal. Rptr. at 789.

values, protect tax revenues, provide neighborhood social and economic stability, attract business and industry and encourage conditions which make a community a pleasant place to live and work. Whether these be classified as "planning considerations" or "economic considerations," we hold that so long as the primary purpose of the zoning ordinance is not to regulate economic competition, but to subserve a valid objective pursuant to a city's police powers, such ordinance is not invalid even though it might have an indirect impact on economic competition.<sup>51</sup>

The same rationale was applied in a more recent California decision, *Ensign Bickford Realty Corp. v. City Council*.<sup>52</sup> In this case the realty company requested the city to rezone a six-acre parcel from residential to a classification permitting neighborhood shopping centers. The city council denied rezoning on the ground that it would frustrate the city's policy of encouraging commercial and residential development in a nearby area which had already been zoned to permit neighborhood shopping centers. Recognizing this policy and noting there was agreement that the area would support one but not two neighborhood centers, the appellate court viewed the issue as being where that one shopping center should be located. Applying these facts to the principles enunciated in *Van Sicklen*,<sup>53</sup> the court held that there was no evidence that the city was permitting commercial development on one parcel and denying it as to another for the purpose of creating a business monopoly. "To the contrary, the council was regulating the commercial growth of the City as it related to the needs of the residential areas for that commercial development."<sup>54</sup>

Several other decisions also hold that zoning regulations can be used to protect an established central business district. In *Schloss v. Jamison*,<sup>55</sup> a zoning ordinance prohibited off-site advertising signs, but not business signs, in the CBD. The plaintiff sign company challenged the ordinance, alleging that the regulation restricted competition with TV, radio and newspapers. The court rejected that challenge and, more significantly, sustained the ordinance on the ground that one of its clear purposes was to promote the establishment of a strong central business district by prohibiting signs advertising competing outlying shopping centers. In *Chevron Oil Company v. Beaver County*,<sup>56</sup> two oil

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51. *Id.* at 127-28, 92 Cal. Rptr. at 789-90.

52. 68 Cal. App. 3d 467, 137 Cal. Rptr. 304 (1977).

53. See note 51 and accompanying text *supra*.

54. 68 Cal. App. 3d at 478, 137 Cal. Rptr. at 310.

55. 262 N.C. 108, 136 S.E.2d 691 (1964).

56. 22 Utah 2d 143, 449 P.2d 989 (1969).



companies challenged a county zoning ordinance which zoned land around two freeway intersections for grazing. The county argued that its refusal to rezone the land for highway service was justified because "any tourist business which would go to the isolated junction area would be a loss to the established businesses of Beaver City"<sup>57</sup> and "any earnings and profits which might be engendered by the new establishment would tend to drain away into other towns of comparable size to Beaver which lie in adjoining counties."<sup>58</sup> The court sustained the refusal to rezone. A similar result was reached in *American Oil Company v. Board of Appeals*.<sup>59</sup> The court sustained the denial of a special exception to construct a gas station upon finding that (1) the existence of other stations satisfied the present need, and (2) the master plan for future development of a transit system and town center recommended limitation of strip commercial facilities.

A case involving Lexington, Kentucky's efforts to protect its central business district is also relevant here. *Fallon v. Baker*,<sup>60</sup> demonstrates that courts will view with favor a well thought out and explicit policy on the location and timing of suburban shopping centers, and will hold a city to such a policy once adopted.<sup>61</sup> In 1967, Lexington adopted a comprehensive land use plan which had as one of its major policies the revitalization of its deteriorating CBD and concomitant control over the timing and location of suburban shopping centers. The plan designated certain general areas for two shopping centers outside the CBD, one in the southeast sector to be needed in the early 1970's and the second in the northern sector to be needed by 1980. Yet, despite the careful planning, the result was failure.<sup>62</sup>

Ironically, the reason for failure was not disapproval by any court of the plan to control outlying centers, but the failure of Lexington to

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57. *Id.* at 144, 449 P.2d at 990.

58. *Id.*

59. 270 Md 301, 310 A.2d 796 (1973).

60. 455 S.W.2d 572 (Ky. 1970).

61. For a general discussion of the events leading up to this case, see Tarlock, *supra* note 16; 1 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 26.11, at 505-07 (1974).

62. As one commentator observed:

[A]t first glance this situation would appear to have been a favorable one for intelligent implementation of planning policy—a joint city-county planning and zoning mechanism, a new state enabling law emphasizing the importance of planning, a recently adopted plan prepared by one of America's most respected planners (Ladislas Segoe), an explicit policy on the location and the timing of suburban shopping centers, and a court whose zoning decisions have ranked among the country's best. Yet the result was failure.

N. Williams, *supra* note 61, at 506 n. 93.

follow its own policies.<sup>63</sup> Only a few months after the plan was approved, the planning commission granted rezoning for development of a forty-five acre regional shopping center on a site far from the areas designated in the comprehensive plan. At the same time, the commission denied applications for two other shopping centers which were in general conformity with the plan. A group of neighborhood property owners successfully challenged approval of the development, the court emphasizing the lack of conformity with the adopted comprehensive plan.<sup>64</sup> The clear implication is that the court would have been willing to uphold a *denial* of the application given the fact that Lexington had developed a well-documented and well-reasoned plan to control outlying shopping centers.

#### IV. SUPPORTING DEVELOPMENTS IN OTHER AREAS OF LAND USE LAW

While the number of decisions directly considering regulation of competition in furtherance of some overriding public purpose is still limited, several analogous lines of cases lend strong support for the right of a municipality to adopt zoning ordinances to protect an existing central business district despite an incidental limiting effect on competition.

A number of jurisdictions have long recognized that public need, or the lack thereof, for a particular commercial use is a valid factor to be considered in judging the reasonableness of a zoning ordinance. In *Lucky Stores, Inc. v. Board of Appeals*,<sup>65</sup> the court held that an ordinance provision authorizing consideration of need was not unconstitutional despite its incidental effect on competition. The court further held that such provisions were not inconsistent with cases holding that prevention of competition is not a proper purpose of zoning. A New York court, in *Shapiro v. Town of Oyster Bay*,<sup>66</sup> sustained a municipal policy which permitted development of new shopping centers only where the nearest shopping facilities were more than a mile from any given neighborhood. In *Duddles v. City Council*,<sup>67</sup> an Oregon court invalidated a rezoning from residential to commercial. One reason given for the decision was that, while the city's master plan

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63. Tarlock explains that the population projections underlying the plan were low and thus the shopping centers were needed prior to the designated dates. Furthermore, the plans to revitalize the CBD never got off the ground. Tarlock, *supra* note 16, at 142.

64. Fallon v. Baker, 455 S.W.2d 572, 574 (Ky. 1970).

65. 270 Md. 513, 312 A.2d 758 (1973).

66. 27 Misc.2d 844, 211 N.Y.S.2d 414 (1961).

67. 21 Or. App. 310, 535 P.2d 583 (1975).

showed a need for some commercial property in the area, the extent of the rezoning, taken in conjunction with existing commercial zoning, would have allowed development of a shopping center larger than that necessary to serve the needs of the local community.<sup>68</sup>

In another useful line of cases, courts have recognized that although a specific objective, such as regulation of competition, may be beyond the scope of government power when considered as the *primary* objective of government action, the realization of that objective as an incidental effect of a regulation adopted primarily to achieve a proper public purpose will not invalidate the regulation. The *Forte*,<sup>69</sup> *Van Sicklen*<sup>70</sup> and *Lucky Stores*<sup>71</sup> cases all address this issue in the specific context of ordinances regulating competition.<sup>72</sup> Similar holdings abound in urban renewal cases where courts have, as a matter of course, held that incidental private benefits do not invalidate programs designed primarily to achieve proper public purposes.<sup>73</sup> Likewise, the regulation of aesthetics has frequently been sustained as an incidental effect of a zoning ordinance even in jurisdictions where regulation of aesthetics is not recognized as a valid primary purpose of zoning.<sup>74</sup>

One group of aesthetic zoning cases deserves separate mention. Florida courts long ago recognized an exception to the then general

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68. *Id.* at 320-22, 535 P.2d at 589.

Other cases recognizing that public need for a particular commercial use may be considered include: *Sinclair Pipe Line Co. v. Village of Richton Park*, 19 Ill. 2d 370, 167 N.E.2d 406 (1960); *Hoffmann v. City of Waukegan*, 51 Ill. App. 2d 241, 201 N.E.2d 177 (1964); *Rigby v. Crate*, 15 App. Div. 2d 605, 222 N.Y.S.2d 406 (1961); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973).

69. *Forte v. Borough of Tenafly*, 106 N.J. Super. 346, 255 A.2d 804 (App. Div. 1969). *See* notes 45-48 and accompanying text *supra*.

70. *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971). *See* notes 49-51 and accompanying text *supra*.

71. *Lucky Stores, Inc. v. Board of Appeals*, 270 Md. 513, 312 A.2d 758 (1973). *See* note 65 and accompanying text *supra*.

72. In addition, see *In re Appeal of Lieb*, 179 Pa. Super. Ct. 318, 116 A.2d 860 (1955) (court rejected regulation of competition as a valid primary purpose of zoning but also stated that a zoning ordinance was not unlawful because it incidentally restricted competition in pursuit of a valid public purpose).

73. *See, e.g., Prince George's County v. Collington Crossroads, Inc.*, 275 Md. 171, 339 A.2d 278 (1975); *Yonkers Community Dev. Agency v. Morris*, 37 N.Y.2d 478, 325 N.E.2d 327 (1975).

74. *See, e.g., La Salle Nat'l Bank v. City of Evanston*, 57 Ill. 2d 415, 432-33, 312 N.E.2d 625, 634 (1974); *Sun Oil Co. v. City of Madison Heights*, 41 Mich. App. 47, 53, 199 N.W.2d 525, 529 (1972); *Piscitelli v. Township Comm.*, 103 N.J. Super. 589, 597-98, 248 A.2d 274, 278-79 (1968); *Kenyon Peck, Inc. v. Kennedy*, 210 Va. 60, 64-65, 168 S.E.2d 117, 120 (1969). These and numerous other cases on point are discussed at *Annot.*, 21 A.L.R. 3d 1222 § 5 (1968).

rule that zoning for aesthetic considerations was invalid and held that where, because of the importance of tourism, aesthetic considerations are vital to the economy of a city, aesthetics becomes a proper concern of the zoning ordinance.<sup>75</sup> The cases are of particular interest because they recognize that zoning regulations may be adopted to protect the economic well-being of a community even where the regulation necessary to achieve that protection has an incidental effect going beyond the purposes for which zoning ordinances may normally be adopted. The same principle has been recognized in California<sup>76</sup> and New Jersey.<sup>77</sup>

In a somewhat related line of cases, courts have sometimes sustained an otherwise unacceptable regulation on the basis that preservation of a landmark or historic district was vital to the economy of a city. For example, in *Opinion of the Justices to the Senate*,<sup>78</sup> an historic district ordinance was upheld because it benefited the economy of Nantucket by helping to develop and maintain its vacation and travel industry. In *City of Santa Fe v. Gamble-Skogmo, Inc.*,<sup>79</sup> strict controls over construction or alteration of buildings in Santa Fe's historic district were approved because of the district's importance to the tourism industry of the area.

Beyond these lines of cases, which represent well-established principles of direct applicability to the commercial competition question, there are a number of significant recent trends in land use law which suggest that courts will be increasingly receptive to regulations which control competition in the public interest. The most important cases in this category are those placing growing emphasis upon the importance of, and even the requirement of, a comprehensive land use plan as a predicate for the valid exercise of zoning powers.<sup>80</sup> Planning for the future necessarily implies an allocation of land to specific future uses. If the allocations are not honored, the plan loses its significance, a

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75. See, e.g., *Dade County v. Gould*, 99 So. 2d 236 (Fla. 1957); *City of Miami Beach v. Ocean & Inland Co.*, 147 Fla. 480, 3 So. 2d 364 (1941); *Eskind v. City of Vero Beach*, 150 So. 2d 254 (Fla. App. 1962).

76. *Desert Outdoor Advertising v. County of San Bernardino*, 255 Cal. App. 2d 765, 63 Cal. Rptr. 543 (1968).

77. *United Advertising Corp. v. Borough of Metuchen*, 42 N.J. 1, 5-6, 198 A.2d 447, 449 (1964).

78. 333 Mass. 773, 128 N.E.2d 557 (1955).

79. 73 N.M. 410, 389 P.2d 13 (1964).

80. See, e.g., *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975); *Udell v. Haas*, 21 N.Y.2d 463, 235 N.E.2d 897, 288 N.Y.S.2d 888 (1968); *Fasano v. Board of County Comm'rs*, 264 Or. 574, 507 P.2d 23 (1973); *Duddles v. City Council*, 21 Or. App. 310, 535 P.2d 583 (1975).

result inconsistent with most of the recent developments in land use law. If, on the other hand, the allocations are honored, it means that land "needed" now, or in ten years, for one thing, for example, industrial or residential use, cannot be used for something else, for example, a shopping center. It also means that if the plan designates "X" and "Y" as the optimum locations for commercial development, a shopping center proposed for "Z" should be rejected. This reasoning was adopted in *City of Tempe v. Razor*,<sup>81</sup> in which the court upheld the denial of an application to rezone a portion of an industrial area for commercial use. The court attached great weight to the fact that Tempe had undertaken a comprehensive planning program in the face of burgeoning growth and had adopted a policy of limiting commercial development in designated industrial areas on the grounds that it was "[v]ery difficult to get quality industrial development unless you have [a] relatively monolithic land use pattern."<sup>82</sup> The cases which have directly sustained the regulation of competition through zoning have frequently placed similar strong emphasis on comprehensive planning.<sup>83</sup>

The recent trend in residential exclusionary zoning cases which requires a community to accept its "fair share" of housing demand<sup>84</sup> is also pertinent here. Like planning, fair share assumes an allocation to present and future needs. For that reason these cases suggest that a municipality will no longer be able to freely create an unlimited supply or oversupply of land for commercial development beyond its foreseeable needs. It will have not just the right, but the obligation, to allocate land to reasonably foreseeable needs. Perhaps more important, the fair share cases lead rather inescapably to two logical conclusions; each municipality must provide *at least* its fair share, *and* no community has an obligation to provide *more than* its fair share. There is every reason to suspect that both municipalities and developers will soon carry the fair share philosophy and its implications over from residential cases to commercial cases. In fact, one such case has already been

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81. 24 Ariz. App. 118, 536 P.2d 239 (1975).

82. *Id.* at 122, 536 P.2d at 243.

83. See *Forte v. Borough of Tenafly*, 106 N.J. Super. 346, 255 A.2d 804 (App. Div. 1969) (see note 45 and accompanying text *supra*); *Van Sicklen v. Browne*, 15 Cal. App. 3d 122, 92 Cal. Rptr. 786 (1971) (see note 49 and accompanying text *supra*); *American Oil Co. v. Board of Appeals*, 270 Md. 301, 310 A.2d 796 (1973) (see note 59 and accompanying text *supra*).

84. See, e.g., *Sisters of Providence v. City of Evanston*, 335 F. Supp. 396 (N. D. Ill. 1971); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, cert. denied, 423 U.S. 808 (1975); *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975).

reported. In *Sullivan v. Board of Supervisors*,<sup>85</sup> the court seemed to concede that a municipality may have an obligation to provide for its "fair share" of commercial development. However, the court concluded that the developer challenging the zoning had not offered sufficient evidence to demonstrate that the municipality did not already have its fair share of commercial development.

These "fair share" cases are closely related to the growing emphasis on regionalism in both case and statutory law. Cases such as *Mt. Laurel*,<sup>86</sup> *Chesterdale*<sup>87</sup> and *Berenson*<sup>88</sup> are some of the recent cases requiring consideration of regional factors in local land use decisions. From a statutory viewpoint, a number of states, notably Florida, have established mechanisms to ensure that regional needs will be taken into account in local land use decision-making.<sup>89</sup> The Model Land Development Code adopted last year by the American Law Institute contains many provisions which would increase the control of non-local governments over developments of regional impact or benefit.<sup>90</sup> Both Minnesota and New Jersey have adopted statutes having the effect of sharing the tax benefits and burdens of developments of regional impact.<sup>91</sup> Minnesota has also recently adopted legislation giving the Twin Cities Metropolitan Council extensive control over regional zoning and development decisions. The act gives the Council a potential veto over new private construction of metropolitan-wide significance, including major commercial developments.<sup>92</sup>

The relevance of this trend toward regionalism is that to the extent

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85. 22 Pa. Commw. Ct. 318, 348 A.2d 464 (1975).

86. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 336 A.2d 713, *cert. denied*, 423 U.S. 808 (1975).

87. *Township of Willistown v. Chesterdale Farms, Inc.*, 462 Pa. 445, 341 A.2d 466 (1975).

88. *Berenson v. Town of New Castle*, 38 N.Y.2d 102, 341 N.E.2d 236, 378 N.Y.S.2d 672 (1975).

89. The Environmental Land & Water Management Act, 14 FLA. STAT. ANN. §§ 380.012-.10 (1974 & Supp. 1976). For a critique of the Florida experience, see R. HEALY, *LAND USE AND THE STATES* 103 (1976). Provisions of the Florida Act relating to designation of areas of critical state concern were recently held unconstitutional in *Cross Key Waterways v. Askew*, — So. 2d — (Dist. Ct. App. Y-362, Aug. 10, 1977). A full discussion of similar developments in other states can be found in F. BOSSELMAN and D. CALLIES, *THE QUIET REVOLUTION IN LAND USE CONTROLS* (1974); NATIONAL RESOURCES DEFENSE COUNCIL, *LAND USE CONTROLS IN THE UNITED STATES* (1977).

90. ALI, *MODEL LAND DEVELOPMENT CODE*, Articles 7, 8 (1975).

91. MINN. STAT. ANN. § 473 (Supp. 1976); N.J. STAT. ANN. §§ 13:17-1 to -86 (Supp. 1977).

92. MINN. STAT. ANN. § 473.173 (Supp. 1976).

non-local government preempts the field of land use regulation, or courts require local governments to pay greater heed to regional needs and impacts, or tax laws stop encouraging the race for ratables, the traditional forces that have limited the desire and ability of local government to control competition through land use regulation will become less important. Developers will no longer be able to play one local government against another or to defeat the policies of one government by crossing a municipal line into another jurisdiction. Furthermore, the local race for ratables will no longer cause local governments to zone beyond their realistic needs in the hope of catching as many commercial and industrial developments as possible without regard to regional needs. As these developments continue, we can hope that planners, zoners and courts will all begin to view the region as a system in which land uses ought to be coordinated and complementary rather than competitive to a point destructive of the general welfare of the region.

#### CONCLUSION

These recent developments in land use and zoning law suggest that a good deal of the accepted wisdom about zoning and competition is of limited use and doubtful validity as a guide for the future. Lawyers refer with pride to "the genius of the common law system," by which they mean its ability to deal with and resolve new issues on the basis of decisions made in prior analogous situations. But here, as elsewhere, the line between genius and insanity is a thin one. The legal system would be out of touch with reality if it assumed that the fundamental issues frequently involved in municipal debates over central business districts and outlying shopping centers could be decided by reference to cases in which zoning regulations provided only a thin veil for an attempt to protect one businessman from the competition of another.

If the facts in any particular situation convince municipal officials and planners that there is not a sufficient market to support both existing business districts and a new shopping center, it seems the height of folly to say that they must allow the shopping center to be built so that free market forces can decide whether the shopping center or the central business district will survive. We believe there is enough genius in the common law to avoid that result if the municipal officials, and the planners who guide them, will make the sort of commitment to studying, planning and implementing a commercial development program that is necessary to demonstrate that their purposes are founded

in the public interest of the entire community and not in the parochial concerns of a few businessmen.

Of course, some will say that all the legal theory and all the planning in the world mean nothing if, as in many communities across the country, the outlying center has already been built. The battle to preserve a central business district is certainly easier if outlying growth is controlled from the outset, but a good case can be made for regulation even where an outlying center has been built and inroads upon the central business district have already taken place. In some instances, a CBD can meet a single shopping center face-to-face, but is gradually overwhelmed as a second or third outlying center is permitted. In other cases, even where the retail function of the CBD has been seriously eroded by existing outlying centers, thoughtful commercial planning and regulation can take advantage of a growing market to restore some measure of economic vitality to a community's CBD. The Urban Land Institute has predicted that renovation and expansion of existing centers may become the largest single area of shopping center development activity within a few years.<sup>93</sup> The issue in many communities is whether all regional retail growth will be absorbed by renovation and expansion of outlying centers or whether it will, in part, be directed to a renovated and expanded CBD. If the CBD is to have its share of that growth, cities and city planners must find the determination and the dollars to undertake the studies and the capital improvement programs necessary, and then must support the public commitment to the CBD with zoning provisions that effectively control the location and timing of commercial development on a community-wide basis. Forming the resolution to pursue such a program, rather than reforming the law, is the greatest challenge to success in this field.

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93. 5 LAND USE PLANNING REPORT 279 (1977).



